

Quality Criminal Legal Practice at the Remand Stage in Myanmar

A PRIMER

ACKNOWLEDGEMENTS

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The ILF is grateful to **UNICEF Myanmar** and **MyJustice Myanmar** (British Council) whose generous support of The ILF Myanmar, and commitment to the provision of quality legal aid services worldwide, has enabled us to draft this publication.

Design: Ahlgrim Design Group

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Introduction

- 1 Myanmar's laws *allow* for legal representation at the remand stage. Legal representation at this early stage is critical to protect the rights of the accused. This Primer traces the legal basis for representation at remand, which should be considered a right in itself. It outlines how lawyers can provide an effective service at this stage. And it provides suggestions about how to overcome common obstacles, such as the Court's frequent refusal to accept a power of attorney or to hear objections to extensions of remand.
- 2 Access to a lawyer at the remand stage is critical because fundamental rights are at stake, right there and then. Arrest and detention represent potential infringements of the right to liberty and freedom, contained in fundamental human rights instruments and the Myanmar Constitution (article 21). Of course, such infringements may be lawful and justified. Other rights provide guidance about whether and how arrest and detention may be challenged. Critically, there is a right against arbitrary arrest and detention. Police action must, therefore, be in accordance with the law. Next, punishment prior to conviction is inconsistent with the right of the presumption of innocence. If pre-trial detention is, or effectively amounts to, punishment then it is in breach of that fundamental right. Next, the determination of pre-trial release is subject to fair trial rights, which means, amongst other things, that it must be considered by an impartial tribunal. Pre-trial release also reduces the risk of violations of fair trial rights in subsequent stages. Accused who are not in pre-trial detention are in a much better position to exercise their fair trial rights.
- 3 Rights infringements are common at the remand stage because of the nature of the criminal procedure. This is universally true. The point may be illustrated by reference to criminal procedure in Myanmar. Police have the power to arrest a person without a warrant. The threshold for the exercise of this power appears quite low. A reasonable suspicion is considered certainly sufficient. Police are required to register a first information report, and may detain a person for 24 hours. After expiry of that period, the person must be brought before a Court. At this first remand hearing, police may apply for an extension of detention of either 15 or 30 days (depending on the seriousness of the charge). Given the police's broad powers, individuals are especially vulnerable to rights abuses at the arrest and remand stage.
- 4 The Primer also details the practice of remand hearings through case studies and data. And it contains a set of considerations for stakeholder to improve pre-trial rights. It is designed to be a practical resource for legal practitioners, students, civil society, criminal justice professionals, persons involved in the criminal justice system, and more generally for those interested in criminal justice and human rights.

The Remand Stage: The Rights at Stake and the Importance of Access to a Lawyer

- 5 Basic rights, contained in foundational international rights instruments and Myanmar law, are at stake at the remand stage. Fundamentally, no one shall be subjected to *arbitrary* arrest or detention.¹ Therefore, any arrest or detention must strictly comply with applicable legal standards.
- 6 Further, the person has the right to be presumed innocent until proved guilty.² A person in remand detention has not been found guilty of the offence(s) in relation to which the person is in remand detention (remand detention is thus a form of *pre-trial detention*). It follows that remand detention may not be treated as a *punitive measure*. At all stages of criminal proceedings, including the remand stage, a person has further rights, including:
 - Right to legal representation;³
 - Right against self-incrimination;⁴
 - Right to be free from torture;⁵ and
 - Fair trial rights.⁶
- 7 Critically, regarding the last of these, fair trial rights should be considered to cover pre-trial release hearings in criminal matters. This is because such a hearing may be considered part of the determination of a criminal charge, and also because such a hearing is a determination of a person's rights.
- 8 The risk of rights violations is particularly acute at the stages of arrest and remand detention. Early access to counsel is one measure that may prevent violations, including unlawful arrests, exceeding the lawful period of initial detention (24 hours), forced confession, torture and other forms of abuse, and unlawful searches of women.⁷

1 See: UDHR, Article 9; International Covenant on Civil and Political Rights ("ICCPR") Article 9; and the Constitution of the Republic of the Union of Myanmar (2008) ("The Constitution"), Article 21(b).

2 See: UDHR, Article 11; ICCPR, Article 14.

3 See: The Courts Manual, Section 455(1); Code of Criminal Procedure ("CrPC"), Section 340 (1); and The Constitution, Article 375

4 See: ICCPR, Article 14(3); CrPC, Section 164(3).

5 See: UDHR, Article 5; CRL, sections 80 and 56.

6 See: UDHR, Article 10; ICCPR; Article 14; and see the Constitution, Articles 21, 347, and 353.

7 See: CrPC, section 52.

Children on Remand: Rights and Access to a Lawyer

- 9 In addition to the basic rights noted above, there are further rights that protect children in conflict with the law. The Convention on the Rights of the Child (“CRC”) provides that arrest, detention or imprisonment shall be used only as a measure of last resort and for the shortest appropriate period of time.⁸ Similarly, the effect of the Myanmar Child Rights Law (“CRL”) should be considered to be that detention is a last resort. Relevant to the stages prior to conviction:
- The CRL allows for diversion⁹ before or during the police investigation.¹⁰
 - Police may release a child upon signing a bond.¹¹
 - The Juvenile Court may release the child to a parent or guardian. Placement of a child in “Temporary Care Station”¹² or “other appropriate place” is a last resort, when no bond is signed, and must be for as short a period as possible.¹³
 - In any event, the Juvenile Court may not issue an order for a child to be detained in police custody or prison.¹⁴

