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The Rule of Law in Myanmar: Challenges and Prospects

December 2012

Report of the International Bar Association's Human Rights Institute (IBAHRI)
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Executive Summary

Myanmar¹ is currently undergoing rapid transformation. After two decades of internal repression, civil wars and estrangement from the international community, it has embarked on a process of reform. Critics of the government have been freed from jail; ceasefires have been negotiated with some of its armed opponents; and the country looks set once again to engage with the global economy.

The path ahead is marked by as many challenges as opportunities. Years of stagnation have bred widespread corruption. Poverty and disease are endemic, and the grievances that underlie Myanmar's ethnic conflicts remain unresolved. Hundreds of thousands of refugees are still displaced, and an unknown number have suffered more directly at the hands of combatants on all sides. The country's institutions are correspondingly fragile. Previous regimes have maintained themselves in power only by suppressing alternative viewpoints and ignoring international human rights standards.

Myanmar is on the cusp of major reforms, but it needs to confront and overcome the legacy of its recent past if those reforms are to make progress. In order to understand Myanmar's prospects and needs at this important juncture and, more specifically, to find out how far it has begun to adhere to globally prevalent understandings of the rule of law, the International Bar Association's Human Rights Institute (IBAHRI) sent a delegation to the country's major cities on a fact-finding mission between 11 and 18 August 2012. Its assessment and conclusions are laid out in this report.

As the delegation learned, formal changes to Myanmar's laws and institutions will do little in themselves to improve the daily lives of the country's population, but they are an essential precondition to the success of current reforms. If beneficial changes are to endure, they must be supported by a legal structure that safeguards fundamental human rights regardless of gender, ethnicity or other irrelevant factors, by providing effective remedies for their breach. That calls in turn for an internally coherent legal and procedural framework that is consistent with good international practice. An essential stage in this process will be Myanmar's signature, ratification and implementation of those core human rights treaties to which Myanmar is not yet a party. (See Chapter Three.)

Efforts to strengthen social, economic and civil rights within the country further require policies and actions that educate people about their rights, and furnish practical assistance to anyone whose rights have been breached. This should be accompanied by the revision or repeal of criminal statutes and decrees that have in the past validated repressive activity by the state, and a review of prison conditions and detentions to complement the amnesty process begun by President Thein Sein in May 2011. Steps should also be taken to broaden the country's narrow definitions of citizenship, which currently operate to deny at least 800,000 members of the Rohingya community and an unknown number of other people equal protection under statutory law and the 2008 Constitution. (See Chapter Three.)

1 The State Law and Order Restoration Council (SLORC) that took power in September 1988 passed a so-called Adaptation of Expressions Law, which replaced 'Burma' with 'Myanmar'. This arguably serves to acknowledge the country's many non-Burman ethnicities, but the right of the unelected SLORC to make so fundamental a change is still contested by the National League for Democracy, as well as a number of foreign governments and human rights organisations. This report follows the United Nations in using the newer name; however, and for simplicity's sake, it does so in respect of the entire period since 1947. Similarly, it refers to 'Yangon' instead of 'Rangoon'.

Myanmar's nascent system of checks and balances also needs to be fortified. A recent clash between legislators and the Constitutional Tribunal has revealed the fragility of existing institutional arrangements, and the provisions governing the composition of that body ought to be re-examined with a view to creating a Tribunal that is genuinely independent. Other individuals and bodies, including civil society activists and journalists, should also be given the legal protections and practical assistance they need to monitor the lawfulness of state action. Normalising the principle that the state is bound by its own laws will contribute to a climate of certainty that benefits Myanmar's population as well as its economy. This was recognised within government itself by a senior official who told the IBAHRI delegation that 'the new government needs not only to sue, but also to be sued.' (See Chapter Four.)

The legislative process needs to be made correspondingly more transparent and responsive to the needs of Myanmar's population. Although the new parliament has made considerable progress since it began sitting in January 2011, it is overworked, under-resourced and still too secretive. Greater efforts should be made to publicise draft legislation and consult parties who are likely to be affected by proposed changes, and Myanmar's government would do well to establish a law reform commission to make future reforms as consistent and efficient as possible. (See Chapter Five.)

The Myanmar National Human Rights Commission, a body established by order of the president in September 2011, has a central role to play in the reform process. It is, however, seriously hampered at present by its lack of a statutory mandate, and the consequent absence of provisions to guarantee its diversity and independence from the executive. This needs to change so that the organisation can work effectively in future to discover human rights abuses and assist victims to obtain suitable remedies. (See Chapter Six.)

The role and status of the army will be crucial to Myanmar's fortunes over the next few years. Former officers still dominate the country's governing institutions. The 2008 Constitution meanwhile reserves to the military extensive emergency powers and legal immunities, and grants the Commander-in-Chief the right to appoint 25 per cent of all legislators, which effectively allows him to veto proposed constitutional amendments. These political realities make for a widespread concern within Myanmar, even among civilians, to accommodate military interests. The IBAHRI acknowledges this pragmatism, but believes it should complement the reform process. Ongoing efforts to integrate the military into the reform process should therefore be stepped up. It is also important to initiate a process that begins to acknowledge injustices committed within Myanmar over the last quarter of a century. Whatever form this takes (which is properly to be decided by Myanmar's own people), anyone denied his or her rights deserves a voice, just as people wrongly accused of abuses should be given the opportunity to clear their names. (See Chapter Seven.)

The strengthening of Myanmar's legal fabric requires that ordinary people gain greater access to justice, and this will necessitate major improvements to the country's legal system. The judiciary is currently subject to inordinate influence by the executive and military. It is held in low esteem by the population at large, and widely considered to be under-educated and corrupt. Its supremacy, independence and impartiality therefore need to be established throughout the country, in rural provinces and ethnic regions as well as major cities. This requires that the law specify in clearer terms how judges are to be appointed, promoted, paid, and (where justified) removed. The IBAHRI believes that an important stage in this process will be the creation of a Judicial Appointments Board

and a Ministry of Justice. Attention should also be paid to less formal dispute resolution procedures that are common in Myanmar – notably hearings before village chiefs – and efforts should be made to ensure that they and local officials in general are made more familiar with the provisions of the 2008 Constitution and the reform process that is currently under way. (See Chapter Eight.)

The legal profession is similarly deficient, largely because it was deliberately undermined by previous governments. Many lawyers were harassed or punished simply because they sought to represent clients effectively, and others have been penalised for their criticisms of the government. The organisation that should have represented their interests, namely the Bar Council, has meanwhile been unwilling to play that role. Like the judiciary the independent legal profession needs to be revitalised. Measures taken in 1989 to neutralise the legal profession must be reversed, and a representative Bar Council restored. This will help rectify a widespread perception within and beyond Myanmar that disciplinary measures are used by the executive to silence outspoken lawyers. Improved training programmes should also be introduced, and serious consideration should be given to the creation of an independent prosecution service and a legal aid system that makes it easier for poor people to have their rights vindicated in court. (See Chapter Nine.)

The IBAHRI finally urges international organisations and foreign governments to lend their urgent support to Myanmar's reform process. As this report shows, the country is more receptive today than it has been for more than 20 years to external advice and rights-based reforms that will promote good governance. Provided that programmes benefit all the people of Myanmar (not just 'citizens'), international aid should be as flexible and generous as possible.

This report makes 28 detailed recommendations in respect of the above matters. They can be found in Chapter Ten.

1. Introduction

1.1 The IBAHRI delegation and its mandate

The International Bar Association (IBA), established in 1947, is the world's leading organisation of international legal practitioners. Its membership includes over 40,000 lawyers and almost 200 bar associations and law societies spanning every continent. It consequently influences the legal profession and helps shape development of law reform throughout the world. The IBA Human Rights Institute (IBAHRI) works to promote, protect and enforce human rights under a just rule of law, and to preserve the independence of the judiciary and the legal profession.

Through its international justice programme, IBAHRI is committed to the promotion of the rule of law, and the struggle to give victims of human rights abuses a right to have their grievances heard and remedied. In view of recent positive changes in Myanmar, including the establishment of a National Human Rights Commission, the release of political prisoners and the beginning of a law reform process, IBAHRI decided to despatch a fact-finding mission of legal experts to the country. Its task was to gain a comprehensive picture of current developments, especially with regard to the judiciary and the legal profession, and to make recommendations where appropriate.

The delegates' precise mandate was as follows:

- (i) to examine the functioning and independence of the judicial system including judges and the legal profession, in light of the newly established national human rights commission;
- (ii) to analyse the international and domestic legal norms applicable to the judicial system relevant to (i) above and their implementation in Myanmar;
- (iii) to examine any relevant related matters, including the responsibilities of all stakeholders; and
- (iv) to write and publish a report containing the findings of the mission, with recommendations.

The IBAHRI expresses its deep gratitude to the delegation members who collectively played an important part in facilitating the production of this report. They were:

Philippe Kirsch OC, QC, a Canadian lawyer and diplomat who was the first president of the International Criminal Court

Judge Philippe Kirsch OC, QC, was the first President of the International Criminal Court (ICC) and a Judge of its Appeals Chamber (2003–2009). He was subsequently Judge ad hoc at the International Court of Justice in the case concerning *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (2009–2012), Chair of the International Commission of Inquiry to investigate all alleged violations of international human rights law in Libya, UN Human Rights Council (2011–2012) and Commissioner on the Bahrain Independent Commission of Inquiry (2011).

In 1998, then Legal Adviser for the Department of Foreign Affairs and International Trade of Canada, he chaired the Committee of the Whole of the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an ICC and later the Preparatory Commission for the ICC (1999–2002). He spent most of his 30 years with the Government of Canada (1972–2003) in

multilateral and legal work. He was Ambassador and Deputy Permanent Representative of Canada to the UN (1988–1992), Director General of the Bureau of Legal Affairs (1992–1994), and Assistant Deputy Minister and Legal Advisor to the Department (1994–1999). He chaired a number of multilateral bodies including the Sixth (Legal) Committee of the UN General Assembly (1982), treaty-making bodies aimed at the suppression of various acts of terrorism, and conferences on international humanitarian law in the context of the Red Crescent and Red Cross Movement. He appeared twice as an Agent for Canada before the International Court of Justice (1998, 1999). His last assignment for Canada was Ambassador to the Kingdom of Sweden (1999–2003).

Professor Nicholas Cowdery AM QC, the inaugural Co-Chair of the IBAHRI and a former Director of Public Prosecutions of New South Wales

Nicholas Richard Cowdery AM QC BA LLB Hon DLaws *W'gong* FAAL was the Director of Public Prosecutions for the State of New South Wales from 1994 to 2011. He is now an Adjunct Professor of Law at the Sydney Institute of Criminology, Faculty of Law, University of Sydney; a Visiting Professorial Fellow at the Faculties of Law in the Universities of NSW and of Wollongong; and an Adjunct Professor at Charles Sturt University. He has been a legal expert consultant to the Commonwealth Secretariat, London, and is a consultant to the UNODC on a joint International Association of Prosecutors project.

He was admitted as a Barrister in 1971 after undergraduate employment in the office of the Commonwealth Deputy Crown Solicitor in Sydney. He commenced practice (1971–1975) as a public defender in Papua New Guinea. From 1975 until 1994 he was in private practice at the Sydney Bar, where he practised largely in criminal law (prosecuting and defending), common law, administrative law and some commercial law.

Professor Cowdery was President of the International Association of Prosecutors (IAP) from 1999–2005 and is an Honorary Member and Chairman of the Senate of the Association and was awarded its Medal of Honour in 2011. He was inaugural Co-Chair of the IBAHRI from its creation in 1995 until 2000. He was appointed a Member in the Order of Australia (AM) in 2003 for service to the development and practice of criminal law, and for fostering international relations in the area of human rights. He has received many domestic and international awards. He is the author of *Getting Justice Wrong: Myths, Media and Crime* (Allen & Unwin, 2001).

Professor Vitit Muntarbhorn, a prominent expert in international humanitarian law who teaches at Chulalongkorn University in Bangkok, Thailand

Vitit Muntarbhorn is currently Professor of Law at Chulalongkorn University, Bangkok. He is a graduate of the University Oxford and the Free University of Brussels. He is also a barrister (Middle Temple, London).

He has helped a variety of organisations and programmes at the national, regional and multilateral levels. At the multilateral level, currently he serves as Commissioner of the UN Commission of Inquiry on Syria; member of the International Labour Organization's Committee of Experts on the Application of Conventions and Recommendations; member of the Advisory Board of the UN Human Security Fund; and member of the Advisory Group of Experts (on Protection), Office of UNHCR.

From 1990–1994, he was UN Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography. Later he served as member of the Board of the UN Voluntary Fund for Human Rights. From 2004–2010, he was UN Special Rapporteur on the situation of human rights in the DPRKorea (North Korea). During his tenure relating to that mandate he also served as Chairperson of the Coordination Committee of the UN Special Procedures. In 2011, he chaired the UN Commission of Inquiry on the Ivory Coast. He has helped a number of UN agencies on research and programming, including UNDP, UNESCO, OHCHR and UNHCR. He also helps the non-governmental sector and is currently a Commissioner of the International Commission of Jurists.

At the regional level, he is currently co-Chairperson of the civil society Working Group for an ASEAN Human Rights Mechanism. He is a member of the Advisory Council of Jurists under the Asia Pacific Forum of National Human Rights Institutions. He served as alternate member (for Thailand) on the ASEAN High Level Panel to draft the terms of reference for the ASEAN Human Rights Body. He also helps pro bono various regional non-governmental organisations on human rights, such as FORUM-ASIA.

At the national level, in addition to teaching, he helps several ministries and non-governmental organisations on human rights, humanitarian law and development issues. He is the author of Thailand's first country report for the Convention on the Elimination of All Forms of Discrimination against Women. For a decade, he chaired Thailand's National Sub-Committee on Child Rights and helped to prepare country reports under the Convention on the Rights of the Child. He also acts as adviser to prepare country reports for a number of other human rights treaties, ranging from the ICCPR to the Convention on the Elimination of Racial Discrimination and the Convention against Torture. He continues to help an array of non-governmental organisations in Thailand pro bono.

He has published a number of books, articles and reports on issues ranging from international law to human rights, humanitarian law, refugee law, regional organisations and human development. He is the recipient of the 2004 UNESCO Human Rights Education Prize and a number of other awards.

Sadakat Kadri, a barrister at London's Doughty Street Chambers and rapporteur for the mission

Sadakat Kadri specialises in criminal, constitutional and international human rights law. He has represented clients and appellants at all levels of the UK judicial system, including death row prisoners before the Privy Council. On the international plane, he has advised governments and individuals on matters ranging from internet regulation to the constitutionality of a *coup d'état*, and he has participated in appeals in Brunei, Fiji and Malawi. He is also familiar with the legal framework of the United States, having worked at the American Civil Liberties Union after studying at Harvard and qualifying for the New York Bar. He has observed court hearings in the Middle East on behalf of the International Parliamentary Union, and he visited Syria in March 2011 as part of an IBAHRI investigation into the independence of that country's courts and legal profession. Kadri's most recent book is *Heaven on Earth: A Journey Through Shari'a Law* (Random House UK/Farrar Straus & Giroux US); he is also the author of *The Trial: A History from Socrates to OJ Simpson* (HarperCollins UK/Random House US); and he writes for various publications including the *London Review of Books*.

IBAHRI Programme lawyer Shirley Pouget, who planned and managed the mission

Shirley Pouget is a programme lawyer at the IBAHRI. She manages a wide range of projects that relate to human rights in the administration of justice, including inter alia, undertaking fact-finding missions and sending trial observers to countries where the rule of law has deteriorated (Syria, Myanmar and Thailand), and pioneering advocacy programmes to support the establishment of international justice mechanisms where individuals face serious human rights violations. Shirley also conceived and manages the IBAHRI Taskforce on Illicit Financial Flows, Poverty and Human Rights.

Prior to working at the IBA, she worked as Cabinet member of Andre Vallini, President of the General Council of Isère, France (Conseil Général d'Isère) and Senator, mainly advising on French justice reform and criminal draft legislation. Between 2006 and 2007, she worked for Ensemble contre la peine de mort (ECPM) as the scientific programme director of the 3rd World against the death penalty in Paris where she coordinated over 200 senior legal professionals from 50 different jurisdictions. In 2005 she coordinated a scoping mission on the Burmese–Thai border in Thailand. Shirley has travelled extensively across Eastern Europe and the Balkans while researching Roma issues in Budapest. Shirley is a French law graduate (LLB eq; Maîtrise International and European law; Pg dip civil crisis management and humanitarian law from the University of Law, Aix-en-Provence, a certificate degree in European law, Eötvös Loránd University, Budapest). She studied English legal translation and is a former Hypokhâgne student (preparatory class to the French Grandes Écoles). She has authored and co-authored published articles and reports on the abolition of the death penalty and international justice.

1.2 Interviews and consultations

Over the course of its seven-day stay, the delegation travelled between Yangon, Nay Pyi Taw, Mandalay and Bago, and met more than 100 people, including senior politicians, civil society activists, judges, lawyers, diplomats, and representatives of a number of international NGOs. Among those officials who received the delegates were the Attorney General, the Deputy Chief Justice and the Director-General of the Supreme Court, the Director-General of Myanmar Police, the Chair and other members of the Myanmar National Human Rights Commission, several senior parliamentarians and two advisers to President Thein Sein. The delegates also held discussions with members of the largest party outside government, the National League for Democracy, including its leader, Daw² Aung San Suu Kyi and deputy-leader, U Tin Oo.

The IBAHRI wishes to emphasise the extremely cooperative attitude of all those Myanmar government officials, legislators, politicians, civil society activists, judges and lawyers who met the delegation. It expresses its appreciation to them, to the Ministry of External Affairs which, though itself unable to receive the delegates, worked hard to facilitate their entry into Myanmar, and to the British Embassy, the British Council and the Pyoe Pin Civil Society Programme for their efforts to ensure the smooth running of their meetings on the ground.

This report's contents are based primarily on material gathered within Myanmar between 11 and 18 August 2012, though it takes account of relevant factual and legal developments up to 13 November

² 'Daw' is a conventional honorific that roughly translates as 'Aunt'. The male counterpart is 'U'.

2012, with appropriate citations. Although this framework gave the delegation a valuable overview of the challenges and opportunities facing Myanmar, certain limitations to its inquiry ought to be noted at the outset. It did not meet representatives of the Ministries of Defence, Border Areas, External Affairs, and Home Affairs, or representatives of the Border Security Force (Nasaka) and army (Tatmadaw). This report does not therefore directly relay their outlooks on Myanmar's current and future needs, though their perspectives have not been ignored, and the delegation has tried hard to represent them fairly. The brevity of the delegates' visit, which allowed only for travel to the country's four major cities, also limited what they were personally able to experience. Their information about rural areas and conflict zones is consequently based on the evidence of interviewees, supplemented by subsequent news reports.

In the interests of transparency, interviewees have been identified and statements have been quoted and attributed by name wherever possible. The delegation was concerned that people should feel free to express their views openly, however, and everyone who spoke in an unofficial or informal capacity was given the option of speaking off the record on a non-attributable basis. This seemed necessary because, despite growing tolerance of criticism by Myanmar's authorities, fears about speaking too frankly remain widespread. Insofar as anonymous statements are cited in this report, the lack of attribution therefore signifies only precaution.

1.3 The rule of law: an overview

The delegation's mandate required in part that it consider the extent to which Myanmar adheres to globally prevalent understandings of the rule of law. Such a broad mission should begin by looking at the meaning of the term 'rule of law' itself. It appeared on the international level for the first time as part of the preamble to the Universal Declaration of Human Rights (UDHR), which states that:

'It is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.'

The rule of law has since become a central feature of the international legal system. A UN General Assembly resolution of January 2012 characterised the principle as a requirement that 'all persons, institutions and entities, public and private, including the State itself, are accountable to just, fair and equitable laws and are entitled without any discrimination to equal protection of the law.' The assembled states observed in addition that this 'applies to all States equally, and to international organizations... [R]espect for and promotion of the rule of law and justice should guide all of their activities and accord predictability and legitimacy to their actions'. The reason was that 'the advancement of the rule of law at the national and international levels is essential for the realization of sustained economic growth, sustainable development, the eradication of poverty and hunger and the protection of all human rights and fundamental freedoms.'³

Support for the rule of law is also a keystone of regional treaties all over the world, including the Inter-American Democratic Charter, the African Charter on Democracy, Elections and Governance, the Arab Charter on Human Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Venice Commission, established by the Council of Europe

³ See General Assembly Resolution 66/102 on the Rule of Law at the National and International Levels, A/RES/66/102, 13 January 2012, available online at: www.unrol.org/files/GA%20Resolution%202012.pdf, and attached to this report at Annexe A. The web page cited was last accessed on 3 December 2012, and all other footnoted links were similarly accessible on that date unless otherwise stated.

in 1990, devoted an entire report to its theoretical underpinnings and practical implications in April 2011.⁴ The ASEAN Charter (which Myanmar ratified on 21 July 2008) meanwhile declares it to be a principle to be honoured by all member states, and the community-building process that is currently under way within the organisation is explicitly designed ‘to strengthen democracy, enhance good governance and the rule of law, and to protect human rights and fundamental freedoms’.⁵

As the aspirations expressed by ASEAN suggest, the concept of the rule of law is inextricably linked nowadays to an assumption that arbitrary actions are wrong, and that discretionary powers should always be exercised predictably. The Venice Commission’s useful analysis ascribes six features to the concept, namely: (i) the supremacy of transparently made laws; (ii) legal certainty; (iii) a prohibition of arbitrariness; (iv) access to justice before independent and impartial courts; (v) procedures that allow for human rights to be protected; and (vi) non-discrimination and equality before the law.⁶ The concept also entails that the substance of the laws will meet minimal standards of fairness. As noted above, the Universal Declaration of Human Rights explicitly linked it to the protection of human rights more than half a century ago, and its substantive components were emphasised in 2004 by the then UN Secretary-General Kofi Annan. His annual report of that year stated that:

‘The “rule of law”... refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.’⁷

This is important in the case of Myanmar because durable development requires that reforms command moral authority within the country and respect in the world beyond. Neither can be achieved through a legal system that limits justice to the rigid application of commands from above. In the interests of mutual comprehension, it is important to note, however, that Myanmar’s ruling officials have frequently emphasised the narrower view in recent many years. The rule of law has been used as a synonym for forceful rule by law, and the 2008 Constitution itself contains evidence that the authoritarian approach lives on. In its English version, Burmese terminology which appeared in the official translation of the previous 1974 Constitution as ‘rule of law’ is consistently rendered ‘prevalence of law and order’.⁸

As the rest of this report will show, a state cannot in fact be said to be abiding by the rule of law simply because its institutions are able to validate their actions by reference to court decisions, statutes, or procedurally correct executive decrees. A truly stable society rests not only on force – but also on wisdom, the consent of the governed, and the protection of the weak.

4 See European Commission for Democracy Through Law (Venice Commission), ‘Report on the Rule of Law’ (March, 2011), online at: www.venice.coe.int/docs/2011/CDL-AD%282011%29003rev-e.pdf. Its checklist is attached to this report as Annexe I.

5 See Charter of the Association of Southeast Asian Nations, Art 1(7) and 2(2)(h): www.asean.org/archive/publications/ASEAN-Charter.pdf.

6 Venice Commission, ‘Report on the Rule of Law’ (n 3), 10–13.

7 See Kofi Annan’s report to the Security Council on ‘The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies’, 23 August 2004, para 6, online at: www.unrol.org/files/2004%20report.pdf.

