UNITED NATIONS **A**

General Assembly

Distr.
GENERAL

A/HRC/12/NGO/21
7 September 2009

ENGLISH ONLY

HUMAN RIGHTS COUNCIL
Twelfth session
Agenda item 4

HUMAN RIGHTS SITUATIONS THAT REQUIRE THE COUNCIL'S ATTENTION

Written statement* submitted by the Asian Legal Resource Centre (ALRC), a non-governmental organization in general consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[28 August 2009]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

MYANMAR: Institutionalized denial of fundamental rights and the 2008 Constitution of Myanmar

1. The case decided against democracy party leader Daw Aung San Suu Kyi and co-accused this August 2009 brought to global attention the institutionalizing of fundamental human rights abuse through what the Asian Legal Resource Centre (ALRC) has characterized as Myanmar's "injustice system". Although global outrage was expressed at the politically contrived manner in which the proceedings reached their inevitable conclusion, the trial was in many respects typical of hundreds, perhaps thousands, of others in recent years, many of which the ALRC has studied and documented in detail. These features included the following:

(a) Inapplicability of charges: Leaving aside questions over whether or not the house arrest of the accused in this case was legal at all, the charges against the defendants were inapplicable as the order against Aung San Suu Kyi did not include anything to prohibit her from communicating with someone already in her house. Many other cases heard against opponents of the government in Myanmar also rest on inapplicable and baseless charges. The police, who may receive interrogation files from military personnel and be ordered to frame charges without ever having had contact with an accused, often appear at a loss to identify an offence. For instance, in the case of Aung Aung Oo and three others (Bahan Township Court, Felony No. 442/09, under trial, Judge U Khin Maung Htay presiding), the accused were charged with an arms offence but during the preliminary trial process the charge was instead changed to intent to cause public fear or alarm: an offence used when the police can find no other. In the case of Aung Aung Oo and three, the so-called crime was having had stickers calling for the release of Aung San Suu Kyi. The police have no evidence that they had stuck them up anywhere in public or had committed a crime as alleged, but they are being held in detention and prosecuted nonetheless.

(b) Violations of basic criminal procedure: Judges from two districts heard the case against Aung San Suu Kyi and her co-accused. This is a fundamental breach of criminal procedure, which requires that a judge of a jurisdiction hear a case against an accused in the jurisdiction where the alleged offence occurred. There is no provision of law for mixing judges of different jurisdictions. The case also was heard in a closed court which only select persons were allowed to attend: again, there is no basis in law for trying someone in this manner; however, the trying of opponents to the present government in this way is the norm, not the exception. The ALRC is not aware of any such case in recent years that has been conducted in an open courtroom. In fact, in the case of Aung San Suu Kyi and her co-accused there was more openness than in many such cases. Very often family members and also lawyers are denied access to courtrooms. For instance, in the case of human rights defender U Myint Aye and two co-accused, who were sentenced to life imprisonment for an alleged bombing plot (Yangon North District Court, Felony No. 102/08, decided 28 November 2008, Judge U Thaung Nyunt presiding), the first defendant was not represented in court despite his attempts to have a lawyer. His original counsel was also charged and imprisoned in a separate case. Myint Aye and his co-accused claimed that they were tortured to extract confessions but the court ignored these claims.

(c) Problems with witnesses: The court in the case of Aung San Suu Kyi initially allowed only one defence witness and thereafter on request to a higher court, a second witness. By contrast, the prosecution presented some 17 witnesses, of whom 11 were police and the others were immigration and council officials. Defendants in trials of this sort in Myanmar are routinely unable to present witnesses. It is also common to find that the only witnesses for the prosecution are police and other officials; and ordinary civilian witnesses, where present, are not genuinely independent but appear for the police as professional witnesses. For instance, in the case against

U Tin Min Htut and another, who were accused of writing a letter to the United Nations Secretary General in which they criticized the government and the manner in which the international community has treated the situation in Myanmar (Yangon West District Court, Felony Nos. 138 & 140/09, decided 13 February 2009, Judge U Tin Htut presiding), a line of police testified for the prosecution but the defendants were unable to present witnesses and were not allowed access to a lawyer, even though Tin Min Htut had signed a power of attorney and his advocate had come to the court premises.

2. Together these points speak to the first of two fundamental problems with the judicial system in Myanmar with which the international community must come to terms if it is going to say or do anything useful about the human rights situation there, rather than simply decry the unfair trials of a few prominent individuals. The judiciary is in its present form an appendage of executive authority. Unless its structurally and functionally subordinate position is addressed, it will continue to act as an instrument for the violation of rights rather than their defence. Under these circumstances, calls for the courts to decide cases fairly and in accordance with international standards are completely meaningless. In such cases, the courts in Myanmar are not even capable of complying with domestic standards, and nor should they be expected to be, because they are performing an executive function, not a judicial one: i.e. their role is to imprison government opponents rather than uphold the law.