Access to a lawyer at the police station

- 10 The CRL recognizes the right to have contact with parents, guardians, relatives and a lawyer at the time of arrest.¹⁵ The presence of a lawyer at the police station at this early stage may ensure that police comply with the obligations imposed by the CRL.
- Police are obliged to avoid: being threatening; coercion or unnecessary use of force; torture; and cruelty or inhuman treatment.¹⁶
 - Police may not keep a child in police custody, which is prohibited under any circumstance.¹⁷
 - Next, children may not be detained with adults; and girls must be supervised by women.¹⁸

8 Article 37.

9 See: CRL, sections 71-77, 80(i), 83, and 88.

10 CRL, Section 71(b).

11 CRL, Section 80(j).

12 CRL, Section 3(l).

13 CRL, Section 83(c)-(d).

14 CRL, Section 83. Relevant to the stage after conviction, imprisonment should be considered a last resort: CRL, Section 88(a).

15 CRL, Section 80(g).

16 CRL, Section 80(c).

17 CRL, Section 80(e).

18 CRL, Section 80(f).

- 11 Immediately upon arrest and detention, children are particularly vulnerable and may be in a heightened emotional state, impacting their ability to understand what is happening and decision-making. A defence lawyer who is able to meet with the client at this point is well placed to evaluate the condition of the child, help the child understand what is happening, and explain applicable legal procedures and rights.

Representation by a lawyer at the remand hearing

- 12 Representation by a lawyer at the remand hearing may help secure the immediate release of a child in detention, often by facilitating a referral for diversion.
- 13 To do this, lawyers should file a Power of Attorney and release motion or diversion motion at the first remand hearing. Otherwise, children are typically ordered to be sent to a Training School¹⁹ for the period of the remand. But, because of the shortage of Training Schools,²⁰ many children remain in police custody, often alongside adult detainees, in contravention of the CRL.
- 14 The following case study illustrates how the changing practices of the Juvenile Court in Sittwe regarding legal representation at the remand stage may prejudice children's ability to assert their rights.

CASE STUDY 1

LEGAL REPRESENTATION AT THE REMAND STAGE IN THE JUVENILE COURT

At a particular Juvenile Court, the Judges routinely granted the requests of the ILF lawyers to represent children at the remand hearing stage. As a result, the Court regularly released children into the care of their parents. In one such case in 2019, an ILF lawyer represented a child charged with possession of a drug for the purpose of sale.²¹ The lawyer was successful in obtaining release of the client at the second remand stage under section 83(c) of the CRL, such that the child was returned to the parents. Early access to a lawyer ensured that the child and parents were well-informed of rights and procedures and prepare effectively for the

release application. The child was able to live under the care and protection of the family, and was later able to secure work and use the income to support the family.

However, the Juvenile Court changed its practices. In effect, it exercised a discretion not to allow representation and release applications at the remand stage, which was applied generally to all cases. In 2020, an ILF lawyer represented a child charged with possession of a drug²² (a less serious charge than possession for sale). The Judge refused the lawyer's request

Continued on next page.

19 CRL, Section 3(j).

20 At the time of writing, there were six training schools in Myanmar: three in Mandalay; two in Yangon; and one in Lashio.

21 The Narcotic Drugs and Psychotropic Substances Law, Section 19(a).

22 The Narcotic Drugs and Psychotropic Substances Law, Section 16(c).

CASE STUDY 1 (CONTINUED)

to represent a juvenile client at remand, and did not accept the lawyer's application for release. There is no Training School in the area. The child remained in police custody for a month,

in the company of adult detainees, in breach of the CRL. This not only amplified the trauma of separation, but also exposed the child to negative influences.

In late 2020, cases of Covid-19 were recorded at the local police station. One of the children detained there was an ILF client and was hospitalized after being infected. Thereafter, the Juvenile Court systematically granted bail to The ILF's juvenile clients.

- 15 The violation of rights at the remand stage may also prejudice the accused's rights in subsequent stages of the criminal justice process, including fair trial rights. Early legal representation means the defence has more time to conduct independent investigations to better advance its defence theory, and ensure evidence is not lost. This is especially important in Myanmar because, ordinarily, after the remand period, once the case is opened and after the case management procedure, the Judge immediately calls the prosecution witnesses for examination. This is illustrated in the following case study.

CASE STUDY 2**EARLY LEGAL REPRESENTATION FOR ROBBERY CHARGES**

Three co-accused were arrested and charged with robbery under section 392 of the Penal Code. At the first remand hearing, the lawyer was able to file a POA. However, the Judge did not accept defence's submission objecting to the remand and requesting release. Instead, the Judge allowed a 15 day remand extension, without providing sufficient reasons to justify the finding that there were sufficient grounds to do so.

But the background work done to prepare the remand objection served as a basis for

the advancement of the defence theory. Through the initial client interview and ensuing independent fact investigation, defence identified a witness whose evidence was that a robbery did not take place.

At trial, this evidence, and the cross-examination of prosecution witnesses based thereon, resulted in the complainant indicating they did not want to pursue the case. The Judge found there was no case to answer and the accused were discharged under section 253(2) of the CrPC.