8 Nick Cheesman, ‘Thin Rule of Law or Un-Rule of Law in Myanmar?’, 82 *Pacific Affairs* (2009/10), 597, 602 n 20, online at: www.academia.edu/892302/Thin_Rule_of_Law_or_Un-Rule_of_Law_in_Myanmar; cf 2008 Const, Arts 21(c), 219, 250, 278, 354, 376, 413(b), 432.

2. Background and History

2.1 Myanmar in facts and figures⁹

The Republic of the Union of Myanmar is the largest state in mainland Southeast Asia. With a land mass of 653,508 square kilometres (about 252,320 square miles), it is almost 20 per cent bigger than France and only slightly smaller than Texas. It has a total population of around 55 million. The country comprises seven regions and seven states, as well six 'self-administered areas' and a purpose-built capital at Nay Pyi Taw (which has been directly administered by the president since the government moved there in 2006).¹⁰ About a million people live in Nay Pyi Taw, but the largest city is still Yangon, some 240 miles further south, which has around 4.25 million inhabitants. Myanmar is situated between the region's two major powers, China and India, as well as Thailand, Bangladesh and Laos, and its strategic significance is enhanced further by access to the Bay of Bengal and the western end of the Straits of Malacca.

About two thirds of the country's citizens are ethnically Burman (or Bamar),¹¹ and they dominate its seven regions. It is conventionally said that there are 135 minorities – though this statistic, which originated in a colonial census of 1931, can only ever be approximate – and they dominate the highland states that form a rough crescent around the country's Burman-dominated centre. The most numerous non-Burman citizens are the Shan (about 9 per cent of the population), the Karen (7 per cent), the Arakan/Rakhine (4 per cent), the Mon, the Kachin and the Chin. There are also substantial communities who are not officially recognised as citizens, including people of Chinese origin and the Rohingya minority (perhaps 800,000 strong),¹² which is concentrated in the north of Arakan state, close to Myanmar's border with Bangladesh.

Around 89 per cent of the population are Theravada Buddhists, and the very large majority of the remainder profess Christian, Muslim, Hindu or animist beliefs. The religious distinctions overlap to some extent with ethnic ones. While Burmans are overwhelmingly Buddhist, about a third of the Karen population, 80–90 per cent of the Chin and more than 95 per cent of Kachins are Christian. Almost all the Rohingya are Muslim.

Although Myanmar was anti-Communist in political orientation throughout the Cold War, this was never reflected in its economic policies, and successive governments held themselves out as socialist for four decades. This changed in the late 1980s, however, and the 2008 Constitution now states explicitly that Myanmar has a 'market economy'.¹³ Economic liberalisation has led to increasingly effective exploitation of the country's extremely valuable natural resources. The largest export is natural gas,

9 The information in this section is largely taken from the CIA World Factbook's entry on 'Burma', available online via <https://www.cia.gov/library/publications/the-world-factbook/geos/bm.html>.

10 2008 Const, Arts 49–56. The regions are Ayeyawady (Irrawady), Bago (Pegu), Magway, Mandalay, Yangon, Sagaing and Taninthayi (Tenasserim); the ethnic states are Chin, Kachin, Kayin (Karen), Kayah (Karenni), Mon, Rakhine (Arakan) and Shan; the self-administered areas are Naga, Danu, Pa-O, Pa Laung, Kokang, and Wa.

11 The CIA World Factbook has a figure of 68 per cent, but proportion of non-Burmans might be as little as a quarter or as much as two-fifths: Marie Lall, 'Ethnic Conflict and the 2010 Elections in Burma' (Chatham House 2009), 4, online at: www.chathamhouse.org/sites/default/files/public/Research/Asia/1109pp_lall.pdf. Any estimate is politically controversial, and therefore likely to be contested.

12 See the UNHCR's 2012 country profile for Myanmar, online at: www.unhcr.org/pages/49e4877d6.html.

13 See 2008 Const, Preamble and Art 35.

which was worth US\$3.56bn in FY 2011–12,¹⁴ and the country also possesses lucrative offshore oil fields, teak forests, reserves of precious metals and gemstones, and hydroelectric power potential. Myanmar's primary export markets in 2010 were Thailand, India and China, and most of its imports came from China, Thailand and Singapore (in that order).¹⁵ Notwithstanding the existence of several sanctions regimes elsewhere, the country's foreign currency reserves have been steadily rising in recent years, and the CIA World Factbook estimated in late 2011 that they stood at US\$3.93bn.

A wide range of indicators suggest that macro-economic success is doing little as yet to benefit ordinary citizens. One US scholar estimated in 2010 that spending on health and education then took up just 0.5 per cent and 1.3 per cent respectively of GDP¹⁶ (compared to between 2.5 and 4 per cent for the army, on official statistics). Myanmar simultaneously faces a number of chronic problems, including malnutrition, high infant mortality, diseases such as malaria, tuberculosis and HIV/AIDS, methamphetamine production and trafficking, landlessness among the 70 per cent rural population, environmental degradation, and semi-permanent armed conflicts. Per capita GDP is one of the lowest in Southeast Asia at about US\$715, with around 26 per cent of the population living in poverty.¹⁷ A number of authoritative indices illustrate how closely these problems correspond to political weaknesses. Myanmar is near the bottom of the United Nations Human Development Index (149th out of 187 countries).¹⁸ The Economist Intelligence Unit placed Myanmar fifth from bottom of its Democracy Index in 2011;¹⁹ the Fund for Peace estimated in its most recent Failed States Index that only 20 out of 177 nations were more fragile;²⁰ and Transparency International's assessment of global perceptions of public sector corruption found in 2011 that Myanmar's reputation was worse than every country in the world except North Korea and Somalia.²¹

The bleakness of these statistics can mislead, however, because much has changed over the last two years. Several of Myanmar's once implacable armed conflicts appear to be winding down, and important political and economic reforms are now under way within the country. The sanctions imposed by the United States, Canada, the European Union and Australia are being relaxed in response, and several major multinationals are poised to invest heavily in the country. Spending on education will meanwhile double in 2012–2013, and the health budget is scheduled to quadruple.²²

2.2 Myanmar before 1988²³

The area that nowadays constitutes Myanmar was conquered by Burman kings at least 1,000 years ago. Their successors consolidated their hold in the face of fierce competition from neighbouring

14 'Myanmar's Natural Gas Export Earns Nearly 800 mln USD in 3 Months', (Xinhua), 23 July 2012, online at: http://news.xinhuanet.com/english/business/2012-07/23/c_131733555.htm. Gas exports constituted 12.4 per cent of GDP in 2007–8: see: <http://202.244.105.132/English/Publish/Download/Dp/pdf/225.pdf>, 1 n3.

15 http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113423.pdf. Malaysia, South Korea and Japan also had significant trading links with the country.

16 David I Steinberg, *Burma/Myanmar: What Everyone Needs to Know* (OUP 2010), 96.

17 See the chapter on Myanmar in the Asia Development Bank's Asian Development Outlook report for 2012: www.adb.org/sites/default/files/ado2012-mya.pdf.

18 www.hdr.undp.org/en/statistics.

19 www.sida.se/Global/About%20Sida/S%C3%A5%20arbetar%20vi/EIU_Democracy_Index_Dec2011.pdf.

20 www.fundforpeace.org/global/?q=fsi2012.

21 Transparency International, Corruption Perceptions Index 2011, online at: <http://cpi.transparency.org/cpi2011/results>.

22 Brian McCartan, 'Myanmar Military in the Money', *Asia Times* (28 February 2012), online at: www.atimes.com/atimes/Southeast_Asia/NB28Ae02.html.

23 The history in this section draws primarily on Steinberg, *Burma/Myanmar* (n 15) and Barbara Victor, *The Lady* (Faber 1998).

realms, the most powerful of which were China and Thailand, until in the early 19th century, they came up against the expansive ambitions of the British in India. Growing rivalries erupted into armed hostilities in 1824 and 1852, and a third Anglo-Burmese War in 1885 ended in a decisive victory for the British, who brought the country's ancient monarchy to an end by exiling the king and his family to Ratnagiri, on the far western coast of India.

Efforts to regain independence escalated in tandem with liberation movements in India proper during the 20th century. The first important challenge to British rule coalesced around a leader named Saya (Teacher) San in the early 1930s. His calls for emancipation tapped into Buddhism and nationalist sentiment, as has been true of all potent political movements in the country, and it inspired a rebellion that was not suppressed by the British for two years, but it then ended with the capture and hanging of Saya San. The British subsequently acknowledged the gathering desire for autonomy, with a law that transformed Burma on 1 April 1937 from a dependency of India into a separately administered colony, but it took Japan's invasion of the country during the Second World War to bring about full independence.

Hostilities began in January 1942. Although the Karen and the Kachin would resist the Japanese occupation throughout, the invading forces were initially greeted as liberators by many of the country's other inhabitants. A nationalist leader named Aung San (1915–1947) had by then been persuaded to take their side at the head of the Burmese army, and the Japanese granted the country its titular independence on 1 August 1943. Aung San's alliance with the Japanese formally lasted until March 1945, but the British government resolved nevertheless to negotiate with him after the Allied victory. An understanding of 27 January 1947 (the Aung San-Attlee Agreement) then called for elections to a constituent assembly within four months and independence within a year. Aung San persuaded several important minority ethnic groups to join the interim government, and despite attempts by Karen leaders to lobby for their own separate state, the Panglong Agreement²⁴ of 12 February established that contested border areas should at least temporarily remain part of the new nation.

The constitution drafted by a constituent assembly in May 1947 proclaimed the Union of Burma to be 'an independent sovereign republic', governed by a bicameral parliament and made up of four states – Shan, Kachin, Karen and Karenni – along with a 'special division' of the Chins. It provided that, for the first ten years of its operation, any state would be able to secede if there was majority support in both the state assembly and a popular plebiscite.²⁵ As the country prepared for independence, General Aung San and six senior members of his shadow government were then assassinated on 19 July by paramilitaries loyal to a political rival, an event that still resonates today. The outgoing British governor appointed Thakin Ru as prime minister in his place. The Constituent Assembly went on to approve the Union of Burma's first constitution on 24 September, and the country formally gained its independence on 4 January 1948. It declined to join the recently established British Commonwealth, unlike India, Pakistan and most of the other countries that were formerly subject to occupation by British colonialists.

The next decade and a half was marked by great internal instability, fuelled by ethnic tensions and the volatile politics of the early Cold War. Relations with the newly established People's Republic of

24 The text of the Panglong Agreement is online at: www.ibiblio.org/obl/docs/panglong_agreement.htm.

25 See §§ 201–6 of the 1947 Constitution, online at: www.scribd.com/doc/25420681/1947-Constitution-of-Burma-English-Version#page=undefined.

China worsened, as Kuomintang forces used Shan State as a base for strikes against the revolutionary regime, and in 1958, with Karen insurrectionists mounting military operations just a few miles away from Yangon, the army informed Prime Minister U Nu that a coup was necessary to stave off civil war. On 24 September, he invited them to rule lawfully for six months instead. General Ne Win (1910–2002) in fact ruled for three times as long, before handing back power following U Nu's victory in an election on 6 February 1960.

Notwithstanding General Ne Win's willingness to stand down, the army's experience of power strengthened the institution markedly. It had been apparently successful in ending disorder around the country, and it had removed a major obstacle to the normalisation of relations with China by cooperating to end the activities of a rump Kuomintang army in Shan state. Its economic power had also grown, as a body known as the Defence Services Institute had expanded into a lucrative conglomerate, with interests in sectors ranging from banking and retail to the hospitality industry. Such achievements gave the military confidence as well as a taste for power, and a controversial attempt by parliament in 1961 to declare Buddhism to be the state religion caused it once again to step into the political arena. After a conference of ethnic minority leaders in Yangon, at which many expressed fears of majority domination and desires for autonomy or secession, General Ne Win staged a second coup on 2 March 1962.

In the name of staving off national fragmentation and pursuing 'the Burmese Way to Socialism', U Ne Win set up a Revolutionary Council, which quickly set about dismantling independent political and legal institutions. With the assistance of a shell organisation – the rapidly convened Burma Socialist Programme Party (BSPP) – it suppressed student protests, purged the old civil service, and initiated a process that would gradually rein in the army's chief institutional rival, the Buddhist priesthood or sangha.²⁶ In March 1964, all other parties were banned and, ten years after that, on the 12th anniversary of the 1962 coup, a new Constitution came into force. It proclaimed the BSPP to be the sole political party and leader of the Socialist Republic of the Union of Burma, and subdivided the country into the seven ethnic states and seven primarily Burman regions that exist today.

Although Myanmar had been among the richest countries in Southeast Asia at independence, the following years saw its foreign trade and domestic industries steadily decline. Economic mismanagement was exacerbated by ongoing threats to Myanmar's territorial integrity posed by dozens of armed ethnic rebellions, which were fuelled by numerous factors. Historical grievances played their part – resentments between Burmese nationalists and the Karen, for example, over the latter people's close associations with the British during and after the Second World War – and as that implies, there were (and are) suspicions that some of the rebellions were promoting the interests of foreign enemies. The conflicts also had economic significance. Control of territory often equates to ownership of natural resources in Myanmar – and a corresponding power to conduct or sabotage lucrative business ventures.

In July 1988, the government openly abandoned the doctrines of the Burma Socialist Programme Party, and shortly before then, two reforms shook up the stagnant economy in dramatic fashion. The first, promulgated on 1 September 1987, allowed farmers to sell their grain on the open market.

²⁶ The process was formalised in 1979 by centralising the priesthood's hierarchical structure, establishing educational controls, and requiring monks to register: Steinberg, *Burma/Myanmar*, (n 15) 71–72.

The second, which took effect without any notice less than a week later, invalidated all monetary bills over a certain amount, roughly US\$2.5, with immediate effect. The consequence was a catastrophic loss of confidence in the national currency, and a dramatic slowdown in domestic production at a time when cheap Chinese imports were beginning to flood the country.

As the economic situation worsened, discontent grew; and a brawl between students at a tea shop in March 1988 sparked off violent protests. When 41 demonstrators then suffocated in an overcrowded police van on 18 March, outrage ensued. Opposition to the government grew increasingly organised, under the leadership of a number of lawyers and senior army officers. After six months of unrest, with chaos on the streets, five ships from the US navy off the country's coast and newly-mobilised Chinese troops on the border, the military staged a third coup on 18 September 1988.

2.3 Myanmar in the two decades after the 1988 coup

The 19-man military body that took over in September 1988, which called itself the State Law and Order Restoration Council (SLORC), sought to end the unrest with a declaration of martial law and a series of emergency measures. The 1974 Constitution was overturned, and forceful steps were taken to stamp out active opposition. These caused 440 fatalities on the government's own account, while other observers numbered the dead in thousands.²⁷ Resistance to the regime coalesced in the name of the National League for Democracy (NLD). Many of the new movement's members were subjected to harassment, arrest and detention. Among them was Daw Aung San Suu Kyi, the daughter of the assassinated General Aung San, who was placed under house arrest on 20 July 1989. She would spend around 15 of the next 21 years in detention.

Within a year of seizing power, the SLORC successfully negotiated a number of ceasefires with armed insurgents in Myanmar's border areas,²⁸ and it maintained that it planned to hold free elections. A national vote did then take place on 27 May 1990. Some 93 parties and 87 independents participated, and the NLD won a resounding victory: 392 out of 479 seats, or about 80 per cent, on a 72.59 per cent turnout. Though the result was clear enough, however, the SLORC now refused to cede power. It belatedly claimed that the elections had in fact been part of a process of drafting a new constitution, and under General Than Shwe (1933–), who took over in 1992, the junta embarked on a consultation process that would continue for the better part of two decades. Only a very small proportion of victorious candidates from the 1990 elections was consulted during the course of that process, however. Although the party led by Daw Aung Sang Suu Kyi had won a clear mandate in 1990, her views were never solicited.

On 15 November 1997 the SLORC was formally reconstituted as the State Peace and Development Council (SPDC). There was considerable overlap between the memberships of old and new bodies. Economic liberalisation continued throughout the 1990s, and foreign investment in mineral and fuel exploitation, hardwood extraction and seafood cultivation was encouraged. At the same time, the human rights position worsened. Armed conflicts once again flared in several border states,

27 Steinberg, *Burma/Myanmar* (n 15), 79.

28 The SLORC struck ceasefire agreements with various Shan insurrectionists in the spring of 1989, and by 2006, 25 ethnic groups had agreed to halt armed operations pending the creation of a new constitution. See Steinberg, *Burma/Myanmar* (n 15), 110–13; Marie Lall, 'Ethnic Conflict and the 2010 Elections in Burma' (Chatham House 2009), 6, online at: www.chathamhouse.org/sites/default/files/public/Research/Asia/1109pp_lall.pdf.

and the government began deploying troops to facilitate oil, gas, mining, forestry and hydropower projects. International humanitarian groups logged many allegations that land was being seized without compensation, and that people were being made to work by the army against their will. The latter allegation so concerned the International Labour Organization that it formed a Commission of Inquiry in 1997, which issued a highly critical report in 1998.²⁹ In 2000, it took the unprecedented step of excluding Myanmar from most ILO meetings, until the country acceded two years later to the organisation's request that it be allowed to send a liaison officer to investigate suspected cases of forced labour.

The regime faced considerable criticism from foreign governments. The United States imposed visa restrictions on senior SLORC officials on 3 October 1996; the European Union followed suit and imposed additional trade sanctions later that month; and in May 1997, President Clinton banned all new US investments in Myanmar. The country's rulers were less isolated within Southeast Asia, especially after Myanmar joined ASEAN in July 1997, but the regime appeared to recognise at some level that long-term stability would require greater engagement with the population. In implicit acknowledgment of the need for change, Prime Minister Khin Nyunt announced a seven-step reform programme on 30 August 2003. According to the state-run *New Light of Myanmar* newspaper, it would enable Myanmar 'to develop a modern and developed democracy in the future in accordance with the historical background of the nation, the customs and traditions of the people and the prevailing political, economic and social conditions.'³⁰

Progress towards that goal would not lack for obstacles, however. There had already been an indication on 30 May 2003 that the government was as yet ill-prepared to repair the rifts of 1988. Although the government chose to release Daw Aung San Suu Kyi from house arrest at the beginning of that month, her subsequent decision to tour central Myanmar ended when a 5,000-strong crowd of uncertain provenance attacked her entourage near the town of Depayin. An unknown number of NLD supporters were killed: the Thailand-based Burma Lawyers' Council conducted an investigation that identified ten dead and 108 missing people, while SPDC officials estimated the fatalities at four.³¹ The NLD's leader and deputy-leader, U Tin Oo, were unharmed but were subsequently taken into custody. Another serious crisis began on 15 August 2007, when the government raised energy prices overnight. Buddhist monks staged a series of protests (the so-called 'Saffron Revolution'), eliciting a violent crackdown at the end of September in which at least 31 people lost their lives.³²

2.4 The 2008 Constitution

In pursuit of the seven-step programme laid down in 2003, a new constitution was approved in a referendum staged between 10–24 May 2008. Most polls were held just a week after the greatest natural disaster in Myanmar's modern history – Cyclone Nargis – during which a 3.5 metre tidal surge overwhelmed the Irrawaddy Delta, killing about 138,000 people. Official statistics reported

29 International Labour Organization, 'Forced Labour in Myanmar (Burma)', published on 2 July 1998 and available online at: www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar.htm.

30 www.ibiblio.org/obl/docs/rallies-etc.htm.

31 'Preliminary Report of the Ad Hoc Commission on Depayin Massacre July 4 2003', Legal Issues on *Burma Journal*, August 2003, 7, 48–52, online at: www.ibiblio.org/obl/docs/Depayin_Massacre.pdf; see also Democratic Voice of Burma, 'Police File Whitewashes Depayin Massacre' (30 May 2011), online at: www.dvb.no/news/police-file-whitewashes-depayin-massacre/15890.

32 Steinberg, *Burma/Myanmar* (n 15), 136–7.

nonetheless that 98.12 per cent of the electorate turned out to vote, and that 92.48 per cent of them expressed support for the document. Foreign observers, who were denied visas to enter the country until the last day of voting, were unable to verify those statistics.³³

The 2008 Constitution of the Republic of the Union of Myanmar acknowledges several levels of authority, but its structure is firmly unitary, and pyramidal rather than federal.³⁴ Secession is forbidden and ‘non-disintegration’ is laid down as one of the Union’s basic principles.³⁵ The president stands at the country’s apex, with broad powers that effectively grant him a supervisory role over all its other institutions. He can potentially influence the conduct of parliamentary elections through provisions that let him appoint all members of the Myanmar Union Electoral Commission.³⁶ He also guides the legislature and judiciary in several respects, and has a greater say than either of those branches over the annual budget and the nomination of senior legal officials.

The national (Union) parliament, known as the Pyidaungsu Hluttaw, is composed of a People’s Assembly (Pyithu Hluttaw) and a Nationalities Assembly (Amyotha Hluttaw). Three quarters of the representatives of both bodies are elected: in the case of the People’s Assembly, they are returned from township-based constituencies, while the Nationalities Assembly comprises 12 members from each state and region.³⁷ The Commander-in-Chief of the army nominates the remaining 25 per cent in both cases (110 of 440 in the People’s Assembly, and 56 of 224 seats in the Nationalities Assembly).³⁸ There is no hierarchy – the two chambers are differentiated only by their electoral base – but in the interests of simplicity, they are referred to in the rest of this report as the ‘Lower House’ and ‘Upper House’ respectively. There are unicameral legislatures at state and regional level, in which 25 per cent of representatives are similarly appointed by the Commander-in-Chief. Subordinate ‘leading bodies’ help to govern self-administered areas.³⁹

Myanmar’s ordinary judiciary comprises four tiers. Most cases begin in Township Courts (the lowest level) or District Courts, and decisions of these tribunals may be appealed to a High Court – also known as the State or Divisional Court – and ultimately to the Supreme Court, which also has original jurisdiction over certain matters.⁴⁰ There is also a nine-person Constitutional Tribunal, which addresses questions relating to interpretation and application of the Constitution.

Alongside the three branches of civilian government stands the military (known in Burmese as the Tatmadaw and in the translated version of the Constitution as the Defence Services), which enjoys a privileged legal status. It has primary responsibility for ‘safeguarding the constitution’;⁴¹ military personnel are reserved important ministerial positions; and all soldiers are subject to courts martial

33 *Ibid* (n 15), 140; for the official poll statistics, see the notice dated 29 May 2008 published at the front of the 2008 Constitution.

34 For the 2008 Constitution, see: www.burmalibrary.org/docs5/Myanmar_Constitution-2008-en.pdf; see also Yash Ghai, *The 2008 Myanmar Constitution: Analysis and Assessment*, available at: www.burmalibrary.org/docs6/2008_Myanmar_constitution-analysis_and_assessment-Yash_Ghai.pdf. The Online Burma/Myanmar Library offers a good source of English-language legal material more generally; ordinarily, the same is true of the Burma Lawyers Council, at: www.blc-burma.org, though its website was down when last accessed on 3 December 2012. Other useful websites include Network Myanmar (www.networkmyanmar.org) and the Myanmar Law Google Group at: <https://groups.google.com/forum/?fromgroups=#forum/myanmarlaw>.

35 2008 Const, Arts 10 and 6(a).

36 *Ibid*, Art 398(a).

37 *Ibid*, Art 74.