3. The second point that the international community has so far failed to grasp concerning criminal injustice and its relevance to debate on human rights in Myanmar is that the patterns of bad behaviour developed through the types of cases given above have a flow-on effect into the system as a whole. In ordinary criminal cases the ALRC has observed the same sorts of incorrectly applied charges, consistently broken procedure, lack of evidence and forced confessions. These types of behaviour persist in ordinary cases in part because they are learned in the course of the sorts of politically directed cases described above. But in ordinary cases the concern is not with correct application of executive directions in lieu of law, but instead with obtaining the best price from the highest bidder. Among persons working in and familiar with the legal system in Myanmar it is known as a justice-trading system. However, some persons working for international agencies in Myanmar either misunderstand or pretend to misunderstand that the system is in some way operating in the manner of those elsewhere in the world, or even in the region, and that things can be done to improve the situation of ordinary citizens in the way that they might be in other places through the use of the courts. This is to fundamentally miscomprehend the situation of the courts and their functionaries in Myanmar.

4. These features of institutionalized abuse, and the need for more effective study and critique rather than simple condemnation of specific acts of wrongdoing are of special relevance in the current period, when the government of Myanmar has indicated that it plans to hold an election, perhaps in 2010, after which the 2008 Constitution of Myanmar will come into effect. The response of many in the international community on learning of the re-confinement of Daw Aung San Suu Kyi this August was to condemn the expected election as a farce, for reason of her non-involvement. But the problems associated with the electoral process need to be studied in terms of the institutional contradictions to which her case points rather than in terms of its personalities. The deeply flawed 2008 Constitution further entrenches arrangements for abuses of the sorts outlined above, and any serious attempts from the international community to take up issues of concern to the people of Myanmar in the lead up to and after the anticipated election must respond to the peculiar variety of unconstitutional constitutionalism that it envisages. In particular, the following aspects of the charter must be brought to the foreground and addressed

before it is possible to proceed to more in-depth discussion about human rights in Myanmar under a government operating according to its parameters:

(a) Un-separation of powers: The constitution in section 11(a) separates the branches of government only "to the extent possible". This absurd clause effectively un-separates powers and makes a mockery out of claims to judicial independence. The constitution must guarantee full separation of the judiciary from other parts of state before the courts can be considered anything other than subordinates of the executive.

(b) Army as constitutional defender: Section 20(f) assigns main responsibility to the Defence Services, rather than the judiciary, for defence of the constitution. This is despite the establishing under the charter of a constitutional tribunal. How the army is supposed to perform the task is not explained. This nonsense provision must be removed and responsibility for the constitution must be placed in the hands of the courts before the constitution can be described as a supreme law at all.

(c) Rule of law as a function of the executive: Under Schedule One the rule of law and the police force are both placed under the Union Defence and Security Sector. In other words, both maintenance of law and policing are assigned to the armed forces. This is another blanket provision that ensures the continued militarization of the state and subordination of the judiciary to military interests.

(d) Presidential power over judges: The power to appoint, promote and remove senior judges ultimately lies with an executive president who in turn, the constitution ensures, must be someone approved by the armed forces. The sections of the constitution pertaining to this power must be amended to remove this authority and instead an independent judicial services commission or equivalent must be established for this purpose.

(e) Qualified rights: Apart from the arrangements in the constitution identified above that serve to negate statements of rights in the constitution, the formal statements themselves are consistently qualified and undermined. For instance, the right to be brought before a magistrate within 24 hours, which already exists under ordinary criminal procedure, is defeated through a lengthy opaque clause in section 376 exempting cases concerning national security, the rule of law, peace and tranquility and the interest of the public. Other sections are similarly imprecise and repeatedly allow only for qualified, not guaranteed rights "in accordance with the law".

5. The above observations and recommendations are made with awareness that the Government of Myanmar will anyhow override provisions of the constitution in the same way that it has consistently overridden those of the ordinary law to the extent necessary to achieve its objectives, but are made on the basis that the constitution as a normative document should provide some bases for commitments to protect human rights, against which it is possible to measure a government's actual record of respect, protection and fulfillment. The present document provides no such bases. The international community needs to use cases and issues arising in the present day, like that of Daw Aung San Suu Kyi, to probe, critique and explore the institutional features of abuse and how they will be reconfigured under the planned new arrangements for government after an election of some sort, rather than simply criticize the individual cases of prominent persons as if they are somehow isolated from the structure and functions of Myanmar's criminal justice system and state as a whole.

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