Remand Procedure

Arrest

- 16 Section 54 of the CrPC sets out some of the bases on which police may arrest a person. They are broadly framed and include: any person who has been concerned in any cognizable offence²³ or a reasonable suspicion exists of the person having been so concerned; any person in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing; and any person having in possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house-breaking.²⁴ Information received from an informant has to be reduced to writing, by the police officer-in charge, and signed by the informant in the First Information Report ("FIR").²⁵
- 17 Courts may issue warrants of arrest, which may be executed by police.²⁶

First remand hearing within 24 hours of arrest

- 18 Under section 61 of the CrPC, if a person has been arrested without a warrant, the person may not be detained for a period that is longer than reasonably necessary in the circumstances. Further, the period of detention may not exceed 24 hours unless a special order of a Magistrate is obtained under section 167 CrPC. (Sections 61 and 167 of the CrPC use the word "Magistrate". But it should be noted that, in this document, "Magistrate" and "Judge" are generally used interchangeably.) This 24 hour period only excludes the time necessary to travel from the place of arrest to the police station; and from there to the Magistrate's Court. Therefore, public holidays, weekends (and other matters) should not be considered a justification to exceed that period.²⁷
- 19 Longer detention without the permission of the Magistrate is unlawful. It may be challenged by seeking a writ of habeas corpus issued by the Supreme Court (see articles 296 and 378 of the Constitution). Alternatively, directions of the nature of habeas corpus may be sought from a State or Regional High Court under section 491 of the CrPC.
- 20 Subject to certain qualifications, a person arrested in accordance with a warrant shall be brought without unnecessary delay before the Court.²⁸

23 The definitions section of the CrPC (section 4) provides that cognizable offences include offences in the second schedule in relation to which there may be an arrest without warrant. For example, theft, handling stolen goods, and certain types of aggravated assaults are cognizable. The basic form of assault is not.

24 CrPC, Section 54 (1).

25 CrPC, Section 154.

26 CrPC, Sections 75 and 81.

27 See Chapter III, paragraph 18 Days of Sitting, Courts Manual.

28 CrPC, Section 81.

Obligations on police to release person

- 21 If upon investigation, it appears to the police officer that there is no sufficient evidence or reasonable ground of suspicion to send the accused to a Magistrate, the accused must be released on police bail on his/her personal bond (with or without sureties).²⁹ If the offence is bailable, the police officer must release the accused on bail upon taking security.³¹

Police applications to extend detention

- 22 Police may apply to extend detention under section 167 of the CrPC. Sub-sections 167(1) and (2) of the CrPC provide that, if it appears that the investigation cannot be completed within 24 hours and there are grounds for believing that the accusation or information is well-founded, police shall bring the detained person to court and also forward “entries in the diary hereinafter prescribed relating to the case” to the court. The police are required to provide an up-to-date case diary to the Magistrates, which would show the ground for the application.³² The Magistrate may then authorize an extension of the detention (which is considered in detail below).
- 23 Critically, a proper construction of section 167 means that the onus is on the police to make the application for an extension. It may also mean that, as a general starting point, the onus is on police to satisfy the Magistrate that an extension is appropriate.

Accused must be brought before Court and be given the opportunity to show cause

- 24 Importantly, the accused must be brought before the Magistrate and must be given the opportunity to show cause against the accusation: “No remand, however, may be made under section 167 until the accused has been brought before a Magistrate and has had the opportunity of showing cause against the accusation.”³³

Role of Remand Magistrate

- 25 An application for extension of detention under section 167 of the CrPC may be made to a Magistrate. Subsection 167(2) provides that the Magistrate *may* authorize detention. Various provisions provide guidance about how this discretionary power is to be exercised.
- 26 First, sub-sections 167(1) and (2) require (at least implicitly) that the Magistrate peruse the police’s case diary before exercising the power to extend the period of detention.³⁴

29 CrPC, Section 169.

30 The CrPC definitions sections (section 4) provides that: “bailable offence” means an offence shown as bailable in the second schedule, or which is made bailable by any other law, for the time being in force; and “non-bailable offence” means any other offence.” For example, theft is not bailable. Most forms of assault are bailable.

31 CrPC, Section 170(1).

32 Paragraph 1349, Burma Police Manual, Volume II, Fifth Edition, 1940 (“Police Manual”).

33 Courts Manua, Paragraph 403(1). Police Manual, Paragraph 1349.

34 CrPC, Section 167(2).

- 27 Next, it should be considered that the Magistrate needs to ascertain whether the “accusation or information is well-founded.” A literal reading of section 167 may suggest that this threshold requirement is for police to consider.³⁵ But such an interpretation would mean the Magistrate has no work to do, and would render the requirement that the Magistrate peruse the diary meaningless, and is therefore not sustainable.
- 28 Any request for remand by the police should also be scrutinized by Law Officers of the Law Offices in Myanmar.³⁶

Court’s power under section 344 of the CrPC to postpone or adjourn proceedings

- 29 The Court has a separate power to postpone or adjourn proceedings under section 344 of the CrPC, and may remand an accused for a term not exceeding fifteen days at a time.³⁷
- 30 (If the police investigation is completed within the time allowed under section 167 of the CrPC, remand should not be granted on the ground that witnesses are absent or the police need more time to arrest another suspect, or any similar ground.³⁸ In such instances, the charge sheet should be submitted, leaving it to the Court to postpone commencement of the trial using its powers in section 344 of the CrPC.³⁹)
- 31 In exercising its power under section 344, the Magistrates must determine whether there is a “reasonable cause for remand”. It is further provided that: “If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.”⁴⁰
- 32 Such a test may also be applicable when the Court considers applications for extensions of detention under section 167.

Court’s obligations and powers to grant bail

- 33 In relation to a person arrested or detained without warrant for an offence that is *not non-bailable* (and who has not already been released on the basis of a bond), the Court shall bail the person if the person is willing to give bail, under section 496 of the CrPC.