38 *Ibid*, Arts 109(b) and 141(b).

39 *Ibid*, Arts 161–98.

40 *Ibid*, Arts 315, 316, 306, 295; see also the Judiciary Law 2000.

41 *Ibid*, Art 20(f).

which are exempt from civilian oversight and appealable directly to the Commander-in-Chief. The army's guaranteed control over 25 per cent of legislative seats also gives it a virtual veto over proposed constitutional amendments, which require the support of 'more than' 75 per cent of all legislators.⁴² This presents a formidable obstacle to systemic reform, because many regulatory matters, including important funding and appointment provisions, form part of the Constitution.

2.5 Myanmar since 2008

On 4 January 2010, the SPDC regime headed by General Than Shwe announced that plans were under way to hold Myanmar's first elections for almost two decades.⁴³ A number of controversial electoral laws were enacted two months later. As well as creating a government-dominated election commission, they obliged all candidates to 'protect' the 2008 Constitution and disqualified prisoners from standing for election. One of the many people affected by the last provision was Daw Aung San Suu Kyi, whose house arrest had been extended in August 2009, following a court's decision that her brief and reluctant reception of a mentally disturbed trespasser had amounted to a criminal offence. The NLD and several other smaller parties therefore chose neither to register nor field candidates. The newly appointed Union Electoral Commission duly reported after elections on 7 November 2010 that the SPDC-backed Union Solidarity and Development Party (USDP) had won about 58 per cent of total votes cast. The USDP's position was improved yet further by those constitutional provisions which automatically gave the army a quarter of all parliamentary seats, and the ruling party ended up with around four-fifths of the seats in both legislative chambers.⁴⁴

Once the elections had taken place, however, signs began to emerge of a new direction within government. Daw Aung San Suu Kyi's August 2009 sentence came to an end on 13 November 2010 without further attempt by the government to prolong her detention. Myanmar's new national and local parliaments convened a couple of months later, and on 30 March 2011, the SPDC was formally dissolved. The new Constitution simultaneously came fully into force and the current president, U Thein Sein, assumed the presidency and leadership of an 11-member body known as the National Defence and Security Council.⁴⁵ Although he was a retired general who had served as prime minister under the SPDC, his inaugural speech to parliament promised not only reform, but also liberalisation. 'We guarantee that all citizens will enjoy equal rights in terms of law, and we will reinforce the judicial pillar', he said. 'We will fight corruption in co-operation with the people... So, we will amend and revoke the existing laws and adopt new laws as necessary to implement the provisions on fundamental rights of citizens or human rights.'⁴⁶

One of the first signs that the speech might reflect a genuine thaw in the political mood came with an amendment to the Political Party Registration Law in November 2011, allowing prisoners to stand in elections and obliging candidates to 'respect' the Constitution – not 'protect' it. The NLD chose to register as a result, and on 1 April 2012, elections took place to fill 45 of 48 parliamentary seats

42 *Ibid.*, Art 436; see also section 7.2 of this report.

43 'Entire National People to Remain Vigilant at All Times Against Dangers Posed by Neo-Colonialists', *New Light of Myanmar* (4 January 2010), 1, online at: www.myanmars.net/myanmar/2010/myanmar20100104.html.

44 See International Crisis Group, 'Myanmar's Post-Election Landscape', *Asia Briefing*, No 118, 7 March 2011, 2, 18: [www.crisisgroup.org/~media/Files/asia/south-east-asia/burma-myanmar/B118%20Myanmars%20Post-Election%20Landscape.ashx](http://www.crisisgroup.org/~/media/Files/asia/south-east-asia/burma-myanmar/B118%20Myanmars%20Post-Election%20Landscape.ashx).

45 The NDSC's composition is prescribed by Art 201 of the Constitution.

46 Euro Burma Office, 'President Thein Sein's Inaugural Speech', EBO Analysis Paper No 2, 2011, online at: www.europarl.europa.eu/meetdocs/2009_2014/documents/droi/dv/601_ebopaper2_/601_ebopaper2_en.pdf.

which had been made vacant by the appointments of their previous occupants to government posts (three were in areas that were declared unsafe by the Union Election Commission).⁴⁷ Seventeen parties participated, and the NLD took all but one of the 44 seats it contested (the others were won by the USDP and the Shan Nationalities Democratic Party).⁴⁸ One of the successful candidates was the party's leader, Daw Aung San Suu Kyi. Although a dispute then arose over the parliamentary oath – which retained the older terminology requiring 'protection' of the Constitution – the victorious candidates agreed to take their seats because (in their leader's words) 'we do not want to create a political conflict and we do not want to have any political tension'.⁴⁹ They were sworn in on 30 April. International observers generally felt that the outcome reflected the popular will, though many observed that the elections could only be considered a first step towards democratisation.

President Thein Sein had simultaneously begun to push forward legislative reforms. A Labour Organization Act allowing workers to form trade unions and go on strike (both illegal since 1962) came into effect on 9 March 2012, preliminary details of a proposed law to facilitate foreign investment emerged a week later, and a Settlement of Labour Disputes Act was enacted on 28 March 2012.⁵⁰ The country's currency was then floated on international exchanges, on the same day as the ballot, ending an artificial rate which had for years allowed a handful of licensed importers to make vast profits.⁵¹

The new government also exhibited responsiveness to public grievances that had notably eluded its predecessors. Ceasefires were negotiated with almost all the Union's armed opponents,⁵² and construction of the multi-billion dollar Myitsone dam, a highly controversial hydropower project in Kachin state which is funded by neighbouring China, was suspended at least temporarily by President Thein Sein on 30 September 2011.⁵³ The president then granted a longstanding request of the International Labour Organization for access to conflict zones on 5 April 2012, and state newspapers ran a May Day address a month later in which he called 'for the absolute elimination of forced labour... by 2015'.⁵⁴

The government has also taken important steps to accommodate political criticism. An Amnesty International report issued a month after President Thein Sein took office estimated that the country's jails contained 2,200 political prisoners,⁵⁵ but that figure has been steadily declining as a consequence of a series of amnesties, sentence reductions and commutations that began on 16 May 2011. Many political prisoners were set free on 11 October 2011 and 13 January 2012, at least two dozen more were included

47 Kremena Krumova, 'Burma's By-Elections Mostly For Show, Say Critics', *The Epoch Times* (28 March 2012): www.theepochtimes.com/n2/world/burmas-by-elections-mostly-for-show-say-critics-211920.html.

48 'NLD Wins 43 Seats in Burmese By-Election', *Mizzima News* (3 April 2012), online at: www.mizzima.com/news/inside-burma/6895-nld-wins-43-seats-in-burmese-by-election.html; see also the list of elected representatives published at: www.mizzima.com/images/NewsPhotos/APR12/MPs%20List.pdf.

49 Radio Free Asia, 'NLD Backs Down Over Oath Row' (30 April 2012), online at: www.rfa.org/english/news/burma/nld-04302012180226.html.

50 For the Labour Organization Act, see: www.altsean.org/Docs/Laws/Labor%20Organization%20Law.pdf, and see Ei Ei Toe Lwin, 'Workers, Activists Highlight Labour Law Issues on May Day', *Myanmar Times* (7–13 May 2012), online at: www.mmmtimes.com/2012/news/625/news62510.html; after lengthy debates, the law on foreign investment was enacted on 2 November 2012; see Aung Hla Ton, 'Myanmar State Media Details New Foreign Investment Law', *Reuters* (3 November 2012), online at: www.reuters.com/article/2012/11/03/us-myanmar-investment-idUSBRE8A204F20121103; for the Settlement of Labour Disputes Act, see: www.burmalibrary.org/docs13/Labour_Disputes_Settlement_Act-2012-en.pdf.

51 BBC, 'Burma Sets Currency Exchange Rate as it Floats the Kyat' (2 April 2012), online at: www.bbc.co.uk/news/business-17581115.

52 See eg BBC, 'Burma Government Signs Ceasefire with Karen Rebels' (12 January 2012), online at: www.bbc.co.uk/news/world-asia-16523691.

53 BBC, 'Burma Dam: Work Halted on Divisive Myitsone Project' (30 September 2011), online at: www.bbc.co.uk/news/world-asia-pacific-15121801. There has been pressure from China to reverse the suspension, and rumours persist that work will soon restart.

54 Translation online at: www.mrtv3.net.mm/open9/010512iss.html.

55 www.amnesty.org/en/region/myanmar/report-2011.

among a group of 80 detainees released on 3 July,⁵⁶ and an amnesty announced on 17 September (a week before President Thein Sein was scheduled to make a high-profile visit to the UN General Assembly) saw yet more of the government's critics allowed out of jail.⁵⁷

These steps towards transparency and accountability have been widely welcomed, but many challenges remain to be resolved. At least 450,000 people have been internally displaced by Myanmar's wars, and more than a dozen refugee camps straddle the country's long border with Thailand.⁵⁸ There are still ongoing hostilities between the government and a number of rebel groups, including the Kachin Independence Army – the oldest rebel force in the world, with grievances dating back to 1949 – and a simmering social conflict in Arakan state has recently boiled over into sectarian violence. A tally has yet to be taken of how many government critics remain imprisoned, and a permanent political settlement that is fair to the ordinary people of Myanmar and benign to overseas investors will have to overcome retrograde forces, within and outside the army. Foreign governments are being correspondingly prudent. On 5 April 2012, US Secretary of State Hillary Clinton announced a relaxation of certain financial and travel sanctions, and Australia, the EU and Canada soon took similar steps, but all maintained their embargoes on weapon sales. Clinton then announced on 27 September that the United States would allow imports from Myanmar in the interests of 'normalising' commercial relations, but this was just a permitted waiver of a sanctions law that had been formally renewed by Congress in early August.⁵⁹ The stated concern is that reforms are just a ploy that may yet be reversed, rather than a genuine effort to restore internationally recognised values within the country.

56 Amnesty International, 'Myanmar: Release Remaining Prisoners of Conscience' (4 July 2012), online at: www.amnesty.org/en/news/myanmar-release-remaining-prisoners-consciences-2012-07-04.

57 BBC, 'Burma Releases 500 Prisoners in Amnesty' (17 September 2012), online at: www.bbc.co.uk/news/world-asia-19625381.

58 See figures cited by the Thailand Burma Border Consortium at: www.tbtc.org/index.htm.

59 Associated Press, 'US to Ease Economic Sanctions on Burma in Response to Reforms' (27 September 2012), online at: www.guardian.co.uk/world/2012/sep/27/us-eases-burma-sanctions-clinton-sein.

3. The Civil Sphere: Social, Economic, Cultural, Civil and Political Rights

3.1 Background

Myanmar has a considerably healthier civil society than its troubled recent history might lead one to expect. Although the 1988 Law Relating to Forming of Organizations (the ‘Organizations Law 1988’), requires most associations to register with the Home Affairs Ministry,⁶⁰ the SLORC and SPDC were relatively tolerant towards groups that posed the ruling order no direct political challenge, and it was estimated in 2010 that Myanmar had around 214,000 community-based groups.⁶¹

The number and variety of these grassroots associations offer reasons for optimism. Authoritarian systems of government often corrode individual conceptions of dignity and trust, and the limited control that some of Myanmar’s inhabitants have been able to retain over their personal affairs bodes well for the country’s political renewal. At the same time, the very existence of so many organisations – which frequently concern themselves with major social problems such as landlessness, health, and educational needs – illustrates just how much was left undone by governments over the last few decades.

The corollary of this is that Myanmar’s ruling authorities have for many years been too ready to subvert or override individual rights. They have repeatedly used the country’s courts to victimise people with whom they have disagreed. This is objectionable not only because of its impact on the individuals affected. It has also had systemic consequences. The use of courts to effect the executive’s will has eroded their capacity to uphold ordinary legal rights, thereby limiting or denying ordinary people’s access to justice. Criticism of the government has been made to seem like a violation of public order, rather than a natural difference of opinion. That has neutered many elements of civil society, including the media, that should properly serve as public watchdogs to guard against the abuse of governmental power.

The problems are exacerbated by the military conflicts that have afflicted Myanmar since independence. Although ceasefires have been negotiated between the government and most of its armed opponents, heavy fighting was ongoing in both Kachin and Shan states in November 2012,⁶² and the last two decades of war have left the country deeply scarred. National security forces and armed rebel groups have both allegedly committed numerous human rights violations, including the recruitment of child soldiers and the use of anti-personnel landmines in civilian areas.⁶³ Efforts to crush irregular rebel forces have frequently involved the deployment of heavy munitions against inhabited areas, and a UN report of 2007 reckoned then that the number of villages destroyed,

60 http://burmalibrary.org/docs/SLORC_Law_6-88B.htm.

61 Steinberg, *Burma/Myanmar* (n 15), 126; cf 174.

62 Zin Linn, ‘Burma President Gives Disappointing Answer on Kachin War’ Asian Correspondent (24 October 2012), online at: www.asiancorrespondent.com/91109/burma-president-gives-disappointed-answer-on-kachin-war; see also Human Rights Watch, ‘Untold Miseries’: *Wartime Abuses and Forced Displacement in Burma’s Kachin State* (March 2012), 28, online at: www.hrw.org/sites/default/files/reports/burma0312ForUpload_1_0.pdf.

63 *Ibid*, 54–63. Myanmar’s government is one of only three in the world that has used anti-personnel landmines during the last two years. The others are Syria, Israel and Libya (pro-Gaddafi forces): www.icbl.org/index.php/icbl/Library/News-Articles/LM2012.

relocated or abandoned stood at 3,077.⁶⁴ There have also been documented reports that Myanmar's army has tortured and executed captives, compelled others to serve as porters, mine-sweepers and human shields, and deliberately perpetrated sexual violence and rape against ethnic minority women.⁶⁵ This is considered further in section 3.3 (*Ethnic conflicts*) below.

It is therefore to President Thein Sein's credit that he has taken some important steps to advance the pursuit and protection of fundamental rights within Myanmar. As well as taking some important first steps to normalise political debate, he established the Myanmar National Human Rights Commission on 5 September 2011 with a brief to 'promote and safeguard the fundamental rights of citizens'.⁶⁶ A think tank called the Myanmar Development Resource Institute in May 2011, which he created a month after taking office, is working with the UNDP to formulate a strategy to achieve the United Nations eight Millennium Development Goals by the target date of 2015.⁶⁷ Spending on education and health is meanwhile set to double and quadruple respectively next year,⁶⁸ and the government has declared its intention to universalise Myanmar's rudimentary social security system.⁶⁹ It is also accepting UN help to plan for a census in 2014–15, the first since 1983, which should provide valuable data for assessing the impact of future reforms.⁷⁰

The president's initiatives have been matched by increased activity among non-governmental organisations. The Global Fund to Fight AIDS, Tuberculosis, and Malaria is now working in the country again, after suspending its Myanmar programme for more than five years on the grounds of unwarranted government interference,⁷¹ and the UNDP, UNICEF and the ILO are all stepping up their country operations. Amnesty International visited Myanmar in May 2012 for the first time since 2003, and its subsequent assessment, though mixed, acknowledged progress in fields from public health to poverty alleviation.⁷² In a clear sign that Myanmar's economic prospects are also brightening, the World Bank and the Asian Development Bank both opened offices in Yangon on 1 August.⁷³

64 See Special Rapporteur Paulo Sérgio Pinheiro, 'Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled "Human Rights Council"', 12 Feb 2007, A/HRC/4/14, para 54, online at: www.ibiblio.org/obl/docs4/HRC2007-SRM-rep.pdf.

65 International Labour Organization, 'Forced Labour in Myanmar (Burma)', cited above at n 28; International Human Rights Clinic at Harvard Law School (Richard Goldstone et al), 'Crimes in Burma' (May 2009), 51–74, available online at: www.law.harvard.edu/programs/hrp/documents/Crimes-in-Burma.pdf. One NGO reported in January 2010 that around 92 per cent of 621 households surveyed in Chin state had experienced at least one demand to participate in activities such as road-building and the portering of military supplies: Physicians for Human Rights, *Life Under the Junta: Evidence of Crimes Against Humanity in Burma's Chin State* (January 2011), online at: https://s3.amazonaws.com/PHR_Reports/life-under-the-junta-burma-chin-state.pdf. A Human Rights Watch report of July 2011, based on 58 interviews with Karen refugees, claimed that government forces (which were then conducting a military offensive in Karen state) had required hundreds of prisoners to serve not just as porters, but also as human shields and minesweepers. Human Rights Watch, *Dead Men Walking: Convict Porters on the Front Lines in Eastern Burma* (July 2011), online at: www.hrw.org/sites/default/files/reports/burma0711_OnlineVersion.pdf.

66 This body is considered in detail in Chapter Six: see p 46.

67 See: www.voiceofgoldenland.com/forum.php?id=699&tod=article.

68 See p 15, s 2.1.

69 See the speech made by Vice-President Dr Sai Mauk Kham on 1 May 2012, reported on the Ministry of Labour's website: www.mol.gov.mm/en/a-ceremony-to-mark-the-workers%E2%80%99-day-2012.

70 See 'United Nations, Myanmar Sign Agreement for Census-Taking to Help Country's Poor People Reap Dividends of Important Exercise' (Press Release), online at: www.un.org/News/Press/docs/2012/sgsm14262.doc.htm.

71 Marwaan Macan-Marcar, 'HEALTH-BURMA: Global Fund Back With New Hope', *Inter-Press Service News Agency* (26 February 2011), online at: www.ipsnews.net/2011/02/health-burma-global-fund-back-with-new-hope.

72 Amnesty International, 'Revisiting Human Rights in Burma' (25 May 2012), online at: www.amnesty.org/en/library/asset/ASA16/003/2012/en/62cc4319-a779-4c9e-93c8-0a3945203411/asa160032012en.pdf.

73 Aung Tun, 'ADB, World Bank Open Myanmar Office', *Myanmar Times* (6–12 August 2012), online at: www.mmtimes.com/2012/business/638/biz63805.html.

3.2 Current legal structure

The legal document that formally underpins legal protections in Myanmar is the 2008 Constitution. Its eighth chapter enumerates several ‘fundamental rights’, including various protections against discrimination; rights to education and health care; language and other cultural rights; prohibitions on enslavement, people-trafficking and forced labour; freedom of movement; rights to property and privacy; a right to vote and stand in elections; and freedoms of expression, association and belief. Anyone who violates these rights is potentially guilty of offences under the Penal Code or the Code of Criminal Procedure, and they are also directly enforceable in Myanmar’s courts. The Supreme Court is expressly authorised under the Constitution to issue five different types of order (or ‘writ’) to compel or prohibit state action to remedy a breach,⁷⁴ and High Courts enjoy an inherent jurisdiction, at least in theory, to do the same.

The full title of Chapter VIII is ‘Fundamental Rights and Duties of the Citizens’, and as this suggests, its provisions are hedged by limits. Whereas certain entitlements are expressed absolutely, others are qualified: the enslavement and trafficking of persons is prohibited outright, for example, but free expression is guaranteed only insofar as its exercise is not ‘contrary to the laws, enacted for Union security, prevalence of law and order, community peace and tranquillity or public order and morality.’ The chapter’s last eight sections set out a number of duties owed by citizens to the state. It is meanwhile made subject in its entirety to other provisions that allow for rights to be suspended, restricted or revoked where public safety so requires at times of war, foreign invasion, insurrection or other emergency.⁷⁵

One other limit, which is noteworthy simply because it is so easily overlooked, concerns Chapter VIII’s use of the word ‘citizens’. Although several constitutional rights are granted explicitly or implicitly to persons in general, many others – including freedom of expression, and electoral and education rights – are said to belong to ‘citizens’.⁷⁶ This is significant because the Burma Citizenship Law of 1982 acknowledges as full citizens only people who can prove that they belong to a recognised indigenous group, or that they are descended from people who were permanently settled in Burma in 1823 (that is, prior to the outbreak of the first Anglo-Burma War). Anyone else is an ‘associate’ or ‘naturalised’ citizen at most, and both of those statuses can be revoked on various grounds, including suspected disloyalty or moral turpitude.⁷⁷ An unknown but large number of Myanmar’s inhabitants are not officially recognised as citizens of any sort at all, with the consequence that they formally lack rights that the Constitution itself characterises as ‘fundamental’ (albeit that any Myanmar court denying them those rights would arguably violate the constitutional guarantee of equal protection, and certainly breach international law⁷⁸).

Myanmar has yet to become a party to most of the world’s governing human rights instruments, including the International Covenant on Civil and Political Rights, the International Covenant on

74 2008 Const, Arts 377, 378(a).

75 *Ibid*, Arts 379, 381, 382; see also s 7.2, p 52, of this report.

76 *Ibid*, Arts 345–6; for rights which are expressly granted only to ‘citizens’, see Arts 348, 349, 352, 354, 355, 356, 357, 365, 367, 368, 369, 370, 380, 381.

77 See Burma Citizenship Law 1982, especially §§3, 35, 42, 58, translated (unofficially) at: www.unhcr.org/refworld/docid/3ae6b4f71b.html. Cf the rules for citizenship laid down by §11 of the 1947 Constitution cited in n 24 above.

78 See 2008 Const, Art 348; Office of the United Nations High Commissioner for Human Rights, *The Rights of Non-Citizens* (New York and Geneva 2006), online at: www.ohchr.org/Documents/Publications/noncitizensen.pdf.

Economic, Social and Cultural Rights, the Convention Against Torture, and the Rome Statute that set up the International Criminal Court. There are other treaties, however, that it has signed and ratified.⁷⁹ These include the four Geneva Conventions (though not the additional protocols), the Genocide Convention, the Convention on the Rights of the Child (though not its optional protocol on the involvement of children in armed conflict), the Convention on the Elimination of All Forms of Discrimination against Women, the Freedom of Association and Protection of the Right to Organise Convention, and the Convention concerning Forced or Compulsory Labour, and the Convention on the Rights of Persons with Disabilities. In the interest of controlling illicit activities around the country's ill-policed borders, Myanmar also became a State Party to the UN Convention against Transnational Organized Crime and its Protocol in 2004 (the SPDC promulgated an Anti-Trafficking in Persons Law in 2005). President Thein Sein's administration has more recently hosted regular visits by the UN's Special Rapporteur on the Situation of Human Rights in Myanmar, Tomás Ojea Quintana, and it has taken steps in recent months to improve further Myanmar's relationship with the International Labour Organization. The current Attorney General, Dr Tun Shin, stated on 8 June 2011, during the course of Myanmar's first Universal Periodic Review before the UN Human Rights Council that his country might also be ready soon to 'sign and ratify the core human rights treaties', including the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture (CAT).⁸⁰ During the review process itself, member states made 190 recommendations, of which Myanmar has so far accepted about half.⁸¹

It is important to note that the lack of positive action by Myanmar in respect of many major human rights treaties does not mean that the international norms they enshrine are inapplicable within the country. They may in fact be relevant in two ways. In the first place, the language used in those treaties often parallels that of the 2008 Constitution, and the decisions of international bodies might therefore help to illuminate Myanmar law insofar as it is unclear. Certain norms form so basic a component of international custom in any event that they are conventionally considered to be binding everywhere, regardless of whether countries have signed up to a treaty that acknowledges them. Such rules (which are collectively known as *jus cogens*, or 'compelling law') include the prohibitions against torture, systematic racial discrimination, and crimes against humanity. As a matter of law, therefore, judges are positively obliged to enforce these fundamental norms, even if violations are purportedly authorised by a country's authorities.⁸²

3.3 Findings

The IBAHRI delegation discussed the state of fundamental rights in Myanmar with a range of figures, including community organisers, journalists, politicians and lawyers. All expressed the view that Myanmar had grown freer over the previous year, but they were simultaneously cautious.