35 CrPC, Section 167(1).

36 See: Section 36, The Attorney-General of the Union Law; and Rules 71-73, The Attorney General Rules 2016.

37 CrPC, Section 344(1).

38 Courts Manual, paragraph 407. Police Manual, paragraph 1351.

39 Courts Manual, paragraph 407. Police Manual, paragraph 1351..

40 CrPC, Section 344(2). The explanation about reasonable cause was added in 2016.

- 34 Section 497 is concerned with bail in relation to a person arrested or detained for a *non-bailable* offence. It appears it may be summarized as follows:
- A Magistrates *may* release the person on bail.
 - However, if there are reasonable grounds for believing that the person is guilty of an offence punishable by imprisonment of 20 years or more, a Magistrate *shall* not release a person. But this appears to be qualified as follows: the Court may direct that *any person under the age of sixteen years or any woman or any sick or infirm person accused* of such an offence be released on bail.
 - Finally, if it appears that there are not reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, pending the inquiry, the Magistrate *shall* release the person on bail or bond.

Limitations on Magistrates' powers under section 167

- 35 There are limitations on the Magistrate's powers under section 167. The period cannot exceed 15 days for charges for which the maximum penalty is less than seven years. The period cannot exceed 30 days for charges for which the maximum penalty is not less than seven years.⁴¹

Requirement to provide and record reasons for remand

- 36 Sub-section 167(3) of the CrPC provides that: "A Magistrate authorizing under this section detention in the custody of the police shall record his reasons for so doing." Furthermore, "[t]he reasons for granting a remand must be definite. A bald statement that the police want time to examine witnesses is not sufficient. The facts which give rise to the suspicion that the accused has committed an offence, and the direction in which further investigation can be made, should be specified."⁴² Generally, it may be observed that the Magistrate is required to ensure and record the need for police custody, and why the police custody is necessary for an effective investigation. There are further requirements regarding the location in which a person is kept in custody.⁴³

Juvenile Court

For children accused of criminal offences, the Juvenile Court cannot issue a detention order to hold the child either in police custody or prison under any circumstances.⁴⁴ During the remand period, the Magistrate should immediately place the child, with or without a bond to ensure good conduct, in the custody of the "parent or guardian or temporary care station or another appropriate place".⁴⁵

41 CrPC, Section 167(2).

42 Courts Manual, Paragraph 405(2).

43 Courts Manual, Paragraph 404.

44 CRL, section 83(e).

45 CRL, section 83(c) and (d)

Legal Representation at the Remand Hearing: The Law

- 37 The importance of legal representation at the remand stage is self-evident given the complexity of the relevant laws. Under Myanmar law, every accused has the right to legal representation.⁴⁶ This includes all stages of criminal proceedings, from the point of registration of the FIR, through to investigation, arrest, remand, trial, and appeal. An accused held in custody has the right to counsel from the outset of their detention.⁴⁷
- 38 Insisting on the realization of these provisions in practice is key given the Court's practice not to allow a lawyer to register a POA, a practical issue discussed in detail below.

Child's right to legal representation

- 39 A child's right to legal representation in the early stages of the criminal procedure is contained in the CRL. It is consistent with the rights to legal representation contained in article 40 of the CRC (ratified by Myanmar in 1991). The CRL codifies the role of lawyers.
- It places an obligation on police to allow the child to meet with a lawyer upon arrest (section 80(g)).
 - The Juvenile Court shall allow parents, guardians, relatives, friends, or any other suitable person to examine, make applications or statements on the child's behalf in order to defend the child (section 84(c)).
 - A child is entitled to the enjoyment of the rights in the CRL if there is any possibility the child may not have attained the age of 18 years (section 79).
- 40 The following discussion of recent amendments to the Legal Aid Law emphasizes that these amendments do not limit the right to legal representation contained in the CRL, Constitution and CrPC.

46 See: Constitution, Article 375; CrPC, Section 340, CrPC; Courts Manual, Paragraph 455.

47 See: page 32, Fair Trial Guidebook for Law Officers.

NOTE ON THE LEGAL AID LAW 2016 AND THE AMENDMENT OF APRIL 2021

This note has been added to address recent concerns regarding the curtailment of free legal aid at the remand stage in the aftermath of the Amendment of April 2021 to the Legal Aid Law.

The legal Aid Law was enacted in 2016. One of its basic principles is the obtaining of fair and effective legal assistance expeditiously at different levels of criminal proceedings.⁴⁸ The purpose for enacting the Law was to guide the creation of a state funded legal aid system.

The Amendment of April 2021 made significant changes to the Law.

- The definition of “legal aid eligible person” originally included the categories of persons arrested, accused and detained. The Amendment of 2021 removed these categories.
- Originally, one of the objectives of the Legal Aid Law under section 3(e) was to “reduce unlawful and unnecessary use of detention in police custody and prison while conducting criminal investigation and inquiry.” The Amendment of 2021 deleted section 3(e).
- Originally, the Legal Aid Law included a provision (section 25) that assigned the state-funded legal providers with a duty to facilitate legal representation at the police station and in Court at the remand hearing to persons detained or arrested. The Amendment deleted this provision.

These amendments heightened concerns that access to a lawyer at police stations, training schools and other detention centers at the time of arrest, police investigation and remand hearings was restricted. This is not the case.

The Amendment does not impact the right to a lawyer under the Constitution and other laws, including the CRL. The Amendment only limits the functions and role of state-funded legal aid extended through legal aid boards. It does not restrict private lawyers or lawyers working with non-governmental organisations to represent their clients at the remand stage, upon receiving instructions from their clients.

48 Legal Aid Law, Section 4(g).

Legal Representation at the Remand Hearing: The Situation on the Ground

- 41 Courts often refuse to accept the POA filed by the defence lawyer on behalf of the client. The common explanation offered by Judges is that there is no formal Court file to maintain the record of the POA. This leads to Judges refusing to hear bail or release arguments from lawyers at the remand stage because there is no formal Court case open yet (and therefore no opportunity for lawyers to make arguments). The other reasons that are cited are that legal representation “is not important yet” or “it is still too early”. Often the Court staff treat lawyers who make efforts to represent clients at the remand stage as an inconvenience in the Court proceedings.

Juvenile Court

- 42 The ability of lawyers to represent child detainees at the remand stage is often constrained by police’s refusal to grant access to detainees. In violation of section 80(g) of the CRL, police do not routinely contact lawyers when a child is arrested. When a lawyer does attend, police often do not allow lawyers into the police station where a child is being held. Remand hearings are scheduled without notice to parents and guardians who may be able to contact a lawyer. Indeed, the role of the defence lawyer at the remand hearing is generally not well understood nor recognized. The refusal to allow a POA to be filed is an issue in Juvenile Courts also. Thus, children are often not represented at remand hearings.

Placement in the custody of a training school

- 43 In practice, children are typically placed in the custody of a training school during the remand period. This practice contradicts the underlying preference in the CRL in favor of a child’s liberty. The practice of using the training school during remand may come from a lack of understanding of the conditions in training schools and the harm that such a placement causes. There appears to also be a misconception that custody in training school does not amount to detention. In fact, pre-trial placement in a training school is harsher because children are under the authority of the police investigating the case, and not under the authority of the training school headmaster.
- 44 Because training school is not considered detention, the time spent in a training school is not considered in remission. A consequence of this is that children often may prefer to plead guilty, thus avoiding the wait for trial in custody which will not be taken into account in sentencing if the trial outcome is not favorable. Trial delays due to the pandemic have further contributed to this trend.

Data regarding representation at the remand stage

- 45 Research suggests that representation at the remand stage in Myanmar is very uncommon indeed.⁴⁹ Regarding juvenile justice, practitioners recently shared some of the challenges faced by children in the remand period:⁵⁰
- There is a lack of schools that offer vocational training or education for children to access during remand and trial.
 - Orphans in police custody still have difficulty in getting bail since they do not have guardians into whose custody they may be placed.
 - There is insufficient communication and coordination between the police and social welfare officials.
- 46 The ILF's lawyers typically learn of cases when a potential client is already in custody in a police station or training school. Data collected between January 2018 and December 2020 shows that ILF lawyers attempted to file a POA at the remand stage in 66 cases. Judges accepted the POA in only 20 cases. In relation to juveniles, 24 POA were filed and only three were accepted.

TABLE 1

DATA OBTAINED FROM THE ILF'S REMAND DATABASE

JANUARY 2018 - DECEMBER 2020

STATE	POA FILED		POA ACCEPTED		POA DENIED	
	ADULT	JUVENILE	ADULT	JUVENILE	ADULT	JUVENILE
YANGON	14	3	7	2	7	1
MANDALAY	4	13	3	1	1	12
PATHEIN	16	4	0	0	16	4
LASHIO	3	1	2	0	1	1
SITTWE	5	3	5	0	0	3
TOTAL	42	24	17	3	25	21

49 See: Justice Base, *Legal Practice Brief 5: Remand*, 2019, p 4. See also: Tharthi Myay Foundation, Baseline Research by Myanmar Lawyers, *Everyday Injustice: Criminal Proceedings and Fair Trials in Myanmar*, 2020.

50 International Bridges to Justice, *Overcoming Challenges in Juvenile Criminal Justice System in Myanmar: Report of the virtual roundtable on experiences and practices from access to justice practitioners*, 2020.

TABLE 2

THE REASONS EXPRESSED BY THE JUDGES TO NOT ACCEPT THE POA AT THE REMAND STAGE IN THE CASES ENUMERATED IN TABLE 1

COURT'S REASONING	COURT
The court has no power to decide on release at this stage and the lawyer should go to the police station to seek legal remedy.	Southern District Court, Yangon
The client confessed to the crime and therefore the POA on behalf of the client cannot be accepted.	Thanlyin Township Court, Yangon
The age verification process was not yet complete and the accused was charged with murder.	Mandalay Juvenile Court
The Judge did not give any reasons but verbally directed the police to open the case expeditiously without formally accepting the POA.	Patheingyi Township Court, Mandalay (Juvenile)
There is no rule or law that specifically mentions that Judges have to accept a POA at the remand stage.	Thaketa Township Court in Yangon
Since there is no formal case file in the Court, the Judge cannot accept the POA.	Dawbon Township Court, Thingangjun Township Court, North Okkalapa Township Court, Yangon
No one files POA and release requests at the remand stage.	Mandalay District Court and Mandalay Juvenile Court
Since the same lawyer will be filing a POA and representing the accused during trial, no additional POA was required to be filed at the remand stage.	Mandalay Juvenile Court
No one can file the POA at the remand stage because the file will be sent to the police station.	Pathein Township Court
The case is still not formally opened in the Court, there is no Court file.	Pathein Township Court (Adults and Juveniles), Sittwe Township Court (Juvenile)
The accused was not brought to the Court for the remand hearing and the POA could not be accepted in his absence.	Pathein Township Court
File the POA when the case is formally opened in Court.	Lashio Township Court (Juvenile and Adult)
No formal order, Judge gave POA to the police.	Patheingyi Township Court, Mandalay (Juvenile)

TABLE 3

THE REASONS EXPRESSED BY THE JUDGES TO DISALLOW REMAND OBJECTIONS RAISED BY THE LAWYERS IN THE CASES ENUMERATED IN TABLE 1