79 For a full schedule of the treaties that Myanmar has and has not signed and ratified, see: www1.umn.edu/humanrts/research/ratification-myanmar.html.

80 Thomas Kean, 'Government Commits to 80 Human Rights Recommendations at UN', *Myanmar Times* (27 June – 3 July 2011), online at: www.mmmtimes.com/2011/news/581/news58117.html.

81 See: www.upr-info.org/IMG/pdf/recommendations_to_myanmar_2011.pdf.

82 That is not to say that torture or systematic racism are permissible under Myanmar's law. There is no prohibition of torture in the Constitution, but §§330 and 331 of the Penal Code prohibit the causing of 'hurt' and 'grievous hurt' during an official interrogation (they are punishable by seven and ten years' imprisonment respectively). Systematic racial discrimination might not always violate the Constitution's guarantee of equality, because this is specifically granted to 'citizens' (Art 21(a)), but it can (and should) be presumed that it would contravene Art 347's guarantee of equal protection.

The delegation heard views on a whole range of matters ranging from censorship and land rights to environmental concerns, and their findings here focus on three issues that jointly cover all the subjects raised: access to courts and the administration of justice, freedom of expression, and ethnic conflict.

Access to courts and the administration of justice

Article 21 of the 2008 Constitution provides that ‘every citizen shall enjoy the right of equality, the right of liberty and the right of justice’, while Article 19 lists three ‘judicial principles’: the administration of justice independently according to law; the dispensation of justice in open court unless otherwise prohibited by law; and a guarantee in all cases of the right of defence and the right of appeal under law.

Notwithstanding these principles, many people interviewed by the delegation suggested that access to justice in Myanmar remains elusive. When civil activists were asked where they themselves would go if rights were being infringed, they typically identified institutions such as churches, industrial tribunals⁸³ and local government offices. None thought the Myanmar National Human Rights Commission offered satisfactory protection, while courts were almost universally discounted. Judges were considered corrupt and too close to the executive, and the judicial process in general was seen as expensive and daunting.

In respect of criminal justice specifically, the delegation learned that the Constitution reiterates a provision in the Criminal Procedure Code (CPC) that citizens may not be detained for more than 24 hours without a court’s permission.⁸⁴ The CPC guarantees a qualified right to silence,⁸⁵ but many common procedural protections, including the presumption of innocence and a rule against double jeopardy are lacking. It also allows judges to extend the 24-hour custody period to 15 days, or 30 days in the case of offences punishable by more than seven years’ imprisonment,⁸⁶ while the Constitution itself overrides the 24-hour limit in cases where ‘precautionary measures [are] taken for the security of the Union or prevalence of law and order, peace and tranquillity in accordance with the law in the interest of the public’ (Article 376).

The delegation was left in little doubt that important progress had been made in this field over the last two years. Lawyers otherwise critical of the government said that procedural abuses that were once common – including secret trials, solitary confinement, punitive transfers to remote detention facilities, the denial of adequate health care, and acts of torture – are currently rare or non-existent. Prosecutions under Myanmar’s most draconian statutes were said to have slowed or ceased, and the delegation met several former prisoners who had personally benefited from recent presidential amnesties. The delegation also heard from a number of senior police officers, including the Director-General of Myanmar Police, U Kyaw Kyaw Htun, who all expressed their support for the reform process. They showed the delegation training manuals and codes of practice that Myanmar’s police department had jointly written with UNICEF about the proper way to treat children who find themselves caught up in the criminal justice system. Asked what he thought about civilian scrutiny of

83 Such tribunals have been created by the recent Settlement of Labour Disputes Act 2012, online at: www.burmalibrary.org/docs13/Labour_Disputes_Settlement_Act-2012-en.pdf.

84 2008 Const, Art 21 (b); Criminal Procedure Code, §61, online at: www.wipo.int/wipolex/en/text.jsp?file_id=182263.

85 A defendant need not testify, although a court may draw adverse inferences from such a failure to give evidence: Criminal Procedure Code, §342.

86 2008 Const, Arts 21 (b), 376; Criminal Procedure Code, §§60, 61, 81, 167.

the police, U Kyaw Kyaw Htun said that he would welcome advice on how best to implement oversight procedures, and he expressed a particular interest in learning about good international practice in the matter of state security laws.⁸⁷ In this context, he observed that Chinese law-enforcement methods offered a relatively unsatisfactory model, because Myanmar's colonial heritage was British, and it would therefore be more useful to learn about contemporary policing in the United Kingdom.

It was clear, nonetheless, that the improved situation remains fragile. Many of the people released under recent amnesties have gained their liberty only conditionally, under provisions contained in section 401 of the Criminal Procedure Code,⁸⁸ and the delegation heard evidence to suggest that political prisoners were still being held in jail. The deputy-leader of the National League for Democracy U Tin Oo, and the party spokesperson U Nyan Win estimated on 18 August 2012 that there were 330 such detainees. President Thein Sein declared an amnesty a month later that reportedly set free more than 80 additional dissidents, but monitoring groups maintain that a large but unknown number remain in custody.⁸⁹

The delegation also heard many complaints about the continued existence of repressive legal statutes and edicts. It was told about the State Protection Act 1975, for example, which allows the Cabinet to imprison people without trial for up to three years and to restrict all fundamental rights if this is deemed necessary.⁹⁰ Section Five of the Emergency Provisions Act 1950 makes it a criminal offence to do 'anything' to 'depreciate, pervert, hinder, restrain, or vandalise the loyalty, enthusiasm, acquiescence, health, training, or performance' of soldiers and civil servants – among a large number of other things.⁹¹ (The latter provision is punishable by up to seven years in jail, and one advocate told the IBAHRI delegation that even this limit was illusory; his own political activities had earned him 14 years.) A leading political activist informed the delegation that the Habitual Offenders Restriction Act 1961, which was designed originally to limit the movements of notorious criminals, vagabonds and homeless people, has also been invoked in recent years to penalise political activists. The welfare of prisoners is meanwhile still governed by a manual dating from 1894. There has been talk since at least September 2011 about bringing Myanmar's detention facilities up to modern standards,⁹² but no such reform has yet been enacted.

Freedom of expression, association and assembly

Although the 2008 Constitution formally guarantees that citizens may, subject to certain qualifications, freely express themselves in various ways,⁹³ its protections have not always been observed. The 2012 index of global press freedom published by Reporters Without Borders in fact

87 Uniquely among ASEAN countries, Myanmar is currently excluded from participation in the Bangkok-based International Law Enforcement Academy (www.state.gov/j/inl/c/crime/ilea/c11280.htm), but its police force does conduct training through the UN Office on Drugs and Crime (www.unodc.org/eastasiaandpacific/myanmar/index.html).

88 The Criminal Procedure Code is online at: www.wipo.int/wipolex/en/text.jsp?file_id=182263.

89 Aung Hla Tun and Jason Szep, 'Myanmar Frees Prisoners in Amnesty, Dissidents Included', *Reuters* (18 September 2012), online at: www.reuters.com/article/2012/09/18/us-myanmar-prisoners-idUSBRE88G1CQ20120918.

90 See State Protection Law, §§7–14, online at: www.burmalibrary.org/docs6/State_Protection_Law+amendment.pdf. The statute is formally called the Law to Safeguard the State Against the Dangers of Those Desiring to Cause Subversive Acts.

91 www.burmalibrary.org/docs6/Section_5_of_the_Emergency_Provisions_Act-en.pdf.

92 Shwe Yinn Mar Oo, 'Government to Submit New Jail Law: Minister', *Myanmar Times* (5–11 September 2011), online at: www.mmtimes.com/2011/news/591/news59124.html; cf Ahunt Phone Myat, 'Prisons Act Reform Proposal Rejected by Home Minister', *Democratic Voice of Burma* (30 August 2011), online at: www.dvb.no/news/17351/17351.

93 2008 Const, Art 354.

places Myanmar 11th from the bottom – 169th out of 179 countries.⁹⁴ Low though this ranking is, however, it actually represents an improvement over the previous year, when the country came 174th, and this reflects a number of recent positive moves by President Thein Sein. Journalists have been among those who have benefited from his amnesties,⁹⁵ and a Peaceful Demonstration and Gathering Act (the ‘Demonstrations Act’) that he approved on 2 December 2011 allows for the authorisation of public protests.⁹⁶ Censorship has been relaxed to the extent that around 350 journals and newspapers now exist, and the IBAHRI delegation was told that the Myanmar Journalists Association had recently met without governmental interference for the first time for half a century. On 20 August 2012, the Information Ministry announced that a new Media Act would soon repeal a half-century-old rule requiring the submission of printed materials to a Press Scrutiny and Registration Division (PSRD) for approval prior to publication.⁹⁷ There have also been reports that a new Broadcasting Act will effect equivalent liberalisation to the radio and television media.⁹⁸

These developments do not exclude the possibility of continued governmental interference with free expression, however. The Demonstrations Act obliges demonstrators to give the police five days notice of the time, place, route, purpose, and even slogans of their planned protest. Permission can then be denied on the basis that the gathering will breach ‘the security of the State, rule of law [or] public tranquillity’ – in which case protesters face one-year jail terms under §18 of the Demonstrations Act, two years under §§141-3, 145, 151 and 505(b) of the Penal Code, and even longer terms under other statutes and decrees. The Law Relating to the Forming of Organizations 1988 (the ‘Organizations Law 1988’), for example, allows judges to hand down sentences of up to five years on people who participate in groups ‘that attempt, instigate, incite, abet or commit acts that may in any way disrupt law and order, peace and tranquility, or safe and secure communications; [or] affect or disrupt the regularity of state machinery’.⁹⁹ The Unlawful Associations Act 1908 authorises a similar punishment for anyone linked to an association ‘which has been declared unlawful by the President of the Union’.¹⁰⁰

Such restrictions on free speech are still being enforced. The PSRD announced on 31 July 2012 that it had ordered the indefinite suspension of two journals, *The Voice* and *Envoy*, apparently because of stories they had run about recent Cabinet reshuffles and an exhibition of censored cartoons. They were permitted to restart publication on 18 August, following public protests by more than 100 journalists in Yangon and Mandalay, but no reasons were given for either the suspension or its reversal.¹⁰¹ A more sustained effort to silence criticism can be seen in a conflict between the Ministry of Mines and *The Voice*, over an article published by the magazine in March 2012 alleging serious financial irregularities in a copper mine privatisation. Although the report merely repeated observations by an auditor that had already been aired in parliament, the Ministry launched a

94 See: www.rsrf.org/IMG/CLASSEMENT_2012/CLASSEMENT_ANG.pdf.

95 Reporters Without Borders, ‘All DVB Journalists, Freelancers and Blogger Freed Under Amnesty’ (13 January 2012), online at: <http://en.rsrf.org/burma-dvb-journalists-freelancers-and-13-01-2012,41675.html>.

96 The statute is attached to this report at Annexe B. See also Human Rights Watch, ‘Burma: New Law on Demonstrations Falls Short’ (15 March 2012), online at: www.hrw.org/news/2012/03/15/burma-new-law-demonstrations-falls-short.

97 Printers and Publishers Registration Act 1962, §12; BBC, ‘Burma Abolishes Media Censorship’ (20 August 2012), online at: www.bbc.co.uk/news/world-asia-19315806.

98 Shwe Aung, ‘Government Mulls New Broadcast Law’ (25 April 2012), online at: www.dvb.no/news/government-mulls-new-broadcast-law/21708.

99 Law Relating to the Forming of Organizations 1988, §§3(c), 5(b), (c), 6, online at: http://burmalibrary.org/docs/SLORC_Law_6-88B.htm.

100 Unlawful Associations Act 1908, §§15(2) (b), 17, online at: www.burmalibrary.org/docs09/UNLAWFUL_ASSOCIATIONS_ACT.pdf.

101 See Zinn Linn, ‘Burma’s New Press Law: Everyone’s on Board but the Media’, *Asian Correspondent* (7 August 2012), online at: www.asiancorrespondent.com/87244/burma-plans-to-endorse-a-press-law-without-consulting-journalists; ‘Myanmar Lifts Suspensions on Journals After Protests’ (6 August 2012), online at: <http://in.reuters.com/article/2012/08/06/myanmar-media-idINL4E8J64ED20120806>.

defamation action. As if to underscore that certain subjects were too sensitive to merit free speech protection, the Committee for Press Freedom was then denied permission under the Demonstrations Act to protest in support of *The Voice* outside Yangon's City Hall, on the grounds that traffic might be disrupted.¹⁰² Thirteen people were arrested under the same statute on 21 September 2012 – designated by the United Nations as International Peace Day – for marching in support of peace in Kachin state;¹⁰³ while a solo protest by a lawyer on 18 October led to the arrest of the advocate and two of his alleged accomplices.¹⁰⁴

Ethnic conflicts

The lowering of tensions in several border states has produced some welcome signs that the human rights situation in some of Myanmar's former war zones is in transition. The government signed an action plan with Yangon-based UNICEF officials on 27 June 2012, designed to facilitate the release of underage recruits and bring the use of child soldiers to a complete end.¹⁰⁵ UNICEF has also helped to convene a Mine Risk Education Working Group, led by the Department of Social Welfare, while Myanmar's Foreign Minister announced at an ASEAN meeting in Cambodia on 11 July 2012 that the country was considering signing all key disarmament treaties including the 1997 Anti-Personnel Mine Ban Convention.¹⁰⁶

These changes have been complemented by ongoing progress on the question of forced labour. Myanmar's authorities have been addressing this issue since February 2007, when the SPDC agreed that the International Labour Organization could receive individual complaints and forward them to a governmental commission.¹⁰⁷ Several victims have been granted compensation as a consequence, while some perpetrators have been charged under a provision of the Penal Code (§374) that makes it a crime to compel people to work against their will. The ILO has more recently assisted the military on the drafting of an order reminding soldiers that forced labour is a crime, and it is advising the government on how best to achieve its stated aim of abolishing the practice by 2015.

As noted at the beginning of this chapter, the government has also made a start on addressing at least some of the grievances that underlie the chronic armed conflicts. Two statutes were enacted in March 2012 to deal with an issue that is arguably the single most important political question in modern Myanmar – land tenure – though they themselves illustrate the pitfalls that the country faces. The Farming Act and the Vacant, Fallow, and Virgin Lands Management Act both purport to grant increased security to the 70 per cent of Myanmar's population who work in agriculture, but they also facilitate appropriations by the government, if tenants fail to prove their title to land or if officials

102 Myo Thant, 'The Voice to be Sued After Alleging Ministry's Errors' *Mizzima News* (14 March 2012) online at: www.mizzima.com/gallery/media-alert/6763-the-voice-to-be-sued-after-alleging-ministries-errors.html; United Press International, 'Myanmar Readies for Media Defamation Case' (27 August 2012), online at: www.upi.com/Top_News/Special/2012/08/27/Myanmar-readies-for-media-defamation-case/UPI-35931346063400.

103 Nyein Nyein, '13 Peace Activists Charged in Burma' *The Irrawaddy* (24 September 2012), online at: www.irrawaddy.org/archives/14780; Ei Ei Toe Lwin, 'Lawyers Want One Hearing for Peace Protesters' *Myanmar Times* (22 October 2012), online at: www.mmtimes.com/index.php/national-news/2566-lawyers-want-one-hearing-for-peace-protesters.html.

104 Peter Aung, 'Solitary Protester Hit With Charges' *Democratic Voice of Burma* (25 October 2012), online at: www.dvb.no/news/solitary-protestor-hit-with-charges/24442.

105 www.unhcr.org/refworld/topic,4565c2254a,4565c25f575,4fed72eb2,0,,MMR.html.

106 International Campaign to Ban Landmines, 'Last Major State User of Landmines to Join Landmine Ban Treaty?', online at: www.icbl.org/index.php/icbl/Library/News-Articles/Myanmar-pledge-to-join-ban.

107 International Labour Organisation, 'Supplementary Understanding Between the Government of Myanmar and the International Labour Office, and Other Associated Documents', online at: www.ilo.org/wcmsp5/groups/public/-asia/-ro-bangkok/-ilo-yangon/documents/legaldocument/wcms_106132.pdf.

deem land to be unused. As a consequence, they have been highly divisive, and the delegation heard complaints that the reforms have opened a door to cronyism, neglecting the very farmers they were supposed to protect.¹⁰⁸

One particularly significant development has been a recent surge in sectarian violence in Arakan (or Rakhine) state, a territory on Myanmar's border with Bangladesh which, though communally fractured, has never actually descended into war. The crisis was sparked in June 2012 by the rape and murder of an Arakan Buddhist woman, allegedly by three Rohingya Muslim men. Collective retaliation by a large crowd resulted in ten Muslim bus passengers being beaten to death, and the outbreak of riots in and around the town of Sittwe. On the official account, a total of 88 people were killed over the next few days (31 of them non-Muslims), while more than 100,000 people were forced to flee their homes.¹⁰⁹ Simmering resentments erupted again during October, by which time around 75,000 Rohingya and 3,000 Arakan Buddhists were living in refugee camps. Despite efforts by the government to maintain order, more than 20,000 people were forced to flee their homes before the month was over (almost all of them Rohingya), thousands of homes were burned down, and almost 100 more lives were lost.¹¹⁰

The ethnic and religious tensions reflect a dispute that dates back to Myanmar's recovery of independence in 1947. Rohingya people had been living on both sides of the border since at least 1826, when the province was ceded to British India, and in the uncertainty that prevailed before the subcontinent's partition on 15 August 1947, an unknown number made the short journey into Burma (as it then was). Myanmar's government subsequently insisted that the community was not indigenous and belonged in its entirety to East Pakistan/Bangladesh, which has itself refused to take any responsibility for them.¹¹¹ The Burma Citizenship Law of 1982 then created a stringent set of conditions for the acquisition and transmission of nationality, which effectively excluded almost all Rohingya, putting them at a legal disadvantage that subsists to this day – not least because, as noted in Section 3.2 above, several of the 'fundamental rights' enumerated in the 2008 Constitution are granted to 'citizens' rather than 'persons'.

The delegation did not meet any Myanmar nationals who had been in Arakan state during the June unrest, but the subject of the riots arose regularly during its meetings. Almost everyone lamented the breakdown of harmonious relations, and several accurately pointed out that Myanmar's citizenry included many Muslims from other ethnic groups, but the single sentiment most frequently expressed was hostility towards the Rohingya people. They were sometimes characterised as 'illegal immigrants', on the basis of claims that their parents and grandparents had been transported into Burma after independence by politicians in search of votes. One pro-democracy lawyer accused the current government of a similar cynicism, claiming that it had chosen to exaggerate crimes against Rohingya Muslims so as to whip up religious tension for unspecified political advantages. The delegation

108 For a copy of the Farmland Law, as enacted on 20 September 2011, see: www.burmalibrary.org/docs12/2011_Farmland_Bill%28en%29.pdf; for an unofficial translation of the Vacant, Fallow, and Virgin Lands Management Act, see: www.burmalibrary.org/docs13/VFVLM_Law-en.pdf.

109 See the press release issued by the Ministry of Foreign Affairs on 21 August 2012, online at: www.mofa.gov.mm/pressrelease/Press_Release_Rakhine_State_Affairs_Webversion%2821-08-12%29.pdf; see also Human Rights Watch, *The Government Could Have Stopped This: Sectarian Violence and Ensuing Abuses in Burma's Arakan State* (August 2012), 1, online at www.hrw.org/sites/default/files/reports/burma0812webwcover_0.pdf.

110 BBC, 'Burma Violence: 20,000 Displaced in Rakhine State', 28 October 2012, online at: www.bbc.co.uk/news/world-asia-20114326; 'About 75,000 Rohingyas in Myanmar Camps: Refugee International', *The Hindu* (29 September 2012), online at: www.thehindu.com/news/international/about-75000-rohingyas-in-myanmar-camps-refugee-international/article3948606.ece.

111 On Bangladesh's 'inhumane and illegal' response to the recent crisis, see Human Rights Watch, 'The Government Could Have Stopped This' (n 108), 6.

was also told by senior lawyers that international agencies were biased towards the Rohingya. A representative of the UNDP explained that this perception arose in part from the UNHCR's mandate to support stateless people, which obliges it to focus its efforts on the Rohingya minority rather than on needy people in Arakan state generally.

3.4 Conclusion

The Constitution's acknowledgment that certain rights are fundamental is important. The formal recognition of rights requires work if it is to produce justice on the ground, however, and recent transformations to Myanmar's political landscape have done too little as yet to change the lives of ordinary people. The harsh statutes and decrees of earlier years are still liable to be enforced. Rural and border areas continue to be afflicted by social tensions and economic hardship. The Burma Citizenship Law 1982 meanwhile institutionalises a two-tier system of legal rights, disadvantaging non-citizens to an extent that threatens to place Myanmar in permanent breach of international law.

If these problems are to be overcome, a sturdy and non-discriminatory legal framework is essential. This requires in turn that laws be promulgated and publicised in ways that makes them relevant to people's daily lives. There should be prior consultation, transparency throughout the drafting process, and the systematic repeal of inconsistent older laws. Individuals should then be encouraged to take advantage of their new rights, and local officials need to be trained to comprehend and apply laws and directives after they have been ordained at Union level. Such steps will not only raise public confidence in the reform process. Robust legal argument will lower the risk that always attends the transition from dictatorship to democracy: the possibility that claims of reform will serve to conceal and formally legitimise official theft and oligarchic ambition.

Justice is not a luxury that can be postponed pending economic development; it is a precondition of such development. Social harmony is stabilised when grievances are addressed in timely fashion and policies are guided by specific rights, rather than assumptions about administrative convenience or the collective interest. Institutions that consistently uphold such rights meanwhile strengthen government itself, by encouraging rational and predictable decision-making. This was acknowledged by one senior official, who told the IBAHRI delegation that 'the new Government needs not only to sue, but also to be sued'. As he went on to acknowledge, increased legal certainty would boost confidence among international governments, donors and investors, allowing Myanmar's economic potential to be unlocked fairly, for the benefit of the entire population.

All of this means that the agencies of power in Myanmar, all the way down to township and village level, must make concerted efforts to give practical effect to the rights that the country already acknowledges in legal texts. This is particularly true given the many duties listed in Chapter VIII of the Constitution. Qualified rights and informal civic responsibilities are common all over the world, but some of these obligations ('the duty to enhance unity [and] ensure public peace', for example) are so nebulous that a judge could wrongly understand them to restrict protected liberties. The Constitution's apparent suggestion that all rights may be suspended in the event of an emergency meanwhile contravenes one of the most basic principles of international humanitarian law – that certain principles, such as the prohibitions on torture, systematic racial discrimination and crimes against humanity, are non-derogable, no matter how convenient it might seem in a crisis to violate the rules.

Reforms to the criminal justice system are also essential. At present, the Criminal Procedure Code contains no explicit acknowledgment of the presumption of innocence, no rule to prevent people from being twice tried or punished for the same offence, and no acknowledgement that defendants have a right to be heard and a right to challenge hostile evidence. This ought to be changed, so as to bring Myanmar into line with good international practice, as reflected in Article 14 of the ICCPR. The IBAHRI also welcomes the government's stated intention to improve prison conditions within Myanmar, and hopes it will soon enact a law in this regard. There should in addition be a systematic review of detentions, with a view to releasing any political prisoners who remain in jail. Numerical precision in this field is necessarily elusive, because the term 'political prisoner' can itself be controversial – if, for example, it is applied to a critic of the government who was convicted of violent crimes on the basis of inadequate evidence¹¹² – but the very uncertainty illustrates how useful a transparent review could be.

These reforms should be combined with a broad-ranging review of the statutes that were used in the past to suppress criticism of the government. Any law that might encroach on constitutionally protected rights is necessarily susceptible to abuse, and limits on free expression are especially problematic in a country that has a tradition of penalising political speech. This is all the more important, given the widespread perceptions of official corruption within and outside Myanmar. For the sake of promoting confidence in the integrity of state officials, within and beyond the country's borders, there should therefore be maximum transparency and rules that facilitate the airing of stories in the public interest. Notification and registration requirements should also be minimised, allowing always for honest mistakes, mockery and robust self-expression, and Myanmar's police and township authorities should strain to find ways of permitting protests even if (for example) they might cause some traffic disruption.

IBAHRI hopes that Myanmar's president, parliamentarians and judges will have such matters at the forefront of their minds in months to come. In respect of free speech in particular, they observe that aspects of the Media Act described by the Information Ministry on 20 August 2012 could be improved. The government made clear then that it intends to preserve a power in the PSRD to revoke publishing licences that it deems unlawful. Such a system, though better than prior restraints on publication, would still allow for material to be suppressed simply because it is critical or embarrassing. This is wholly out of keeping with the spirit of reform. IBAHRI urges Myanmar's legislators to make clear instead that the country's inhabitants have every right to make honest criticisms of their government, whether this is done through the print media, radio and television broadcasts, or computer transmissions. All existing restrictions on free speech and assembly should meanwhile be reviewed and where appropriate abolished. These include those sections of the Penal Code mentioned at p 000, the Unlawful Associations Act 1908, the Burma Official Secrets Act 1923, the Wireless Telegraphy Act 1933, the Emergency Provisions Act 1950, the Habitual Offenders Restriction Act 1961, the State Protection Act 1975, the Television and Video Law 1985, the Organizations Law 1988, the Computer Science Development Law 1996, the Motion Picture Law 1996, the Internet Law 2000, and the Electronic Transactions Law 2004.¹¹³

112 One prisoner who is said by supporters to fall into this category is U Myint Aye, the founder of the Human Rights Defenders and Promoters (HRDP) network, who was sentenced to life in prison in December 2008 on the basis of allegations that he had conspired to blow up a branch office of the USDP: see Nyein Nyein, 'Campaign to Free Prominent Prisoner Wins Wide Support', *The Irrawaddy* (8 October 2012), online at: www.irrawaddy.org/archives/15959.

113 Online addresses for several of these laws are given in preceding footnotes. Most of them can be found via the Online Burma/Myanmar Library, cited at n 33.

The failure of successive governments in Myanmar to remedy the stateless situation of the Rohingya people is of particular concern to the IBAHRI. It means that a large and overwhelmingly law-abiding minority now lack full constitutional protection and are denied rights granted under many of Myanmar's ordinary laws (permission to protest under the Demonstrations Act 2012, for example, can be granted only to 'citizens'). It also offends the spirit of Article 15 of the Universal Declaration of Human Rights, which acknowledges that 'everyone has the right to a nationality'; and it contravenes Myanmar's more specific obligations under Articles 2 and 7 of the UN Convention on the Rights of the Child to secure equal treatment and a nationality for all children within its jurisdiction. The IBAHRI does not doubt the intensity of feelings about the crisis in Arakan state, having regard to its finding that hostility towards the Rohingya was widespread, but it is equally certain that these feelings reflect a profound misunderstanding of the nature and scale of that crisis. The riots in Arakan are just one expression of a challenge that demands swift and imaginative resolution: Myanmar's need to integrate at least 800,000 residents who lack every right incidental to citizenship, but have nowhere else to go. The IBAHRI commends the government for those efforts it has made to maintain peace in the state, but it observes also that the segregation of communities can be no substitute for lasting peace. The government would be well advised therefore to make it a priority to amend §3 of the Burma Citizenship Law 1982, so as to broaden the groups eligible for citizenship and minimise statelessness. International organisations and donors should meanwhile be careful to target assistance towards Myanmar's population as a whole, in order that they do not further marginalise the large number of non-citizens within the country.

4. The Political Sphere: the Branches of Government

4.1 Background

Myanmar's governing machinery has been characterised for more than half a century by a strong executive and a weak judiciary. This has important contemporary repercussions, but so too does its more recent adherence to the principle of the separation of powers: the notion that good governance is promoted by dividing responsibilities for the enactment, application and adjudication of laws.

4.2 Current legal structure

Article 11(a) of the 2008 Constitution states that:

‘The three branches of sovereign power, namely, legislative power, executive power and judicial power are separated, to the extent possible, and exert reciprocal control, check and balance among themselves.’

The operation of this principle is conditioned by the Constitution's other provisions, which grant the executive particularly broad powers. The president has the exclusive or primary right to nominate all senior Union officials, including members of the Constitutional Tribunal, Supreme Court justices, and the Attorney General, and the legislature may withhold its consent to their appointment only if ‘it can clearly be proved’ that a candidate is unqualified: Articles 299, 321, 328, 237. Legislators may remove him by way of an impeachment procedure (Article 71), but he ‘shall not [otherwise] be answerable to [either house of the legislature] or to any Court for the exercise of the powers and functions of his office or for any act done or purported to be done by him in the exercise of these powers and functions in accord with the Constitution or any law’ (Article 215). Those powers and functions include leadership of the National Defence and Security Council (Article 201), a discretion to summon parliament and promulgate urgent ordinances (Articles 211–12), a right to issue pardons and amnesties (Article 204), and patronage of the Myanmar National Human Rights Commission, which he created in September 2011.¹¹⁴ The police also report directly to his office, and he may override individual liberties in two far-reaching ways. Under the State Protection Act 1975, the Cabinet (which he appoints) can authorise detentions of up to three years without trial or independent judicial review.¹¹⁵ Chapter XI of the Constitution allows him to declare a regional or national state of emergency – in which case, the powers of all three branches of government pass to the Commander-in-Chief of the army.¹¹⁶

The national legislature has correspondingly fewer rights to affect the operation of other branches of government, but the Constitution allows it to withhold its support for presidential nominations and budgetary proposals in some (though not all) situations. It is also granted one very important power by Article 77(c), which allows the parliamentary speaker ‘to invite organisations or persons representing any of the Union level organisations formed under this Constitution to attend...

114 See s 3.1.

115 See n 89.

116 See s 7.2 of this report.

and give clarifications on matters relating to ongoing discussions'. Such inquiries have become an important part of parliamentary business, and legislators have frequently summoned officials including government ministers and justices of the Supreme Court.

Myanmar's courts have so far exercised only limited influence on the executive and legislature, but the 2008 Constitution creates the institutional machinery for judicial review of both branches. As well as authorising the Supreme Court to enforce fundamental rights through the issuance of judicial orders, it empowers a nine-member Constitutional Tribunal to interpret its provisions, to ascertain whether enacted legislation conforms to them, and to resolve disputes between the central (Union) government, states, regions and self-administered areas. It has the 'final and conclusive' decision in all such cases, and any ordinary court that finds itself having to address a novel matter within the Tribunal's jurisdiction 'shall stay the trial and submit its opinion to the Constitutional Tribunal of the Union [for] resolution.'¹¹⁷

The president and the two parliamentary speakers each nominate a third of the Tribunal's members to parliament, though the list of nominees is actually submitted by the president. Legislators may only withhold approval from persons who are demonstrably disqualified. Members of the Tribunal serve for the same five-year term as the national parliament, unless they resign or undergo impeachment.¹¹⁸ The Tribunal's first Chair was U Thein Soe, a retired major-general, who was sworn in on 30 March 2011 alongside eight other members: two were women and three were former judges.¹¹⁹

The operation of the Constitutional Tribunal gave rise in mid-2012 to what was arguably the most serious test of the 2008 Constitution that Myanmar has so far experienced. At the beginning of the year, President Thein Sein had invited the Constitutional Tribunal to rule that the many of the committees that parliamentarians had established to conduct their business were not 'Union-level organisations' for the purposes of the 2008 Constitution. That claim carried important practical implications – because Union-level organisations have enhanced legislative and budgetary privileges – and on 28 March 2012, the Tribunal ruled in favour of the president. In response, 301 of the Lower House's 440 legislators – including representatives of both the NLD and the ruling USDP – moved to impeach its nine members. After more than three quarters of the Upper House voted for impeachment on 28 August, on the basis that the judges had breached the Constitution and failed to discharge their legal duties, all nine chose to resign.¹²⁰

The impeachment threat was formally permissible under the Constitution. All judges can be impeached by motion of either the executive or legislature, and though the details vary depending on the way the process is initiated, a legislative chamber can act if two-thirds of representatives find any of the following charges to be made out:

117 2008 Const, Arts 320–4.

118 *Ibid*, Arts 334, 335; cf s 8.2 of this report.

119 Soe Than Lynn and Shwe Yinn Mar Oo, 'Members of Constitutional Tribunal Nominated, List of Ministers Approved, *Myanmar Times* (14–20 February 2011), online at: www.mmtimes.com/2011/news/562/news56203.html; 'Persons Approved as Members of Union Level Organizations Make Affirmation in Presence of Speaker of Pyidaungsu Hluttaw', *New Light of Myanmar* (31 March 2011), online at: www.burmalibrary.org/docs12/PYIDH-NLM2011-03-31-affirmations.pdf.

120 For the Tribunal's original ruling, see Submission No 1/2012, translated in *New Light of Myanmar* (16 August, 2012), online at: www.networkmyanmar.com/images/stories/PDF13/nlm2012-08-16.pdf; on the resignations of 6 September 2012, see Win Ko Ko Latt, 'MPs Pass Impeachment Despite Warnings', *Myanmar Times* (3–9 September 2012), online at: www.mmtimes.com/2012/news/642/news08.html.

- high treason;
- breach of any provision of the Constitution;
- misconduct;
- the loss of a required qualification for office; or
- inefficient discharge of duties assigned by law.¹²¹

Replacement judges have yet to be appointed at the time of this report's writing.

4.3 Findings

The IBAHRI delegation met many people who expressed support for a tripartite separation of powers, and rigorous checks and balances. Several admitted that their familiarity with both concepts was limited, because it was only recently that people had begun to discuss what they meant for Myanmar, but they seemed to be considering their implications with great seriousness. The thoughtfulness was found not just among activists and pro-democracy lawyers, but at high levels of government. According to one senior official, whose words have already been quoted in section 3.4, 'the new government needs not only to sue, but also to be sued', because this would actually serve to strengthen the respect in which it was held. Evidence that it took its legal obligations seriously would contribute to a climate of legal certainty, he explained, which would in turn instil confidence among foreign investors.

4.4 Conclusion

Although constitutions all over the world divide governing responsibilities between different organs of the state, a separation of powers does not in itself guarantee harmony. Effective checks and balances are also essential, to minimise the risk that one branch of government will exercise its powers unaccountably and contrary to the national interest. The interdependence of institutions is therefore just as important as their independence. Uncertainties about the ideal relationship between the three branches of government in Myanmar are consequently inevitable. The country's constitutional order is still largely untested, and though any well-run state requires political agencies that collaborate, the very notion of checks and balances depends on a healthy rivalry between the different branches of government.

These abstractions became all too real during the crisis that saw the Constitutional Tribunal's nine members resign en masse in August 2012. The Lower House's decision to stand up for its prerogatives against an executive-appointed court constitutes a useful reminder that Myanmar's governing institutions do not form segments of a single totalitarian monolith. It also threatens future instability, however. The Constitutional Tribunal's record was not one of utter subservience, and its only other two decisions (concerning the appointment of sub-township judges and the status of state and regional National Race Affairs ministers) had actually ruled to limit executive powers.¹²² Article 324

¹²¹ 2008 Const, Arts 302, 311, 334.

¹²² See Submission No 1/2011 (14 July, 2011) and Submission No 2/2011 (14 December, 2011), available online at: www.zomichannel.blogspot.co.uk/2012/02/leitungkhua-constitutional-tribunal.html.

of the Constitution states meanwhile that its rulings ‘shall be final and conclusive’. Parliamentary oversight is always to be welcomed, but when it involves the supervision of judges, the exercise of such oversight also calls for great self-control. Courts are obliged by their nature to decide cases brought before them, and Myanmar’s judicial traditions are already weak enough. The rule of law will be done a disservice if judges are punished for deciding a case in a particular way.

In making these remarks, the IBAHRI has no intention of pronouncing on the merits of the particular dispute ruled on by the Constitutional Tribunal, but it thinks it important that all sides take steps to lessen the risks of such a conflict recurring. One possible improvement would be to alter the rules that govern the Tribunal’s appointment. At present, its members are appointed for five-year periods, which all expire at the same time as the president’s term in office. As one scholar has pointed out, ten-year terms and staggered appointments are more common elsewhere in the world, and they are also preferable ‘to ensure both a political balance and the accumulation of experience. In Myanmar the five year term is too short for either the independence or the experience of judges, and the linking of their term to that of the president might lead to total dominance by the president.’¹²³

123 Yash Ghai, *The 2008 Myanmar Constitution* (n 33), 30.

5. The Legislative Sphere: Parliament and the Reform Process

5.1 Background

Myanmar's colonial past and its oscillations between dictatorship and democracy since independence have given rise to a complex legal history. More than half of the country's 800 or so laws were enacted by the British rulers of India between 1885 and 1948.¹²⁴ These statutes, which typically focused on the interests of government rather than the needs of the Burmese people themselves, authorised many of the practices for which military rulers have been condemned over the last few decades, including restrictions on free speech and the deployment of forced labour.¹²⁵ Most of Myanmar's other laws are effectively martial decrees, enacted with minimal consultation in order to meet a number of actual or perceived emergencies.

The attempt to bring a rights-based perspective to bear on this legacy began during the summer of 2011. Further to President Thein Sein's promise on 30 March to 'amend... revoke... and adopt... laws as necessary to implement the [constitutional] provisions on fundamental rights', committees of the new and recently convened parliament held a series of meetings between 23 May and 23 June. They 'studied 401 existing laws, as well as [the parliamentary] laws and by-laws'. By early August, according to a story published in the *Myanmar Times*, legislators and ministries were being 'instructed to amend or dissolve out-of-date laws.'¹²⁶ On 25 January 2012, the Foreign Minister stated that '[o]ver 300 laws have been reviewed; new laws have been enacted in line with the State Constitution and in commensurate [sic] with the need of the time.'¹²⁷

5.2 The structure of the legislature

Myanmar's parliament (Pyidaungsu Hluttaw) sits at Nay Pyi Taw in a 31-building complex – an architectural representation of the 31 planes of existence identified by Buddhist teachings – that is surrounded by a deep trench and approached along a 20-lane highway. Its two chambers comprise 664 representatives, of whom a quarter are military officers and 30 are women. Though their composition might imply a certain obedience to orthodoxies, parliament has not been the pliant instrument that many sceptics originally anticipated. Under the guidance of two influential speakers, U Shwe Mann in the Lower House and U Khin Aung Myint in the Upper House, representatives have frequently addressed controversial issues such as corruption, cooperating across party lines and sometimes opposing the express wishes of the executive.¹²⁸ The legislature has already been active in seeking out foreign assistance, and on 5 April 2012 it joined the Geneva-based International Parliamentary Union (IPU), a body that aims to foster cooperation and promote human rights

124 Information provided to the delegation by the UNDP.

125 See the Unlawful Associations Act 1908; the Burma Wireless Telegraphy Act 1933; §9(b) of the Towns Act 1907 and §11 of the Village Act 1907, all available via: www.burmalibrary.org.

126 Shwe Yinn Mar Oo and Soe Than Lynn, 'Hluttaws to Focus on Legislation', *Myanmar Times* (8–14 August 2012), online at: www.mmtimes.com/2011/news/587/news58702.html.

127 See the Foreign Minister's translated speech online at: www.icwa.in/pdfs/Myanmar.pdf.

128 Until Myanmar's parliament moves to put its proceedings online, the best unofficial source about its activities is the Thai-based 'Parliament Watch' website at: www.altsean.org/Research/Parliament%20Watch/Home.php.

among representative legislatures across the world. The IPU is currently collaborating with the UN Development Programme to develop a long-term assistance programme.

Much day-to-day business in parliament is conducted through committees, which initiate and scrutinise legislation while also overseeing the activities of executive officials. Each house possesses four that are mandated by the Constitution,¹²⁹ and more than a dozen ad hoc committees that legislators have created themselves. Each comprises 15 members, and leaders of the ruling USDP have taken steps to ensure that they include minority party representation. The committee structure is still evolving, and on 7 August 2012, just five days before the IBAHRI delegation's arrival, it was announced that a new Rule of Law, Peace and Stability committee in the Lower House would be chaired by the NLD leader, Daw Aung San Suu Kyi.

5.3 Findings

The IBAHRI delegation met representatives of the parliamentary Bill Committee of the Lower House and the Public Complaint and Appeals Committee of the Upper House. It also discussed the workings of the legislature with Daw Aung San Suu Kyi, and a number of people who were not themselves parliamentarians.

The Bill Committee of the Lower House

This Lower House standing committee is constitutionally authorised to vet draft legislation and report its findings to parliament.¹³⁰ Its Chair, U Ti Khun Myat, explained that it is not only responsible for promoting new legislation – with some 30 statutes passed so far – but also for amending or repealing laws that are out of date. He admitted that Myanmar lacked sufficient experience, explaining that it had been ‘isolated for half a century’, and that its legislators ‘lack in every corner’ [sic]. He and his colleagues were therefore interested to learn how parliaments operate in other countries, and would welcome help ranging from books to technical support and help in developing their parliamentary procedures. U Ti Khun Myat also said he served on a ‘law commission’, which comprised 52 appointees from various government ministries who tendered advice to parliament. He did not elaborate upon the precise duties of this commission.

The Complaints Committee of the Upper House

The IBAHRI delegation met all 15 members of this ad hoc committee on 14 August 2012. The Chair, U Aung Nyein, explained that it had just seven members when it was created on 8 August 2011 and assumed its present form on 6 January 2012. Its purpose is to deal with complaints and petitions submitted by the public. It had received 1,693 petitions as of May 2012. With the permission of the house speaker, it had forwarded 446 of them to the relevant government department, and 62 had resulted in remedial action of some sort. Complaints were typically concerned with such things as village affairs, religion, land issues and education. Asked for examples of the remedies the Committee might suggest, one of its members recalled a case where someone had not wanted to appeal a decision through the courts, and the Committee had advised the complainant to change their

¹²⁹ 2008 Const, Arts 115(a), 147(a).

¹³⁰ *Ibid*, Arts 102, 115(a), 147(a).

mind. The delegation was told that each house of parliament also possessed a committee that dealt specifically with the fundamental rights guaranteed by Chapter VIII of the Constitution. The remit of these bodies was not established precisely, nor their interaction with the Myanmar National Human Rights Commission.¹³¹

Other perspectives

Several people, from differing points on Myanmar's political spectrum, expressed a worry that the pace of reform is sacrificing deliberation for speed. Sources close to the government acknowledged that the new parliament was poorly equipped to handle the immense task it had undertaken. 'Our founders ambitiously set up a bicameral system, but parliamentarians do not have enough assistance,' the delegation was told by one senior official. 'They cannot hire sufficient people, compared to Westminster or Congress. There are not even sufficient libraries.' Daw Aung San Suu Kyi was similarly concerned that the parliamentary workload was having negative effects on the quality of legislation. 'On average, it takes just one month for laws to go through', she said. 'By the time they are publicised, they are virtually law. [Even we legislators] are given a very short period to comment on draft legislation, and you can only suggest amendments in certain [limited] ways.' She believed that parliament should structure its schedule around a proper calendar, so that representatives were able to work more efficiently and spend more time with the constituents they represent.

Another problem identified by several interviewees, related in many ways to the first, concerned the degree of secrecy that attends the legislative process. The delegates repeatedly found that draft laws were being treated as confidential, and met no one who was prepared to comment authoritatively on the contents of a proposed statute. They attempted to learn more about a legislative proposal to promote foreign investment that has been in the pipeline since March 2012, for example, but though the much amended bill was apparently proceeding through parliament at the time of their visit, they were unable to learn any details about what it contained. When they raised this subject in general terms with Daw Aung San Suu Kyi, she told them that, 'draft bills are actually marked "Secret". I would be breaking the Official Secrets Act if I showed them to anyone.' The delegation subsequently asked the Attorney General to clarify the legal situation, and he confirmed that disclosure of a draft statute would indeed violate the Official Secrets Act.

During their meeting with the NLD leader, the delegation also briefly discussed how she anticipated using her recent appointment as Chair of the Lower House's new Rule of Law, Peace and Stability Committee. At the time of their meeting, which took place on 14 August 2012, its jurisdiction and powers had not yet been defined. Daw Aung San Suu Kyi anticipated, however, that one of its priorities would be to review the substance and necessity of existing legislation, and its conformity with international instruments; it would also consider the workings of Myanmar's security forces and municipal authorities; the operation of the nation's law courts; and matters relating to legal education. IBAHRI observes that by 21 October 2012, the Committee had reportedly received some 1,700 complaints, mostly dealing with 'land dispute, legal and judicial issues'.¹³²

¹³¹ See also s 6.3.

¹³² Eleven News, 'Rule of Law Committee Handling 1,700 Complaints' (21 October 2012), online at: www.elevenmyanmar.com/politics/1020-rule-of-law-committee-handling-1-700-complaints.

5.4 Conclusion

The IBAHRI delegation was impressed by the candour of the parliamentarians it met, and their willingness to receive external advice and assistance. At the same time, it was struck by the scale of the legislative overhaul that confronts them. Activists and lawyers told the delegation during its visit that many existing laws are susceptible to abusive enforcement, and those fears were sporadically corroborated by later events: the report that 13 people were arrested on 21 September 2012 for marching in observance of the UN-designated International Peace Day, for example.¹³³ The colonial statutes and SLORC-era decrees most frequently cited as being in need of reform were, as mentioned above, certain sections of the Penal Code, the Unlawful Associations Act 1908, the Burma Official Secrets Act 1923, the Wireless Telegraphy Act 1933, the Emergency Provisions Act 1950, the Habitual Offenders Restriction Act 1961, the State Protection Act 1975, the Television and Video Law 1985, the Organizations Law 1988, the Computer Science Development Law 1996, the Motion Picture Law 1996, the Internet Law 2000, and the Electronic Transactions Law 2004. Additional laws that require prompt abolition or revision are mentioned elsewhere in this report, and in the Conclusion and Recommendations chapter below.

The IBAHRI acknowledges that the defects of these laws cannot be corrected in an instant, and that certain provisions might merit retention. In this context, they observe that Articles 445 and 446 of the 2008 Constitution could usefully be clarified to promote consistency in the reform process. The first of these states that, ‘Existing laws shall remain in operation in so far as they are not contrary to this Constitution until and unless they are repealed or amended by [parliament].’ The next stipulates that the same shall apply to ‘rules, regulations, by-laws, notifications, orders, directives and procedures’. This could be read to mean that legislation remains valid unless it is *expressly* repealed, whereas it would be far better if redundant laws could be set aside by the simple operation of a new law covering the same ground. In the delegation’s view, Parliament, the Supreme Court or the Constitutional Tribunal ought therefore to make this plain, and clarify that Articles 446 and 447 are no bar to implicit repeal of legislation. Such declarations would minimise the danger that out-of-date statutes will interfere with the operation of recent reforms.