COURT'S REASONING	COURT
The Judge asked the lawyer to go to the police station to object to remand extension.	Lashio Township Court
Since the juvenile Judge was not available on that day, the alternative presiding judge refused to intervene because he was not a juvenile judge.	Lashio Township Court (Juvenile)
The accused had already spent 28 days in the police lock-up. The Judge granted two more days of remand (to make it complete 30 days).	Lashio Township Court, Patheingyi Township Court (Juvenile)
There is no need to file remand objection at the time of the second remand request.	Sittwe Township Court (Juvenile)
Remand objection was denied because the remand period can be extended up to 30 days.	Pathein Township Court
As per section 167 CrPC remand period can be extended up to 30 days.	Mandalay District Court
The case is still at the remand stage and the client could potentially be accused in other criminal cases.	Mandalay Juvenile Court
The Judge will consider the release request when the case formally opens in Court.	Patheingyi Township Court (Juvenile)
The Judge has only granted "custody" and not detention. The lawyer can approach the police for release on police bail.	Mandalay Juvenile Court
Remand request by the police was granted for investigating the case.	Mandalay District Court
The Judge did not give any grounds for rejecting the remand objection and release request.	Patheingyi Township Court (Juvenile)
The accused has to be medically examined.	North Okkalapa Township Court, Yangon
The police investigation is still pending.	Thingangjun Township Court, Dawbone Township Court, Yangon
The remand objection cannot be heard because the Judge is not authorized to accept the POA at this stage.	Dawbone Township Court, Yangon

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TABLE 3 (CONTINUED)

THE REASONS EXPRESSED BY THE JUDGES TO DISALLOW REMAND OBJECTIONS RAISED BY THE LAWYERS IN THE CASES ENUMERATED IN TABLE 1

COURT'S REASONING	COURT
The offence of cheating is punishable with a maximum sentence of up to seven years and therefore 30 days of remand period was permissible under section 167 CrPC.	Thingangjun Township Court, Yangon
The Judge cannot accept the POA and therefore he cannot accept the remand objections. This stage involves police discretion and therefore the Judge cannot make any decisions at the remand stage.	Thaketa Township Court, Yangon
The judge did not accept the POA at remand because no law or rule specifically mentions that the Judge has the authority to accept POA at the remand stage and therefore, he was unable to accept any motions or oral arguments.	Thaketa Township Court, Yangon
The police had sufficient ground to conduct further investigation.	Thingangjun Township Court, Yangon
It is still the remand period.	Chan Mya Thar Zi Township Court, Mandalay, Sittwe Township Court

Representation at the Remand Stage: Practical Guidance

- 47 Defence lawyers should consider the following practical guidance to advocate for the protection of the rights of their clients at an early stage.

Initial client interview

- 48 To ensure effective legal representation, defence lawyers should make every effort to meet with their clients at the earliest possible stage. At the early stages, the defence lawyer should conduct an initial client interview. It should cover key issues relevant at that point, which includes the following:

- The lawyer should advise the client of: the charges filed against the client; their rights; the Court procedures; their options; procedures to apply for bail; and the evidence provided by the prosecution to support the charges.
- The lawyer should seek instructions about: the client's social, economic and family background and situation; and any physical or mental health issues the client has or had.
- The lawyer may also consider seeking instructions about: the client's narrative of the incident; and potential defence theory.

49 Subsequently, the defence lawyer must keep the client continuously informed and involved in the case. The lawyer should also assess the risks of a client statement to the police or remand Judge regarding the accusations. Additionally, a lawyer should document allegations of abuse, and document any injuries sustained by the client.

Filing the POA

50 The lawyer should ensure the POA is signed at the earliest possible opportunity, usually either in the police or Court detention facilities. After conducting the initial client interview, the remand POA should be filed at the remand hearing in the Court. The acceptance of the POA will enable the lawyer to advance arguments on behalf of the client, including for release.

51 More often than not, the POA is not readily accepted by the Judge. Lawyers should be prepared to convince the Judge that legal representation is a right of every accused at any stage of criminal legal proceedings, including the remand stage. Reliance may be placed on the laws and arguments canvassed above.⁵¹ Lawyers may consider preparing written submissions in support of their oral arguments.

Client may file the release motion and remand objection directly

52 If the POA is not accepted by the Judge, the release motion and remand objection may be signed and filed by the client directly. Lawyers representing clients at this early stage can still play an important role in advising clients about this possibility and supporting them to do this. Clients may need significant assistance understanding the full contents and implications of documents they are signing.

Request to police station chief to release the client

53 Judges often refuse to intervene at the remand stage because they erroneously believe (only) the police may release an accused during the investigation stage. Therefore, lawyers may also request the police station chief to release the client (on police bond).

⁵¹ Two case law decisions regarding bail are cited in the Annexure. Practitioners should be sure to familiarise themselves with the decisions in their entirety before relying on them. There may also be other relevant cases.

Objecting to the remand request made by the police

54 During the initial client interview, the lawyer should also discuss and seek instructions from the client to frame arguments to object to remand. The lawyer should consider matters such as the date of arrest, the charges and police accusations, potential alibi, potential eyewitnesses that may support a defence case, extraneous reasons for falsely implicating the client, the nature of the relationship between the accused and complainant, and family and social background. The lawyer may also consider the client's narrative; and defence cases that may be made on the basis of the narrative.