There is one institutional change that could also lend greater urgency and a direction to the legislative reform process. The vetting and advisory responsibilities of the parliamentary committees appear to overlap considerably with those of the Myanmar National Human Rights Commission and the Attorney General’s office (discussed in Chapters Six and Nine respectively). In order to lessen the chance that their efforts will duplicate each other or come into conflict, IBAHRI thinks it would be worth giving a single independent body overall responsibility for law reform, with the resources to transform the scattered initiatives of legislators, committees and ministries into a coordinated strategy. The 52-member law commission mentioned by U Ti Khun Myat could form the nucleus for such a body, though it would need a statutory mandate to fortify its independence and composition. This new law reform commission would ideally comprise not just legal experts and politicians, but also law-enforcement officials, trade union officials, members of ethnic minorities, and community organisers who can give voice to otherwise disadvantaged and unrepresented people.

¹³³ See s 3.3 of this report.

The secrecy that currently attaches to the enactment of legislation gives rise to one last observation. People in a democracy should know about the laws that are being passed in their name. Although executive officials and legislators apparently make some efforts even now to take soundings from potentially affected parties, via methods ranging from unsolicited telephone calls to formal parliamentary hearings, such communications are opaque and sporadic. This is objectionable in principle, and it is also counter-productive. Observations that might improve a law are not being obtained, valuable expertise is going to waste, and governmental organs are learning less than they could about the problems that new laws need to address.

6. The Myanmar National Human Rights Commission

6.1 Background

Although the 2008 Constitution formally guarantees a number of fundamental rights and specifies that they are to be enforced by application to the Supreme Court, neither it nor any other law in Myanmar provides for practical assistance to people whose legal interests are being infringed. The state provides legal aid only in death penalty cases,¹³⁴ and there is no ombudsman or ministerial official who is required to investigate, pursue or remedy illegality in government on behalf of aggrieved individuals.

It was against this backdrop that the Yangon-based Myanmar National Human Rights Commission (MNHRC) was established by an executive order of President Thein Sein on 5 September 2011, ‘with a view to promoting and safeguarding the fundamental rights of citizens’.¹³⁵ The 15 Commissioners included Karen, Kachin, Shan, Chin, Arakan and Mon members, and they had backgrounds in the civil service, the military and academia: three were ambassadors, two were generals, three used to be professors, and all the others once served in some capacity as government functionaries. Three of the Commissioners were women.¹³⁶

The MNHRC quickly took steps to establish its credibility. An early positive move came in the form of a statement dated 6 October 2011, which announced that it would accept complaints from members of the public.¹³⁷ On 10 October it wrote an open letter to President Thein Sein requesting the release of any prisoners ‘who do not pose a threat to the stability of state and public tranquility’. The very next day, the president granted an amnesty that covered 6,359 people, including a considerable number of political prisoners. A second letter, expressing the Commission’s gratitude and requesting further releases ‘when a subsequent amnesty is granted’, was published on 12 November 2011.¹³⁸

Concerns have been expressed, however, that the MNHRC remains a tool of the executive, rather than an independent check on government. News reports at the time of its establishment observed that it had been created less than two weeks after the UN’s Special Rapporteur on the Human Rights Situation in Myanmar, Tomás Quintana, had called for a Commission of Inquiry into violations of international humanitarian law in Myanmar.¹³⁹ It was also accused of undue passivity after 14 February 2012 when its Chair, U Win Mra, stated that it was ‘not appropriate at this time’ to investigate alleged abuses in Myanmar’s conflict zones. He observed then that ceasefire

134 Attorney General of the Union Law 2010, §36(1); for a 2003 critique on the general absence of legal aid, see Burma Lawyers Council, *Legal Issues on Burma* (April 2003), No 14, at 23–45, online at: www.burmalibrary.org/docs08/LIOB_14.pdf.

135 Notification No 34/2011, online at: www.burmalibrary.org/docs11/National_Human_Rights_Commission_Formed-NLM2011-09-06.pdf.

136 This information relating to the MNHRC’s composition is based in part on Notification No 34/2011, *ibid*, and in part on evidence heard by the delegation during its visit.

137 See *New Light of Myanmar* (7 October 2011), online at: www.burmalibrary.org/docs14/NHRC-Statement-NLM2011-10-07.pdf.

138 ‘Myanmar National Human Rights Commission Sends Open Letter to President’, *New Light of Myanmar* (13 November 2011), online at: www.burmalibrary.org/docs14/NHRC-prisoners-NLM2011-11-13.pdf.

139 BBC, ‘Burma Sets Up Human Rights Commission’ (6 September 2011), online at: www.bbc.co.uk/news/world-asia-pacific-14807362; Charlie Campbell, ‘Empowering the Myanmar Human Rights Commission’, *The Irrawaddy* (9 May 2012), online at: www.irrawaddy.org/archives/3860.

negotiations were in progress, and that ‘with the establishment of the peace, other problems like human rights violations and atrocities supposed to be committed against ethnic groups will also recede into the background.’¹⁴⁰

6.2 Current legal structure

The presidential edict establishing the MNHRC contained a list of members and a statement that it ‘was formed... with a view to promoting and safeguarding fundamental rights of citizens described in the Constitution of the Republic of the Union of Myanmar’. It said nothing else about its composition, procedures, funding, or the ways in which its responsibilities were to be discharged. This put the body at odds with prevailing interpretations of the Principles Relating to the Status of National Human Rights Institutions (the ‘Paris Principles’), a UN-sanctioned statement of good practice, which serves as the basis for collaboration between the OHCHR, the UNDP and at least 60 national human rights institutions.¹⁴¹ The second of the Paris Principles states that:

‘A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.’

As a consequence of its perceived divergence from this and other more specific aspects of the Paris Principles, the MNHRC is not accredited to work independently with the UN’s Human Rights Council and it has not yet been admitted to the 18-member Asia Pacific Forum of National Human Rights Institutions. On 12 September 2012, however, it became the sixth member of the South East Asia National Human Rights Institutions Forum.

6.3 Findings

The IBAHRI delegation was given a booklet that the MNHRC published on 31 January 2012, which lists the body’s responsibilities under nine heads. It indicates, in summary, that the Commission considered itself on that date obliged to receive and investigate communications on the violations of the fundamental rights of citizens; to convey its findings to the relevant government departments and bodies; to examine and make recommendations on international human rights instruments (whether or not Myanmar had signed up to them); and to enhance human rights awareness among the general public. The booklet stated in addition that the MNHRC was empowered to summon and question witnesses, and to visit the scene of alleged human rights violations. It had received 1,037 complaints in the last three months of 2011. They covered a number of subjects, ranging from employment, health and education grievances to allegations of unlawful detention, but the majority arose out of property disputes. In the words of the booklet, ‘The purposes of [these] complaints are to regain possession of the land confiscated by the [army] or private companies or to be fully compensated or to be provided with substitute land.’¹⁴²

140 Simon Roughneen, ‘Head of HR Commission Rules Out Conflict-Zone Inquiry’, *The Irrawaddy* (15 February 2012), online at: www2.irrawaddy.org/article.php?art_id=23037; Agence France-Presse, ‘“No Probe Into Ethnic Abuse:” Rights Body’ (15 February 2012): www.dvb.no/news/no-probeinto-ethnic-abuse-burma-rights-body/20255; see also Human Rights Watch, ‘Untold Miseries’, 36–7 (cf 69–70), online at: www.hrw.org/sites/default/files/reports/burma0312ForUpload_1_0.pdf.

141 The Paris Principles are online at: www2.ohchr.org/english/law/parisprinciples.htm and attached to this report at Annexe C; see also the UNDP-OHCHR Toolkit for Collaboration with National Human Rights Institutions (2010), online at: www.ohchr.org/Documents/Countries/NHRI/1950-UNDP-UHCHR-Toolkit-LR.pdf.

142 MNHRC, ‘Activities of the Myanmar National Human Right [sic] Commission (5 September 2011 to 31 January 2012)’, provided to the delegation during its visit.

The IBAHRI delegation also met five members of the Commission during its visit to Myanmar, including the Chair, U Win Mra. The Commissioners provided the delegation with updated information about their workload, and said they had been receiving between 30 and 40 complaints a day. They sit throughout the week to consider them. Although they had initially sent correspondence directly to the government institution that seemed most appropriate, they now proceeded by addressing complaints to members of the Cabinet, who would forward them to the relevant ministry.

U Win Mra made clear his view that the MNHRC already complied with the Paris Principles, but he accepted that it had not been 'best practice' to establish the body by way of a presidential edict. In any event, he said that a new law was in its final stages of drafting, which would put the body on a firm statutory footing. This 'Enabling Act' had been drawn up in cooperation with the Asia Pacific Forum and the Attorney General's office, and it would be shown to the Office of the High Commissioner for Human Rights before it was put before parliament. Once passed, the MNHRC would have a selection board and a parliamentary budget. The Chair and his fellow Commissioners felt unable to disclose additional details about the Enabling Act's provisions, but they expressed confidence that it would resolve any outstanding concerns that might exist about the MNHRC's compliance with the Paris Principles.

With respect to funding, members of the Commission explained that pending passage of the Enabling Act, the MNHRC received a monthly grant from the president's office. The delegation later learned from another source that the Cabinet had tried to make provision for the MNHRC's activities in its proposed annual budget for 2012–13, but legislators had complained that the body lacked a constitutional underpinning and the speaker had then ruled that it was therefore ineligible for budgetary provision.¹⁴³ In this context, it is relevant to note that both chambers of parliament have created committees which are themselves concerned with the fundamental rights of citizens under the Constitution. The Commissioners said that the MNHRC had not had dealings with these bodies only because they had been very busy, emphasising that they understood how important it was to make contact with them.

Regarding fact-finding investigations, the Commissioners said that a three-person team had recently travelled to Kachin state, and the Commission would be making its findings public in a press statement the next day. This statement was indeed published; it called on all sides to avoid human rights violations, to promote land mine awareness, and to work in concert to establish peace.¹⁴⁴

The Commissioners also spoke at some length about a visit they had made to Yangon's Insein jail on 27 December 2011. This was one of the first times that an outside organisation had been allowed to visit a prison in Myanmar. Having received complaints from Amnesty International on behalf of prisoners who were on hunger strike, eight of the Commissioners had been granted permission on notice to meet three of the detainees concerned in a room with the prison's director. They had not asked to see them alone, but according to U Win Mra,

143 Soe Than Lynn, 'Hluttaw Refuses Human Rights Body Budget', *Myanmar Times* (26 March – 1 April 2012), online at: www.mmmtimes.com/2012/news/620/news62016.html.

144 See the MNHRC's statement of 14 August 2012, online at: www.reliefweb.int/report/myanmar/statement-myanmar-national-human-rights-commission-its-trip-kachin-state.

‘I don’t think they were under any fear or coercion, because they spoke very effectively. We asked them if they had suffered any torture. All three of them said “No”. We asked them whether they had been deprived of drinking water, as contained in the allegations of Amnesty International, and they said “no”. They also said they were being given medical attention during their strike. We also inspected cells which were being described [by Amnesty International] as “dog cells” and we found out that they were quite clean, airy and spacious, and we also found out that the food was quite OK.’

U Win Mra went on to say that one of the prisoners had ‘confessed that he had suffered torture by the police, but not in Insein jail’. Asked whether they had investigated this allegation of torture any further, he said they had not, because it had happened ‘a long time ago’. He observed in this connection that the MNHRC does not concern itself with alleged misconduct that took place in the past, or with matters that have been considered by a national court.

After its visit to the prison at Insein, the Commission had made certain public recommendations, and the delegates later read the report it had issued. This observed that, notwithstanding the inaccuracy of Amnesty International’s specific allegations, ‘prison congestion is an important source of grievances which should be addressed in a timely fashion’, and that there should be meditation sessions and religious classes for all Buddhist, Christian, Muslim and Hindu prisoners who wanted them.¹⁴⁵

In order to learn something about popular perceptions of the MNHRC, the delegates took additional soundings from several lawyers and civil society activists. The results were mixed. One group of advocates said it was ‘not helpful’; another stated that it ‘makes some efforts’; while one Mandalay lawyer favourably recalled that the MNHRC had secured damages of 10 million kyat (roughly £11,000) for a kidney donor whose operation had been bungled. Some grassroots activists forwarded complaints to the body, but several expressed scepticism about its effectiveness and its willingness to take action. The Deputy-Leader of the NLD, U Tin Oo, acknowledged the collective expertise of its members, but complained that their powers were only declaratory and that they lacked the legal authority or personal inclination to investigate government bodies.

6.4 Conclusion

The IBAHRI delegation was pleased to learn that the MNHRC considers itself duty-bound to promote and protect human rights. Throughout, the delegates were also keenly aware of the many obstacles that might hinder its operations in contemporary Myanmar. They were, however, unable to agree with its members that the Commission is already in compliance with the Paris Principles. Although the powers and duties described in the MNHRC’s January 2012 booklet are extensive, they are self-generated assertions rather than a legislative mandate. They can be adjusted at any time for any reason, and the delegation observes in this regard that the Commission no longer ‘convey[s] its findings to the relevant government departments and bodies’, as it said it did in January 2012, but forwards them instead to members of the Cabinet. There may well be sound practical reasons for this change, but it could also be seen as evidence of undue closeness to the executive branch: a perception that would be less plausible if the original and revised procedures had been laid out in publicly promulgated laws.

¹⁴⁵ The text of the MNHRC’s statement is online at: www.altsean.org/Research/Regime%20Watch/Judicial/HRCStatements/2011/HRC-301211.php.

If current and future Commissioners are to perform their investigative and remedial duties with confidence, they therefore need solidly legal powers that give effect to the institutional and procedural guarantees enumerated by the Paris Principles. IBAHRI hopes that an Enabling Act will soon ensure that this is the case. The extent to which it does so will be determined by the degree to which its remit is broadened, its independence is guaranteed, and its operations serve in practice to oversee all those institutions that currently have the authority to affect people's legal rights in Myanmar. Given the absence of public information about the proposed Enabling Act's provisions, any observations in this regard are somewhat hypothetical, but the IBAHRI notes that:

- The autonomy of Commissioners should be fortified by the creation of an independent appointments body, and future appointees should be engaged for a fixed period, so as to make them relatively secure from political pressure.
- The MNHRC should be composed so as to reflect the experience of all sectors of Myanmar society. Its current ethnic diversity is welcome, but appointees ought also to have backgrounds in (for example) Myanmar's new trade unions, its revitalizing professional associations, and community groups.¹⁴⁶
- The MNHRC's funding should be put on a firm footing, in order that its members can confidently discharge their duties without fear of financial peril. This will help ensure that the organisation is 'independent of the Government and not... subject to financial control which might affect its independence'.¹⁴⁷
- The MNHRC ought not just to receive complaints, but also to conduct meaningful investigations, to publicise human rights, to encourage the ratification of international human rights instruments, and to assist in formulating human rights educational programmes.¹⁴⁸ As a first step, the Commission might usefully establish a regularly updated website that can keep the general public and other interested parties apprised of its activities.
- The MNHRC's mandate should ensure that it acts for all persons in Myanmar (not just 'citizens'), and it should make it a priority to promote the equality of legal protection for 'any person' guaranteed by Article 347 of the Constitution.
- The MNHRC should have a power and duty to use the judicial system on behalf of complainants whom it considers entitled to a legal remedy under Article 378 of the Constitution or any other provision. Absent such a responsibility, people whose rights have been infringed are serious risk of injustice, because the Attorney General disclaims any responsibility for upholding individual rights under Chapter VIII of the 2008 Constitution.¹⁴⁹
- The MNHRC ought to reconsider its reluctance to investigate historical complaints. Although such grievances may call for a sensitive approach, injustice should not be ignored simply on the grounds that it is old.

146 See Paris Principles, *Composition and guarantees of independence and pluralism*, 1(a)–(e), 2.

147 *Ibid.*, 2.

148 *Ibid.*, *Competence and responsibilities*, 3(b)–(g).

149 See s 9.3 of this report.

- The IBAHRI notes additionally that compliance with the Paris Principles requires the MNHRC to draw the government’s attention ‘to situations in any part of the country where human rights are violated’, and to express opinions and propose improvements where appropriate.¹⁵⁰ Although it is doubtless advisable to address contentious issues with tact, any human rights commission worth the name must also speak embarrassing truths with boldness when necessary.

150 *Ibid*, 3(a)(iv).

7. The Military Sphere: the Role of the Army

7.1 Background

The army (Tatmadaw) has always played an important role in the politics of Myanmar and, although its seizures of power have been notoriously divisive, there are more constructive achievements with which it can be credited. It originated as the Burma Independence Army, of which the founder, General Aung San, is considered a hero by the people of Myanmar almost regardless of their political or ethnic affiliations. Several senior military officers were meanwhile active in the democracy movement of 1988, and a number of them retain important positions in the National League for Democracy. Indeed, the party's 85-year-old deputy leader, U Tin Oo, is a former Commander-in-Chief.

The respect historically paid to the Tatmadaw makes the assertion of civilian control considerably more complex than it might be elsewhere, especially when one takes into account the army's social and economic functions. In Myanmar's impoverished and disadvantaged circumstances, it has offered greater social mobility than any other institution, and that has long attracted entrants with ambition and talent. One consequence is that there are now some 400,000 individuals in active service, while military families account for around two million people in total.¹⁵¹ The Tatmadaw has material interests to match. It directly controls two major conglomerates, the Myanmar Economic Holdings Corporation and the Myanmar Economic Corporation, which (to quote an academic observer) 'have been incorporated outside the public sector and employ hundreds of thousands of workers with extensive joint venture and contract operations with foreign firms'.¹⁵² It also benefits from considerable government spending. According to the Minister for Finance and Revenue, it will receive around 14.4 per cent of the 2012–13 budget, which represents an increase in real terms of nearly 60 per cent over the previous year.¹⁵³

7.2 Current legal structure

The 2008 Constitution imposes a heavy burden on the Defence Services of Myanmar. They are tasked with 'participat[ing] in the National political leadership role of the State', 'safeguarding the non-disintegration of the Union, the non-disintegration of National solidarity and the perpetuation of sovereignty', 'safeguarding the Constitution', and 'safeguarding the Union against all internal and external dangers'.¹⁵⁴ Though President Thein Sein rules as a civilian, the Tatmadaw exercises a commensurate degree of political power. Four of the seven judges on the Supreme Court, including the Chief Justice, are former senior officers in the Tatmadaw,¹⁵⁵ and it has been estimated that 89 per cent of the members of the national parliament have some affiliation to the former SPDC

151 Steinberg, *Burma/Myanmar* (n 15), 101.

152 *Ibid.*, 163.

153 Brian McCartan, 'Myanmar Military in the Money', *Asia Times* (28 February 2012), online at: www.atimes.com/atimes/Southeast_Asia/NB28Ae02.html (citing a 31 January 2012 announcement by Major-General Hla Tin, Minister for Finance and Revenue).

154 2008 Const, Arts 6(f), 20(e), 20(f), 339.

155 Information provided to the IBAHRI delegation by Yangon lawyers.

government.¹⁵⁶ The Commander-in-Chief (currently General Min Aung Hlaing) directly nominates a quarter of the members to all the country's legislatures – Union, state and regional – and he chooses the Ministers of Defence, Home Affairs and Border Affairs.¹⁵⁷ He also presides over a courts martial system that operates independently of the regular judiciary,¹⁵⁸ and he sits on a National Defence and Security Council, which 'coordinates' with the president on declarations of states of emergency and transfers to the army of legislative, executive and judicial functions.¹⁵⁹ At least one constitutional provision, namely Article 40(c), might conceivably be read to suggest that the Commander-in-Chief can assume sovereign power on his own account.

The continuing potency of the military is illustrated with particular clarity by two articles of the Constitution that address legal liabilities for historic wrongs, and the procedures it lays down for its own amendment. Article 204(b) acknowledges a power in the president 'to grant amnesty' while requiring him to exercise it 'in accord with the recommendation of the National Defence and Security Council'. More forthright still is Article 445's stipulation that, 'No proceeding shall be instituted against [the SLORC or the SPDC] or any member thereof or any member of the Government, in respect of any act done in the execution of their respective duties.' Any proposal to change these or any other articles cannot even be considered without the support of 20 per cent of parliamentary representatives. To succeed, a proposed amendment must then win the votes of 'more than 75 per cent of all the representatives of [parliament]',¹⁶⁰ giving the military appointees in parliament an effective veto power.

7.3 Findings

The IBAHRI delegation did not meet representatives of the Tatmadaw, whose perspective on Myanmar's current reform process consequently figures only indirectly in this report. It is important to note, however, that the army's engagement with civilian agencies has been increasing considerably of late. The government began facilitating a degree of access to previously closed conflict zones in the spring of 2012,¹⁶¹ UNICEF is conducting courses on child soldier recruitment at Tatmadaw training schools,¹⁶² and the Defence Ministry recently coordinated with the International Labour Organization to remind all serving soldiers that forced labour is a crime under Myanmar law. The officers nominated by the Commander-in-Chief to sit as legislators are also apparently amenable to constructive dialogue. Daw Aung San Suu Kyi told the IBAHRI delegation: 'We need the cooperation of the military, and I've therefore said openly that we will cooperate with them. We entered parliament to make contact with them, and achieving [mutual] understanding is not impossible, because their attitudes are much more reasonable than we might have imagined.'

A senior government official interviewed by the delegation compared the role of the Tatmadaw to that enjoyed by the armed forces of Indonesia since President Suharto's seizure of power in 1967.

156 Tomás Ojea Quintana (UN Special Rapporteur on the Situation of Human Rights in Myanmar), Progress Report of September 2011, para 13, available online at: <http://unic.un.org/imucms/userfiles/yangon/file/A-66-365.pdf>.

157 2008 Const, Art 232(b) (ii).

158 *Ibid*, Arts 20(b), 319 and 343.

159 *Ibid*, Arts 201, 410, 412, 417–27, 431; see also Arts 296(b), 379.

160 *Ibid*, Arts 435, 436(b).

161 See Amnesty International, 'Revisiting Human Rights in Burma', 25 May 2012, cited above at n 71

162 Information provided to the delegation by UNICEF officials in Yangon.

He told them that Myanmar's Defence Forces operate according to a doctrine known in Indonesia as *dwifungsi* (dual function), according to which the army is obliged to perform political as well as military duties in pursuit of its overriding obligation to protect the country. This carried important consequences, in his view:

'Security concerns are still high... Change will take time... There might be a reduction of [parliamentary] military representation in future, but this depends on relations between the military and the political process... If the military have to abandon one function, they must be compensated in some way.'

The delegation discussed the question of accountability for past human rights abuses at several meetings. No one expressed the view that criminal trials would advance the current reform process, but attitudes otherwise varied considerably. On the one hand, members of the Myanmar National Human Rights Commission were not inclined to address historical misdeeds at all. The organisation's Chair, U Win Mra, said that, 'We are looking to the future... We are based on the Paris Principles and in order to engage in [that] a specific mandate would be needed.' He also told the delegation that 'Myanmar is in a unique situation, because the transition towards democracy is taking place peacefully, not in a violent way. The purpose of truth and reconciliation commissions is to disengage the present from the past so that a new government can look back, but in our system the past and the present are linked, and change takes place very smoothly through parliament.'