Legal grounds for objecting to an application for extension of detention

55 Some of the legal grounds that could be raised to object to the remand request are as follows:

- Pre-trial custody is a deprivation of liberty and punitive in nature as it violates the inherent right to be presumed innocent until proven guilty according to law.
- If the accused is not brought to Court within 24 hours of arrest, the lawyer should file a release request on the grounds that the detention is illegal. Similarly, if the accused is not brought to the Court by the police at the designated remand hearing date, the lawyer should challenge the detention as illegal and in violation of the fundamental right to personal liberty and freedom.
- If the arrest does not comply with sections 54 and 154 of the CrPC, or other requirements, the remand detention should be challenged. Such illegalities should be put on the record at an early stage. Evidence obtained through an unlawful detention may not be admissible and may be the subject of an exclusion application.⁵²
- The request for remand extension does not specify the reason why more time is needed for the police to investigate the case.
- The police have no reasonable grounds for seeking remand.
- The remand request does not specify the facts which give rise to the suspicion that the accused has committed an offence.
- There is insufficient evidence to justify the remand.
- The remand request does not specify the purpose of detention with regards to the direction in which further investigation can be made.
- Children accused of crime cannot be detained in police custody and any interrogation should be conducted in the presence of parents and lawyer after the child is entrusted to the parents/ guardians.

52 Such evidence is sometimes described as "fruit of the poisonous tree". See: The ILF, *Pretrial Motions: A Primer for Legal Aid Lawyers*, 2021.

Court should insist that police provide specific reasons to justify extending detention

- 56 Defence lawyers should request that the Court insist that the investigating officer provides reasons to further detain the client. Specifically, they should be required to specify what remains to be done that would justify detention. This means police should also be required to provide information about the stage and direction of the investigation. Often, the investigation can proceed and there is no need to extend detention.

Court's non-compliance with requirements to provide adequate reasons may form basis of application for release

- 57 When a Judge grants a remand extension, the specific reasons for such detention must be written on the back of the remand application. If the Judge fails to provide the specific reasons in writing for the extension of remand, the order purporting to detain him is not in accordance with the law. Defence lawyers should request that the accused be released on bail. If the remand order is issued without sufficient legal basis, defence lawyers can file a revision motion challenging the order as illegal and improper and seeking release of the accused from detention. Therefore, it is important to immediately apply for a copy of the Court's remand order.
- 58 The following case study illustrates how some of the arguments may be made in practice.

CASE STUDY 3

LEGAL GROUNDS TO OBJECT TO EXTENSION OF DETENTION FOR DRUG CHARGES

The accused was arrested for charges under the Drug Law. The lawyer represented the accused at the second remand hearing. The lawyer argued that the investigating officer had had adequate time to conduct the investigation. Further, during the pandemic, the client should not be sent to prison due to the increased risk to his health.

The lawyer's arguments were based on section 403 of the Court Manual, section 167 of the CrPC, and case law on bail, and the principle of the presumption of innocence.

The Judge asked the police and Law Officer to explain further about the reasons why second remand was being sought. The investigating officer responded that the

medical reports, expected to be received in twenty days, were the reason for his request for a second remand. The law officer further argued that a second remand was permissible due to the fact that it was a drug case with a sentence of ten years which meant that a remand of total 30 days is allowed. The lawyer filed written objections to the remand on the following grounds:

1. The police had already detained the client for 15 days, which is sufficient time to investigate. The 30 day period is the *maximum number* of days. It does not mean the accused necessarily needs to undergo maximum period of remand.

Continued on next page.

CASE STUDY 3 (CONTINUED)

2. If further interrogation is needed to be done after the medical reports are completed, the accused can be summoned to do so as he lives within the Court's jurisdiction with his family.
3. Due to the pandemic, the President issued an amnesty order for decongesting the prisons. Detaining the client without any purpose for the investigation is counter-productive and increases the risks in overcrowded detention facilities.
4. The Court in considering the release request of a prisoner the subject of investigation or trial does not have to decide the guilt or innocence of the person. Rather, it should consider factors such as whether the accused is likely to destroy prosecution evidence; whether he may be a flight risk; if he has a criminal antecedent; if there is a likelihood of committing similar crimes again; and if he can give the sufficient bail bond with sound guarantors.
5. Since the client is only 19 years of age, with no criminal antecedent, lives with his family within the Court's jurisdiction, and has no means to destroy evidence or influence prosecution witnesses who are mostly police, there are sufficient grounds for release on bail.

The Judge after considering the arguments presented by both the parties, responded with a written order that explained his decision to grant a second remand. Despite the ultimate extension of the remand, it was a significant shift in process for the Judge in this Court to fully consider the defence arguments rather than immediately siding with the prosecution.

Another challenge emerged when the Judge refused to provide the lawyer with a copy of the remand extension order. There was confusion around the procedure for the lawyer's request since it was not a typical one. The lawyer ultimately obtained the copy of the order from the Court copying agency and the Court clerk who were not sure about the practice of providing remand order.

The order indicated that the Judge granted the remand extension as the offence's maximum penalty was ten years imprisonment, and the extension of remand was permissible for 30 days under section 167 CrPC. Further, the medical report was deemed a vital piece of evidence and was still outstanding. Regarding the COVID-19 argument, the Judge ordered that the prison is operating in accordance with the guidance of Ministry of Health and Sports. Thus, the reason for requesting remand was sufficient.

Challenging the remand period

- 59 As per section 167 of the CrPC, an accused's remanded detention may be extended for up to 15 or 30 days depending on the maximum penalty for the offence. In practice, police invariably request the maximum period of remand for follow-up investigations, without explaining the reason why the maximum period is necessary. Judges routinely agree to grant requests for the maximum period. Lawyers should advocate for shorter periods. The following arguments should be borne in mind in this regard:
- The maximum period of police remand may not always be justifiable for the police investigation in a given case. If the charges or police case are routine or do not require complex investigations, police must be held to account to explain and justify the need for the maximum period of remand.
 - There may be credible information which justifies further investigation. But it cannot itself always be considered a sufficient reason to extend detention.
 - Setting a shorter remand period can enable the Judges to more effectively oversee the progress of police investigations.