A different approach was taken by leaders of the National League for Democracy. Daw Aung San Suu Kyi was opposed to the pursuit of criminal trials, because this would be 'unacceptable to the military', but she considered it very important to establish some kind of a process to give victims a voice. 'I don't believe you can achieve national reconciliation without addressing the past', she said. 'More than 80 per cent [of the population] simply want recognition of their suffering... In Burma, it is not culturally acceptable to say you harbour resentment, but in fact [people] do... [They] should be encouraged to talk about how they really feel.' Asked what kind of process she envisaged, she referred to the South African Truth and Reconciliation Commission. The NLD's official spokesman, U Nyan Win, also cited South Africa's experience, explaining that it was not important to impose fines or prison sentences; people should simply be allowed to hear the truth about their own history.

7.4 Conclusion

The military's privileged political and economic status represents a standing challenge to Myanmar's progress towards a representative democracy. At the same time, the service of ex-SPDC officials lends the current administration continuity and experience, easing the frictions of the nation's transition. These realities mean that the army's interests must be accommodated constructively for political change to take hold, which requires positive initiatives to expose the Tatmadaw to international norms. The IBAHRI therefore commends groups such as the ILO, UNICEF and the International Commission of the Red Cross for developing programmes that are both acceptable and useful to the army.

The tension between pragmatism and principle is especially pronounced when it comes to considering how past misdeeds should be remedied in the present. Myanmar's moves towards democracy have encouraged a widespread hope for a resolution of its political and military conflicts, but the types of resolution that a victim might seek are obviously different from the closure that

his or her victimiser is likely to have in mind. A narrow interpretation of Article 445 of the 2008 Constitution might even suggest that the immunity it accords ‘any act done in the execution of... duties’ could cover serious criminal acts.

In the IBAHRI’s view, this would be a serious misreading of Article 445; and in any event, those bodies charged with upholding fundamental rights in Myanmar should now endeavour to have serious allegations of abuse investigated, acknowledged, and compensated. Outsiders cannot instruct the people of Myanmar how to come to terms with their own past, but they can usefully identify the state of international law and relevant experiences from other countries. In transitional processes from South Africa and Sierra Leone to Latin America, a willingness to address historical grievances has turned out to be an essential step in healing social fractures. The Myanmar National Human Rights Commission may indeed lack a legislative mandate to consider such grievances, as its Chair observed, but it should use the powers of advocacy it also asserts to argue for such a mandate. Blanket amnesties and deliberate failures to investigate past offences are inconsistent with Myanmar’s obligations under international law, and the country must do its best to avoid suggestions that it grants criminals impunity.¹⁶³

Despite the widespread reluctance in Myanmar to focus on punishments at this stage, the IBAHRI observes finally that Myanmar has a penal code and criminal courts. There is consequently no good reason that soldiers should escape prosecution if they breach their military duties by committing crimes. It is notable in this regard that at the time of the delegation’s visit, members of the army were reportedly being prosecuted in a case arising out of an interrogation in the Kachin village of Tawlawgyi in January 2012. Earlier in 2012, the Supreme Court entertained (though then dismissed) a lawsuit from the husband of Sumlut Roi Ja, a Kachin woman allegedly abducted and killed by soldiers in October 2011. Such cases may be exceptional, but they are also important. The trial of crimes is a normal aspect of judicial business, and legal processes exist to give victims a remedy and to allow the innocent to clear their names. These are not observations alien to Myanmar – they arise out of her own commitment to the rule of law – and the restoration of full legality will play an invaluable role in restoring to the Tatmadaw the honour with which it was traditionally credited.

163 For useful overviews of the law in this field, see Office of the High Commissioner for Human Rights, ‘Rule of Law Tools for Post-Conflict States: Amnesties’, (New York and Geneva, 2009), HR/PUB/09/1, available online at: www.ohchr.org/Documents/Publications/Amnesties_en.pdf; Andreas O’Shea, *Amnesty for Crime in International Law and Practice* (Kluwer Law Int’l 2002). For a trenchant critique of the constitutional immunities, see International Center for Transitional Justice (ICTJ), *Impunity Prolonged: Burma and its 2008 Constitution* (September 2009) at 32–35, available at: www.ictj.org/sites/default/files/ICTJ-Myanmar-Impunity-Constitution-2009-English.pdf. The International Criminal Court can assert jurisdiction if there is a culpable failure by the state concerned to investigate or prosecute: see Art 17 of the Rome Statute that set up the Court, available online at: <http://untreaty.un.org/cod/icc/statute/romefra.htm>. A damning report authored by Richard Goldstone and others for the International Human Rights Clinic at Harvard Law School, cited above at n 000 found prima facie evidence of war crimes and crimes against humanity and called upon the Security Council to consider establishing a Commission of Inquiry (4), but the current United Nations Special Rapporteur on the Situation of Human Rights in Myanmar, Tomás Ojea Quintana, said more recently (in an interview published on 9 July 2012) that ‘this is not the moment for the country members of the UN to decide... to create an international commission – something that was discussed in the past but now it seems that the political environment at the UN level does not allow for that and we have to be honest on this’: see www.burmanet.org/news/2012/07/09/democratic-voice-of-burma-tomas-quintana-%E2%80%99the-rule-of-law-for-any-system-is-crucial%E2%80%99-david-stout.

8. The Judicial Sphere (I): Courts and Judges

8.1 Background

Although the British bequeathed a relatively dense legal structure to independent Burma in 1948, the crises that threatened the country over the following decade brought courts into disrepute, along with most other governing institutions. In the aftermath of Myanmar's second coup in 1962, the country's rulers then set about tackling judicial corruption and inefficiency by stripping judges of many of their traditional functions. In the words of one writer,

'The executive in a series of steps swallowed up the judiciary: first, reorganizing the superior courts and personnel; second, establishing a special apparatus of military-run criminal tribunals that gradually eclipsed the ordinary ones in importance; third, farming out judicial functions to administrative bodies; and fourth, placing final appellate powers in a one-party legislature that was itself subordinate to the executive.'¹⁶⁴

This process was institutionalised by the 1974 Constitution, which delegated day-to-day dispute resolution to 'people's courts' that owed their primary allegiance to the Burmese Way to Socialism.¹⁶⁵ Although a professional judiciary was restored by the SLORC after 1988, judges were accustomed by then to act as administrators rather than arbiters, basing decisions on state policy, instead of legal reasoning and the application of precedent.¹⁶⁶ That did not change over the next two decades.

8.2 Current legal structure

Myanmar's civilian courts are organised into four levels. At the apex stands the Supreme Court itself, which presides over 14 state and regional High Courts (also known as State or Divisional Courts), 67 District and Self-Administered Area Courts, and 324 Township Courts.¹⁶⁷ At the time of the IBAHRI delegation's visit, these courts apparently contained 1,131 judges, including 36 men and 16 women in the High Court. In the country as a whole, female judges actually outnumbered their male counterparts, by 570 to 558.¹⁶⁸ Village chiefs (or 'headmen') also wield certain quasi-judicial powers of investigation, arrest and punishment.¹⁶⁹ These local arrangements have recently been altered by the Ward or Village Tract Administration Act 2012, which provides for the election by secret ballot of all village level officials.¹⁷⁰ Myanmar also has its Constitutional Tribunal and a system of courts martial, discussed in depth in sections 4.2, 4.4 and 7.2.

164 Cheesman, 'Thin Rule' (n 7), 602.

165 1974 Const, §132(c), available online at: www.burmalibrary.org/docs07/1974Constitution.pdf.

166 For a good overview of the decline of the judiciary after 1962, see Myint Zan, 'Judicial Independence in Burma: No March Backwards Towards the Past', 1 *Asian-Pacific Law and Policy Journal* (2000) 5:1, 18–35, available online at: http://blog.hawaii.edu/aplpj/files/2011/11/APLPJ_01.1_zan.pdf.

167 These figures were obtained by the IBAHRI delegation from the UNDP.

168 These statistics were provided to the delegation during its visit to the Supreme Court at Nay Pyi Taw.

169 The powers of village heads were first regularised by statute under the British: see the Towns Act 1907 and the Village Act 1907, available online at: www.burmalibrary.org/docs11/The-Towns-Act-1907.pdf; www.burmalibrary.org/docs11/The-Village-Act-1907.pdf; see also §45 of the Criminal Procedure Code, online at: www.wipo.int/wipolex/en/text.jsp?file_id=182263.

170 Soe Than Lynn, 'Secret Ballot Retained in Ward, Village Admin Bill', *Myanmar Times* (5–11 March 2012), online at: www.mmtimes.com/2012/news/617/news61721.html.

The 2008 Constitution guarantees the independence and impartiality of the judiciary,¹⁷¹ and it mandates presumptively public courtroom hearings, a right of defence and a right of appeal.¹⁷² The Supreme Court is authorised meanwhile to issue five writs, including orders for *habeas corpus*, injunctions to compel governmental action, orders to quash illegal acts and *quo warranto* orders (which require state officials to prove that they are authorised to conduct a contested activity).¹⁷³

The formal safeguards are, however, somewhat undermined by the extent of executive control over the judiciary. The president nominates the Chief Justice of the Supreme Court, and parliament may withhold its approval only if ‘it can clearly be proved’ that the prospective appointee lacks the qualifications prescribed for the post.¹⁷⁴ These qualifications are alternatives and one of them is simply that the president considers his candidate to be ‘an eminent jurist’.¹⁷⁵ The office-holder since February 2012 is U Tun Tun Oo, a retired Lieutenant-Colonel. The president then consults with said Chief Justice to propose on a similar basis the remaining Supreme Court judges (who may be as few as seven or as many as eleven), and Chief Justices of state and regional courts.¹⁷⁶ The president also nominates a third of the Constitutional Tribunal’s nine members (the Lower and Upper House speakers propose the rest) and parliament’s veto powers are again limited in the same way.¹⁷⁷ All other judges are appointed by the Supreme Court: selections to the High Court are reportedly made by an ex-chief justice (under the SPDC) named U Aung Toe,¹⁷⁸ while lower level judges are selected like other civil servants through a Public Service Selection and Training Board, the members of which are appointed by the government.¹⁷⁹

There do not appear to be any legal constraints on the dismissal of lower judicial officials, but judges of the Supreme Court and High Court ordinarily ‘shall hold office’ up to the age of 70 and 65 respectively,¹⁸⁰ while members of the Constitutional Tribunal are appointed for fixed five-year terms. This is subject to exceptions for voluntary resignation, ill health or impeachment – a scenario considered in more detail in sections 4.2 and 4.4.

The president’s powers of appointment are augmented by his control over the financing of Myanmar’s court system. Although the Supreme Court is responsible for assessing the judiciary’s annual budget in advance, it is the executive’s task to present that budget to the legislature. Its proposals for the salaries and allowances of senior judges and Constitutional Tribunal members (as well as those organisations’ expenditures) are all but conclusive: they can be ‘discussed at [parliament] but not refused or curtailed’.¹⁸¹

171 2008 Const, Arts 300(a), 301(f), 309(a), 310(f), 330(c) and 333(e).

172 *Ibid*, Art 19.

173 *Ibid*, Art 378(a).

174 *Ibid*, Art 299(c)(i), (ii).

175 *Ibid*, Art 301(d).

176 *Ibid*, Arts 299(d)(i), 308(b)(i), (ii).

177 See s 4.2.

178 Evidence given to the IBAHRI delegation by Yangon lawyers on 13 August 2012.

179 Information provided to the delegation during its visit to the Supreme Court. See also 2008 Const, Art 318(a); Judiciary Law 2000, §13.

180 2008 Const, Arts 303, 312.

181 *Ibid*, Arts 297, 103(b).

8.3 Findings

The IBAHRI delegation met two Supreme Court judges – U Sein Than, the Court’s Deputy Chief-Justice and Director-General, and Justice Soe Nyunt (who was also a member of the Bar Council) – and it heard views about the judiciary from almost everyone else it met during its week-long visit.

The judges provided useful statistics, detailed analysis of the Constitution’s provisions on the judiciary, and a careful explanation of the way that jurisdiction is divided between Myanmar’s Union-level courts. They were not minded to speculate on future reforms and other contingencies that had not yet come to pass, however. Asked whether they thought a Judicial Appointments Board might fortify the independence of judges, for example, they explained that even if this might be suitable at lower levels, the president already enjoyed full authority under the Constitution to make appointments in other cases. When the delegation sought clarification of when it might be right to impeach a judge for ‘misconduct’, they said that this might occur if a judge did something that a judge ought not to do. An impeachment on this basis had not yet occurred in Myanmar.¹⁸²

The delegation came across considerably more critical attitudes elsewhere. One journalist complained that the government could always rely on support from the judiciary, which was inactive and subordinate to the military. This belief was echoed by several community activists, none of whom expressed the view that courts were a reliable way of securing justice. They considered legal action to be unduly expensive, and frequently identified alternative avenues of redress. One said that she would rather seek help from her church, just as Buddhists were more likely to go to a monk. Another considered local government officials to be more reliable, and one told the delegation he would sooner approach the police than the judiciary.

Lawyers expressed similar scepticism about the capacities of the Bench. They complained that the only mandatory qualification for lower level judges is a law degree, and that judicial officials were typically ill-read, inefficient, weak and corrupt. According to one lawyer’s association, a defendant ordinarily had to pay a bribe of 100,000 kyat (about £110) just to get bail. Another group complained that judges were easily intimidated. Township Court judges were often very young, because the minimum age for appointment had recently been reduced to 25, and all judges feared complaints from clients, reprimands from superior judicial officials, and pressure from the government or military.

At least some of these deficiencies are recognised at a high level of the government. One senior administration official frankly observed that under martial law, ‘Judges came to take a role as consultants. Martial law took no notice of law at all. There was very informal prosecution of many cases. So they have limited experience. This is an important problem. A democratic system needs the rule of law. Who will do this though? We are short of persons with sufficient knowledge, especially where legislation is concerned. They have some skills in criminal cases, but not otherwise. So the first thing we need is capacity, legal capacity.’

Efforts to improve the capabilities of the judiciary are in fact taking place. A training facility exists in Hlaing Tharyar township, about 20 kilometres from central Yangon, and judges currently benefit from courses that are run by the Attorney General’s Office and the Supreme Court. UNICEF has

¹⁸² For the sake of completeness, it should be noted that soon after this meeting, there was a move to impeach members of the Constitutional Tribunal on other grounds: see p 37, s 4.2.

been working since 2010 to strengthen Myanmar's juvenile justice system, and it is assisting the Supreme Court to develop child-friendly procedures and sustainable training programmes for Township and District Court judges.¹⁸³ The delegation also heard from a presidential adviser, U Sit Aye, that copies of High Court decisions are being forwarded to lower courts, in order that economic and political changes can proceed along properly legal lines.

Notwithstanding these positive developments, the changes introduced by the 2008 Constitution are as yet having limited practical impact. The Supreme Court's power under Article 378(a) to remedy wrongdoing by issuing writs usefully illustrates this point. According to testimony given to parliament on 8 August 2012 by Justice U Aung Myint, the Court had by that date received 133 applications under the section; 24 of them had been summarily dismissed, 109 had been the subject of oral argument, and seven writs had eventually been granted.¹⁸⁴ In the opinion of one group of lawyers, the success rate was so low that it proved the Court's 'fear, subservience and failure to help the victims'.¹⁸⁵ The IBAHRI delegates were unable to assess that view, not least because it presumes on the merits of applications about which they have no information, but they would nevertheless invite the Court to consider whether its current approach to Article 378(a) might be unduly cautious.¹⁸⁶

8.4 Conclusion

Upholding the rule of law requires courts carefully to scrutinise intrusive action by the state and oppressive behaviour by private groups and individuals. Certain violations, such as torture, must always be condemned, regardless of counter-arguments that might be advanced about 'duties', 'responsibilities' or 'necessity'. Qualified rights such as free speech should be upheld unless they are clearly outweighed by another constitutionally protected interest, such as the right to privacy. This calls for a judiciary that feels confident about asserting its independence from governmental pressure and popular prejudice, and judges who are familiar with approaches towards the interpretation of law elsewhere in the world.

Myanmar's history means that it would be unrealistic to expect overnight transformations in this regard, but improvements are essential. Although the criticisms heard by the IBAHRI delegation were all individual perceptions, the allegations of judicial corruption, inefficiency, and susceptibility to executive influence were so widespread that they cannot be sensibly discounted. It is also important to bear in mind that efforts to bolster the position of judges will advantage ordinary people only if the quality of judicial decisions is simultaneously improved. One simple way of addressing the specific issue of corruption might be to raise salaries. The delegation learned that this course of action was actually proposed¹⁸⁷ in February 2012 by the Lower House Speaker, U Shwe Mann, and a subsequent pay rise of around 30 per cent has reportedly had a palpable effect in reducing courtroom bribery. Any additional increases will be justifiable only if they form part of a long-term strategy, however,

183 Information obtained from UNICEF during the delegation's visit.

184 'Signing MOUs and Agreements with International... [etc]', *New Light of Myanmar* (8 August 2012), online at: www.burmalibrary.org/docs13/PH-NLM2012-08-09-day22.pdf.

185 Evidence from Yangon lawyers to the IBAHRI delegation during its visit.

186 In this context, it is notable that all the seven writs issued were *quo warranto* orders, which simply require executive officials to prove some authority for their action. The habeas corpus writ, which traditionally requires that detained people actually be produced in court, has not been granted in Myanmar since at least 1965: Cheesman, 'Thin Rule' (n 7), 603.

187 Myo Thant, 'Speaker Shwe Mann Again Pushes For Pay Increase', *Mizzima News* (21 February 2012), online at: www.mizzima.com/news/inside-burma/6626-speaker-shwe-mahn-again-pushes-for-pay-increase.html.

and this will require a major revamp of educational and training programmes. These should all have regard to the UN's Basic Principles on the Independence of the Judiciary ('Judiciary Basic Principles'). They should emphasise the importance of judicial ethics and lay particular stress on:

- the need for judges to 'decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason' (Judiciary Basic Principle 2);
- the obligation on judges to decide independently 'whether an issue submitted for [their] decision is within [their] competence as defined by law' (Judiciary Basic Principle 3); and
- the obligation on judges 'to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected' (Judiciary Basic Principle 6).

The IBAHRI believes that a more fundamental institutional reform will also be required to restore the judiciary's reputation: the establishment of an independent judicial appointments board. Such a body would bring Myanmar into line with good international practice as reflected in Judiciary Basic Principle 10, which states that 'any method of judicial selection shall safeguard against judicial appointments for improper motives'.¹⁸⁸ The IBAHRI delegation heard no evidence to suggest that the current president and Supreme Court are actually misusing their extensive powers of appointment, but the possibility of future abuse should be forestalled by the more robust safeguards that an appointments board would provide.

It is finally important that the judiciary develop a more dynamic approach towards the vindication of individual legal rights. As a first step, judges should explore with greater vigour the remedies they are entitled to grant under existing legislation. These include a power under §100 of the Criminal Procedure Code to inquire into any detention they consider potentially unlawful, and to make any order that seems proper. All judges above Township level also have the right under §25 of the Judiciary Law 2000 to 'inspect prisons, [labour] camps and police lock-ups for enabling convicted persons and those under detention to enjoy rights to which they are entitled in accordance with law and relating to the proceedings and for preventing undue delay in the trial of cases.' Courts can also dispense legal remedies identical to or analogous to the five writs that the Supreme Court can issue: see Article 378(b). The Supreme Court itself should meanwhile not merely consider applications for writs, but also develop principles that allow Myanmar's inhabitants to understand the circumstances in which such applications are likely to be granted or refused. In this context, the IBAHRI reiterates its observations in section 3.2, and invites the Supreme Court to clarify the extent to which international norms are directly enforceable in Myanmar's courts.

¹⁸⁸ See also Judiciary Basic Principle 11, which states that 'the term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law'. The Judiciary Basic Principles are available online at: www2.ohchr.org/english/law/indjudiciary.htm, and attached to this report as Annexe D.

9. The Judicial Sphere (II): the Legal Profession

9.1 Background

All lawyers in independent practice in Myanmar are either ‘advocates’ or ‘pleaders’, a distinction that dates back to colonial times. The former have full rights of audience in all tribunals, while the latter appear only in District and Township Courts and are subdivided into two further categories: ordinary pleaders, who handle criminal matters and low-level civil disputes, and ‘higher grade pleaders’ who can take on all types of case.¹⁸⁹ Criminal prosecutions are conducted by functionaries working under the Attorney General, an official post inherited from the British. The 1947 Constitution provided for the nomination of Attorneys-General by the Prime Minister,¹⁹⁰ and office-holders have worked closely with the executive ever since.

A Bar Council Act brought into force in Burma in 1929 provided for all advocates in the country to be represented and regulated by a 15-person Bar Council, comprising ten elected advocates, four nominees of the High Court (no more than two of whom could be judges) and the Attorney General.¹⁹¹ (This operated independently of local bar associations, through which lawyers also pursued their professional interests.) The same statute entrusted questions of discipline to the High Court, which was authorised to ‘reprimand, suspend or remove from practice’ any advocate whom it found guilty of misconduct. This complemented an existing power to ‘suspend or dismiss’ a pleader who was guilty of various misdemeanours, including ‘fraudulent or grossly improper conduct in the discharge of his professional duty’.¹⁹² In the case of advocates, the High Court did not conduct the preliminary inquiry – which was delegated to either a District Court or the Bar Council – and it was obliged, upon receiving the inquiry report, to hold a hearing on notice before making its final order.¹⁹³

Lawyers played an important role in the campaigns and protests of 1988, and the Bar Council issued numerous statements in support of the pro-democracy movement. The legal profession became a target after the SLORC takeover as a result. A new Bar Council Law reduced the Bar Council’s membership to eleven, and it stipulated that the six advocates who remained were to be ‘nominated by the Supreme Court’. The Attorney General was simultaneously promoted from an ordinary member to chairman.¹⁹⁴ The government’s repression of lawyers intensified, and their capacity to defend their collective interests weakened. Several bar associations were denied the opportunity to register under the Organizations Law 1988, and members who continued meeting consequently risked imprisonment for up to five years. Politically recalcitrant lawyers also faced charges under other statutes, including the Unlawful Associations Act 1908, the Emergency Provisions Act 1950

189 Legal Practitioners Act 1880, §§6, 7; Bar Council Act 1929, §14(1); Courts Manual, Rule 7(2).

190 1947 Const, §126.

191 Bar Council Act 1929, §4(1).

192 *Ibid*, §10(1); Legal Practitioners Act 1880, §13.

193 *Ibid*, §10(b), 11, 12(2) & (3). Part I of the Courts Manual lays down the procedures for such inquiries; it is ordinarily online at: www.blc-burma.org/index.php?q=node/157, but this site was down when last accessed on 3 December 2012.

194 Bar Council Law (No 22/89), summarised in ‘The Bar Council Under the SPDC’, 14 Legal Issues of Burma Journal (2003), 63–4, online at: www.burmalibrary.org/docs08/LIOB_14.pdf.

and the State Protection Act 1975. Disciplinary procedures began at the same time to be used as a means of political control. According to observations reportedly made in 1993 by Khin Nyunt, then ‘Secretary-1’ of the SLORC, typical reasons for disbarment at that time were ‘traitorous rebellion, violation of provisions in the Unlawful Associations [Act], sedition against the national government, insulting judges and interference with the judiciary, cheating and swindling, fabrication of records, bribery, exchange of foreign currency, violation of regulatory law, etc.’¹⁹⁵

9.2 Current legal structure

According to observations made by the Attorney General to the delegation on 14 August 2012, Myanmar has 8,272 advocates and 39,682 higher grade pleaders. It can be presumed that they are graduates of the country’s two law schools, which form part of the universities at Yangon and Mandalay, and that all are citizens (because citizenship is a condition for admission to the Bar¹⁹⁶). Advocates and pleaders are subject respectively to the Bar Council Law 1989 and the Legal Practitioners Act, as well as a book of regulations known as the Courts Manual.