Request for immediate release

- 60 A legal aid provider should advocate for the client's release from pretrial custody at the earliest possible opportunity and throughout the case, as appropriate.
- 61 The remand stage is a critical opportunity to protect the client from illegal detention. In bailable offences, bail is a matter of right and it is binding upon the investigating officer to release the accused within 24 hours of the arrest upon the furnishing of surety by the accused.⁵³ In non-bailable offences, bail may be granted by the police within 24 hours of the arrest on a personal bond if there is not sufficient evidence or reasonable ground of suspicion to justify forwarding of the accused to a Magistrate.⁵⁴ The accused is also entitled to release if there is no reasonable complaint, credible information, or reasonable suspicion for arrest.⁵⁵
- 62 An alternative procedure is the filing of a motion under section 491(1) of the CrPC seeking directions in the nature of a habeas corpus from the High Court. Similarly, the Union Supreme Court can also issue a writ of habeas corpus (see articles 296 and 378 of the Constitution).

53 CrPC, Section 170.

54 CrPC, Section 169.

55 CrPC, Section 54.

Considerations for Stakeholders at the Remand Stage

63 In conclusion, in an effort to draw together the key themes of this Primer, this Chapter sets out considerations for the various actors at the remand stage. Taken together, these would contribute to the realization of pre-trial rights of accused.

Honorable Union Supreme Court (“USC”) and High Courts

64 Under section 73 of the Union Judiciary Law 2010, the USC may exercise its power to issue orders, directives or procedures as guidance on remand hearing proceedings. The guidance should aim to advance the rights of the accused and the best interests of children.

65 High Courts may use the power contained in section 42 of the *Union Judiciary Law 2010*, to supervise remand hearings conducted in the District Courts and Township Courts, to ensure compliance with the laws and protection of the rights of persons detained on remand.

Judges presiding over remand hearings

66 Remand Judges may play a critical role in ensuring the rights of persons on remand are observed. The following should be considered:

- Courts should allow defence lawyers to represent their client at remand hearings.
- Remand hearings should be conducted according to the laws and procedures.
- Remand hearings should be conducted in all cases by all Courts, including special and military tribunals.
- Judges should examine extensions requests and consider arguments put by parties.
- Extensions should only be allowed if they are actually necessary (and not as a matter of routine).
- Judges should advise accused of the right to a lawyer when the accused is first brought before Court.
- Judges should consider whether there is any indication of brutality or cruelty and, if there is, take further appropriate steps.
- Courts should consider release requests filed during the remand stage.
- Court staff should be directed to accept POAs and motions at the remand stage.

Defence Lawyers

- 67 As well as the practices canvassed above, defence lawyers should consider the following:
- Lawyers should routinely advocate for an expansive interpretation of rights, including legal representation at the remand stage and opportunities to challenge detention. This can contribute to systemic change.
 - Lawyers should seek to contribute to the aspirational goal of ensuring every person is legally represented at the remand stage.

Prosecutors

- 68 To reduce instances of unlawful detention and inappropriate prosecutions, the Attorney General's Office should instruct Law Officers to exercise their powers and satisfy their obligations under law, including:
- Scrutinize requests for remand by police.⁵⁶
 - Advise the Court that an accused is a juvenile, and that the Court may release the child or place the child in the care of a parent or guardian, or temporary care station.⁵⁷
 - Remind the Court a child may not be detained in police custody nor in prison.

Police

- 69 The police have wide discretion to refrain from detaining suspects, and especially children. Police should consider the following:
- Arrest without a warrant is a discretion and should be used sparingly.
 - Extension of detention is not always necessary, and must be based on reasonable grounds.
 - Ensure strict compliance with the procedures of arrest and detention, including the CrPC, CRL and Police Manual.
 - Accord persons who may be children their rights under section 79 of the CRL. Ensure strict compliance with the CRL, and, critically, end the practice of unlawfully detaining children in police custody. Use diversion for children whenever possible.
 - Ensure the rights of women who are accused are respected.

⁵⁶ Attorney-General of the Union Law, 2010, Section 36(g).

⁵⁷ Rules of the Attorney General of the Union, 2016, Section 70(c).

Civil Society

- 70 Civil society has a key role to play in contributing to the realization of pre-trial rights. It may consider the following:
- Include the right to a lawyer at the remand stage and rights to apply for pre-trial release in training and awareness campaigns.
 - Ensure paralegal networks are provided with training on the rights of arrestees.
 - Civil society organisations, Bar Associations, the Bar Council, law firms and legal aid organisations should consider piloting duty lawyer projects in Township and District Courts.

Annexure: Case Law Decisions Regarding Bail

- “ ... the principle to be deduced from sections 496 and 497 of the Criminal Procedure Code is that grant of bail is the rule and refusal is an exception and as an accused person is presumed under the law to be innocent until his guilt is proved, he should be released on bail during the pendency of the case against him unless he is likely to influence or intimi-date the witnesses for the prosecution or is likely to abscond if bail is granted to him. It has not been alleged that the applicant is likely to abscond and it has also not been shown to the satisfaction of this Court that he is likely to tamper with the witnesses for the prosecution.” *Hussain Bux Khan v The Union of Burma (HC) [1960] BLR 192, 194.*
- Bail may be applied at any time, including at an early stage. *Maung Lu Min v The Union of Burma (HC) [1956] BLR 112.*

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