There are about 1,700 prosecutors, based in regional offices all over the country, and all are subject to the direction of the Attorney General, whose powers and duties are described in the Attorney General of the Union Law 2010.¹⁹⁷ They become involved in a case from the moment it reaches a court. According to the Director-General of Myanmar Police, arresting and investigating officers are not allowed to contact them until that point, though prosecutors can then revert to the police for more evidence (‘a request, not an instruction’). The Constitution and the Criminal Procedure Code both stipulate that arrested suspects should be produced before a magistrate within 24 hours, though this period can then be extended to up to 30 days.¹⁹⁸

As noted in the preceding section, the Bar Council has been chaired since 1989 by the Attorney General. The incumbent (Dr Tun Shin) told the IBAHRI delegation that its other members include the Deputy Attorney General, the Director-General of the Attorney General’s Office, the Director-General of the Supreme Court, another judge, and eight nominee advocates. The disciplinary procedures that operated prior to 1989 have not been restored.

9.3 Findings

The IBAHRI delegation met more than 40 private legal practitioners, including representatives of the 5,292-strong Yangon Bar Association, the Mandalay Bar Association, the Bago Bar Association, activist law firms, and legal networks. The youngest pleaders had only recently graduated while the most senior advocate was 91 years old, and they collectively had experience in fields ranging from medical malpractice to drug trafficking. The delegation also discussed issues pertaining to the Bar with U Soe Nyunt, one of the Supreme Court justices whom they met.¹⁹⁹

195 Asian Human Rights Commission, ‘An appeal for Burmese lawyers struggling for justice in a highly dysfunctional system’ (date unknown), available at: www.humanrights.asia/resources/journals-magazines/article2/1101/an-appeal-for-burmese-lawyers-struggling-for-justice-in-a-highly-dysfunctional-system.

196 See Courts Manual, Rules 3(3), 7(3); cf 12(2).

197 SPDC Law No 22/2010, available as a scanned attachment via: <https://groups.google.com/forum/?fromgroups=#!topic/myanmarlaw/LA7gzGTvO9s>.

198 See s 3.2.

199 See s 8.3.

Former and current lawyers

Lawyers asked about the state of Myanmar's legal culture repeatedly said that ordinary people were ignorant about their legal rights and poorly equipped to enforce them. The delegation met a number of legal practitioners who were actively working to improve the situation; one legal network in Mandalay conducts training sessions on the rule of law in Saturday markets and other public places, for example. As has been noted elsewhere in this report, criticisms of the judiciary were common, and the delegation also heard complaints about those officials who conduct prosecutions on behalf of the Attorney General's department. According to several advocates and pleaders, they have sometimes acted on political orders, prosecuting regardless of proper procedures and evidential requirements, and defendants have ended up being punished despite inadequate legal proof. Although statutes forbid reliance on confessions made to police officers, it has apparently been common for such statements to be admitted in court.²⁰⁰ One advocate also recalled that public prosecutors until 1988 had been obliged to notify the relevant ministry if they believed a suspect to be innocent, and regretted that this no longer occurred.

The delegation heard evidence suggesting that Myanmar's authorities have been hostile, or at best arbitrary, towards the legal profession itself. The Bago Bar Association has apparently functioned openly since 1992, but lawyers in both of Myanmar's other major cities said that after 1988, it had become impossible to associate lawfully. Some had avoided police attention only by holding clandestine meetings. Others described being harassed or penalised for representing critics of the government, or for their own political activities. One lawyer had spent 14 years in jail for student activism and participation in the 1988 demonstrations; another had been imprisoned for a total of 16 years, following a conviction in 1988 under section 5 of the Emergency Provisions Act 1950.

Over 1,000 lawyers have meanwhile suffered reprimands, suspensions or disbarments over the last two decades, and the belief was widespread that the disciplinary process had been abused to punish people critical of the government. Several lawyers claimed that their careers had been blighted in this way. It was also said that the Supreme Court has in the past taken disciplinary action without giving persons affected the opportunity to respond to allegations made against them.

A degree of harassment continues. One lawyer stated that he had been interviewed by the Special Branch prior to meeting the IBAHRI delegation. At one of the delegations' own meetings in Mandalay, state security officials attended the premises and sent through a message requiring the names of everyone present. The delegation also heard that some 200 lawyers remain disbarred, and though it was widely believed that a number of reinstatements had taken place in recent months, the basis on which a lawyer might have his or her licence restored was poorly understood. One disbarred lawyer told the IBAHRI delegation that he would not even apply for reinstatement because he feared he would have to swear to 'protect' the 2008 Constitution, which he considered to be in need of significant amendment.

In the light of these complaints, the delegation was particularly concerned to find out what role the Bar Council had played in promoting the interests of the profession. The answers were uniformly

²⁰⁰ Although this practice does indeed seem to contravene §§24–6 of the Evidence Act (and possibly §162 of the Criminal Procedure Code), it should be noted that it was sanctioned by the Supreme Court a few years after the 1988 coup, in *Union of Myanmar v U Ye Naung and Another* (MLR 1991).

negative. Some lawyers thought the body merely neglectful. They observed that the education and training of lawyers was deficient, for example, and that the Bar Council did not contribute to law school curricula or promote the teaching of human rights. Others were more critical. There was particular unhappiness about its perceived lack of independence. One said that the Bar Council used to have as one of its slogans ‘Act Without Fear’ but had long ceased to protect the rights of lawyers ‘because its president and secretary are from the government’. Asked to provide a concrete example of its failings in this regard, he recalled a case in which an advocate had lost her licence following a judge’s complaint, with no help from the Bar Council. One advocate, himself disbarred (and imprisoned) for political activities, stated that its procedures are one-sided. ‘Since 1988, the Bar has been seen by the government as an enemy... There has not been one situation since 1988 where the Bar Council or the Attorney General has helped lawyers subject to disciplinary problems or criminal allegations.’ Another lawyer, who had also been disbarred and imprisoned for many years, was similarly uncomplimentary, albeit that he had recently had his practising licence returned. ‘The present Bar Council doesn’t support lawyers,’ he said. ‘It is not [even] carrot and stick, only stick.’

All those advocates who commented on the subject expressed general support for a representative Bar Council that would again represent their interests, and several called specifically for restoration of §4 of the old Bar Council Act – the provision which had provided for the election of ten advocates to a 15-member body. The delegation heard that a call along these lines had been made at a meeting of between 100–200 lawyers at the Royal Rose restaurant in Yangon on 1 June 2012. In the opinion of a formerly jailed advocate who had attended that gathering, all seats on the Bar Council ought in future to be filled by elections.

The Attorney General and Justice Soe Nyunt

The Attorney General of the Union is an *ex officio* member of the government and of the constitutionally mandated Financial Commission who is appointed by parliament after nomination by the president.²⁰¹ Under the 2008 Constitution, legislators can only refuse a candidate if ‘it can clearly be proved’ that he or she lacks the requisite qualifications. The Attorney General of the Union Law 2010 lists 17 duties and seven powers that are associated with the office. They extend from ‘performing the duties of a member of the Union government’, to representation of the State in all cases and appeals, the prosecution of criminal cases, and the tendering of advice to all branches and organs of government.²⁰² In order to discharge these functions, the Attorney General’s office has been subdivided into four departments. One focuses on prosecutions; another on administration; a third on advising central government on international treaties, memoranda of understandings and investment contracts; and a fourth on the scrutiny of draft laws and legal translations.²⁰³

Dr Tun Shin described the role of his office in general terms. It was not responsible for drafting laws, he explained, but it vetted them after their initiation by government ministries. He spoke of its important role in the reform process; he described his hopes for sustained programmes of legal training; and he told the delegation that Myanmar had recently decided to join the ASEAN Law Association. After noting that Myanmar pays for the services of defence counsel in

201 2008 Const, Arts 200, 229, 237.

202 Attorney General of the Union Law 2010, §§12–13.

203 *The Role of the Union Attorney General’s Office* (booklet given to the delegates), 21–28.

capital cases, he expressed regret that the country lacked the resources to pay for additional legal assistance. If the money could be found, however, he would support the establishment of a publicly funded legal aid service.

Asked whether it was part of his job to challenge illegality by government departments, he explained that it was not. Allegations of such illegality, if made, could be heard by the Supreme Court, but his responsibility was to defend the ministry concerned. He also said that he never acted for individuals and that it was for the Myanmar National Human Rights Commission to protect the rights of aggrieved persons in such cases.

When Dr Tun Shin was asked whether prosecutors had guidelines to assist them in performing their functions, he invited the delegates to read a booklet he would give them at the end of the meeting. He in fact gave them two booklets – a 29-page history of his office, and a copy of the Attorney General of the Union Law 2010 – and section 36 of the latter law imposed 16 functions and duties on subordinate law officers in his department. These included various obligations to secure compliance with the law, to assess the soundness of a case, and to scrutinise the validity of a charge.

Asked about the disciplinary functions of the Bar Council (which he chairs) Dr Tun Shin stated that the body delegated inquiries to the Supreme Court, which then liaised with it in deciding how to proceed. Although the delegation attempted to clarify precisely how each body's tasks were divided, the evidence it heard was ambiguous. The Attorney-General suggested that the Bar Council's own executive subsequently made the decision about what action would be appropriate. Justice Soe Nyunt said, however, that it was judges from the Supreme Court who took action. The delegation considered that this apparent overlap of responsibilities helped explain why several practising lawyers considered existing disciplinary procedures to be insufficiently transparent.

The IBAHRI delegation was interested to learn the authority's current approach towards the reinstatement of disbarred lawyers, having regard to a statement that Dr Tun Shin had made to parliament on 3 October 2011, indicating that the Bar Council was authorised to review licence revocations and make appropriate submissions to the Supreme Court.²⁰⁴ The Attorney General clarified that his own office had in fact received between five and ten applications from disbarred lawyers, but it had not yet considered whether to grant any of them. The delegation was later told by U Soe Nyunt that a total of seven advocates and five higher grade pleaders had been reinstated. The judge also said that the Supreme Court was working to draw up guidelines on how its power to return lawyers' licences should be exercised, and it would welcome advice on what the guidelines should contain.

With regards to the Bar Council's future, the IBAHRI delegation heard from both the Attorney General and U Soe Nyunt that a new Bar Council Act was being drafted, and Dr Tun Shin indicated that he wanted its advocate representatives to be elected once again. Asked about the role that the Bar Council could play in representing advocates against the state, U Soe Nyunt said that the question was under consideration, and that advice on the point would be helpful.

204 *New Light of Myanmar* (4 October 2011) 1, 10, online at: www.myanmars.net/myanmar/2011/myanmar20111004.html.

9.4 Conclusion

The IBAHRI notes with satisfaction that recent positive changes in Myanmar are already promoting a spirit of openness among senior legal officials. There are many good reasons to be concerned for the wellbeing of the legal profession, all the same. Some 200 lawyers remain disbarred, and the delegation met a number of people who believed that there are legal practitioners still in jail on political grounds. Events after the delegation's departure seemed to confirm that politically-motivated hostility against outspoken lawyers subsists in some quarters. A previously disbarred advocate named U Aung Thein had his passport withdrawn in late August, following his return from a trip to Hong Kong, where he had been attending a conference on the elimination of torture and ill treatment.²⁰⁵ Another lawyer named Saw Kyaw Kyaw Min, who had fled abroad after being charged with criminal offences for defending clients during the 2007 Saffron Revolution, was reportedly given a six-month jail term in late August 2012, following his decision to come home.²⁰⁶ This case is particularly disturbing, because several government officials (including people that the IBAHRI delegation met) have publicly stated that Myanmar now welcomes the return of former exiles. Finally, the delegates were disappointed to read news reports in late October that a lawyer by the name of U Myint Aye had been arrested in the town of Prome for staging a one-man protest against court filing fees.²⁰⁷

Practising lawyers repeatedly asked for help in respect of the hostility they still perceived, and the delegation hopes that all interested officials, including the Attorney General and justices of the Supreme Court, will work to assist in this regard. As those office-holders doubtless appreciate, infringements on the right of lawyers to express themselves and associate freely violate Article 354 of the 2008 Constitution, as well as several well-known rules of customary international law. The IBAHRI observes in addition that Article 23 of the UN's Basic Principles on the Role of Lawyers²⁰⁸ (the 'Lawyers Basic Principles') states that:

'Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organisations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organisation.'

The International Bar Association's Standards for the Independence of the Legal Profession include observations that are of similar effect.²⁰⁹ In this context, the IBAHRI reiterates its opinion that the Organizations Law 1988 requires reform or abolition. There should be no doubt in modern Myanmar that lawyers are free to meet in peace, while bar associations should either be exempted from any registration requirement or granted registration as a matter of routine.

205 Asian Human Rights Commission, 'BURMA: Rights Lawyers Passport Confiscated, AHRC Writes to Government' (Press Release), 23 August 2012, online at: www.humanrights.asia/news/press-releases/AHRC-PRL-033-2012.

206 Asian Human Rights Commission, 'BURMA: Lawyer Who Returned Believing Situation Changed Jailed' (Open letter to to President Thein Sein), 11 September 2012, online at: www.humanrights.asia/news/ahrc-news/AHRC-OLT-015-2012.

207 See n 103.

208 The Lawyers Basic Principles are available online at: www2.ohchr.org/english/law/lawyers.htm, and they are included in this report at Annexe E.

209 The IBA Standards for the Independence of the Legal Profession are available via the organisation's website at: www.ibanet.org/About_the_IBA/IBA_resolutions.aspx, and they are attached to this report at Annexe F.

The IBAHRI is also concerned about the concentration of power in the Attorney General's office. It is proper that the Attorney General defend and advance the interests of the government, but his department is integrated so thoroughly into the executive branch that its operations potentially undermine the independence of the legal profession and judiciary. In IBAHRI's opinion, Myanmar would therefore do well to consider the establishment of a separate Ministry of Justice. Although this would call for careful planning, the rewards could be considerable. Whereas the office of the Attorney General as presently constituted gives rise to worries among Myanmar's lawyers of improper executive interference in the judiciary, a properly organised Justice Ministry could usefully promote the judiciary's interests within the government instead.

The Attorney General's governmental role also sits uneasily with the prosecutorial duties that are imposed on him. The prosecution of offences can never be entirely independent of the executive, but having regard to historical misuses of the court system in Myanmar, the current administration could usefully signal the country's new commitment to impartiality by establishing a public prosecution service independent of the Attorney General's office. In this regard, it could be noted that the president has a longstanding power under section 492 of the Criminal Procedure Code 1898, to 'appoint, generally... or for any specified class of cases... one or more officers to be called Public Prosecutors.' Such an institution, created in line with the UN Guidelines on the Role of Prosecutors and the Standards of the International Association of Prosecutors²¹⁰ would constitute a clear indication that justice in Myanmar will in future not only be done; it will be seen to be done.

It is also imperative that steps be taken to rectify the ways in which lawyers may be disciplined in Myanmar. The current rules, which were instituted during an emergency that now lies more than two decades in the past, inadequately set out the reasons for which lawyers might be disciplined, the grounds on which improperly punished lawyers can seek reinstatement, and the inquiry and decision-making procedures to be followed. This clearly contravenes Lawyers Basic Principle 16, which obliges governments to protect practising lawyers from 'intimidation, hindrance, harassment or improper interference',²¹¹ and the threat of 'prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics'.²¹²

Another cause for concern arises out of the disproportionate influence exercised in the Bar Council by the Attorney General's office and the Supreme Court, which jointly occupy or nominate all its members. If Myanmar's legal profession is to be revived, it needs an organisation that can defend and promote its distinct interests, and this requires that it be detached from the executive and independent of the judiciary. In this regard, the delegation recalls Lawyers Basic Principle 24, which states that the executive body of a professional legal association must be 'elected by members and... exercise its functions without external interference'.²¹³ The IBA Principles on the Role of Independent Bar Associations similarly provides that 'a bar association must be independent in the way in which it is run and in the actions it legitimately undertakes. This means that, while it is set up by legislation and must cooperate with government to ensure that all people have access to legal

210 The UN Guidelines on the Role of Prosecutors (the 'Havana Guidelines') are online at: www2.ohchr.org/english/law/prosecutors.htm; the International Association of Prosecutor's Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors are online at: www.iap-association.org/ressources/Standards_English.pdf. They are attached to this report at Annexes G and H.

211 Lawyers Basic Principle 16(a).

212 Lawyers Basic Principle 16(c).

213 Lawyers Basic Principle 24.

services, it must not be subject to undue interference from the government or from any other source. The bar association must be allowed to work freely without being obliged to obtain a clearance from the Executive to carry out its work.’ The IBAHRI delegation was consequently pleased to learn from Dr Tun Shin that fresh legislation will soon restore elections to the Bar Council. IBAHRI recommends that all parties concerned ensure that the new Bar Council Act:

- provides for the majority to be elected from the ranks of advocates in independent practice, in a way that grants other officials a role that is never more than advisory;
- creates a revised code of conduct in order that lawyers can be properly guided on the ethical behaviour that is expected of them, as mandated by Lawyers Basic Principle 26;
- reforms the procedures used to discipline lawyers to ensure that anyone suspected of misconduct is notified of the charge, given an opportunity to be heard, and allowed to challenge adverse decisions by way of judicial review, consistently with Lawyers Basic Principles 26-9; and
- improves the educational and training opportunities available to lawyers, to facilitate their continuing professional development and to make lawyers aware of international human rights instruments (see Lawyers Basic Principle 19).

The IBAHRI observes finally that the need to safeguard the Bar’s independence and revitalise Myanmar’s legal system comes with caveats similar to those applicable to the judiciary. Although the delegation was impressed by the courage that the country’s lawyers have shown in standing up for their profession’s dignity and ordinary people’s rights, it was simultaneously conscious that the last 30 years have taken a toll. As several advocates themselves acknowledged, the politicisation of Myanmar’s laws, the steady corruption of its court system, and the lack of exposure to foreign legislation and practice have combined to demoralise the country’s entire legal culture.

Efforts to fortify the Bar’s independence will only be feasible and durable, therefore, if they are accompanied by extensive capacity-building efforts. This requires training programmes and, in the delegates’ opinion, the country needs also to make some extension to its legal aid system. Although many claims are currently made on Myanmar’s budget, the proper functioning of legal machinery is not just one among various equally valid political options; it is absolutely essential if the reform process is to take root. Nothing could better help in this regard than a scheme of public funding that assists at least some poor people to vindicate their rights in court.²¹⁴

214 The establishment of a funded system of legal aid is mandated by the first four of the Lawyers Basic Principles.

10. Conclusions and Recommendations

The IBAHRI delegation was struck by the extent to which different parties appeared to share a common outlook on Myanmar's future. Grassroots activists described a political climate which, though imperfect, was palpably improving. Police officers spoke of the importance of civilian oversight. Leaders of the National League for Democracy emphasised the need to work with the army. Although there was considerable uncertainty over what terms such as 'checks and balances' and 'rule of law' might require in practice, everyone seemed to welcome the predictability and greater stability that they implied. Some people thought that they would enable relatively disfranchised individuals to know and claim their legal rights. Others observed that an enhanced respect for legal certainty could promote economic growth, because foreign investors tend to avoid arbitrary regimes in favour of those in which rights are clarified and regularly enforced.

The coincidence of views expressed does not amount to agreement about the political direction that Myanmar should now follow, of course, and the reform process remains very fragile. Although government officials were demonstrably supportive of President Thein Sein's current agenda, many individuals and groups have vested political and economic interests that could seriously affect Myanmar's commitment to the implementation of change in years to come. Nevertheless, IBAHRI thinks it very important to take seriously the decision of officialdom to speak the language of progress. In a climate where hopes and expectations of change are high, there is a real possibility that agreement on basic principles will create an impetus for deeds. Those deeds will in turn spur debate, and though not every initiative will work, even unsuccessful attempts will encourage the search for new solutions. Important questions persist over the pace and direction of reform in Myanmar, but the country is better positioned today than it has been for a generation to overcome the challenges that lie ahead.

If a single lesson can be said to have emerged from the IBAHRI mission, it was that rules are only ever as sturdy as the mechanisms that apply or enforce them. Rights that are supposed to be fundamental remain superficial if people do not know they exist, or lack the ability to ensure they are respected. The rule of law is arbitrary unless courts treat people equally and hold all law-breakers to account. This calls for capacity-building on a broad front, with improved training procedures that take account of a range of international experiences. It means that the government has to contemplate systematic change, even if it requires the creation of new institutions and amendment of the Constitution. Reforms need also to be systematic and realistically paced in order to foster social cohesion and avoid political gridlock. Legislation enacted in Nay Pyi Taw has to be made relevant to small villages, disadvantaged regions, and conflict-ridden provinces, through maximal consultation and transparency. As elections become institutionalised, principled politicians on all sides will finally need to guard against the temptation to side with a majority against minorities. Unless they take a lead in this regard, nationalist sentiment could serve to exclude non-citizens from Myanmar's body politic even more comprehensively than is already the case, with disastrous consequences for domestic stability in the longer term.

As the delegation was frequently reminded, the speed of political change in Myanmar means that it is often hard to say where particular powers and responsibilities lie. That makes it especially important to target assistance carefully, so as to put assets and expertise to best use. Myanmar has endorsed the

Global Partnership for Effective Development Cooperation, established at Busan in December 2011, which facilitates various mechanisms for ensuring that aid is deployed as efficiently as possible. Within the country, a natural point of contact for foreign donors in government is the Ministry of Planning's Foreign Economic Relations Department, which the United Nations Development Programme has identified as 'a formal organisational lead for donor coordination'.²¹⁵ The UNDP itself is well placed to advise on current projects within the country: at the time of the IBAHRI delegation's visit, it already had offices in more than 50 of Myanmar's 329 townships, and it was due soon to expand its previously restricted mandate into a normal country programme. The International Labour Organization and UNICEF have both been cooperating fruitfully with government ministries and law-enforcement bodies over the last few years, as noted at sections 3.3, 7.3 and 8.3, while the International Committee of the Red Cross has been working since 2011 with the External Affairs Ministry to improve awareness of international humanitarian law within that institution.²¹⁶

Certain imminent milestones might also affect the utility of particular initiatives and the general trajectory of Myanmar's reform process. The country is due to chair ASEAN in 2014, and it will play a central role in the organisation's three-pronged community-building process. This aims to establish an ASEAN Political-Security Community, Economic Community and Socio-Cultural Community by the end of 2015, all of which will depend on the successful institutionalisation of human rights and the rule of law. It should be borne in mind as well that the mandates of President Thein Sein and the current parliament are both scheduled to expire with fresh elections in that same year.

The recommendations that follow are structured under five heads, namely:

- general improvements to the protection and promotion of fundamental rights;
- changes to identified pieces of legislation;
- institutional changes;
- reforms specific to the judiciary and legal profession; and
- advice specific to international governments and agencies.

They are addressed to all interested parties, including the government of Myanmar, the national parliament, appropriate judicial authorities, civil society organisations and other concerned institutions.

²¹⁵ Evidence to the IBAHRI delegation during its visit.

²¹⁶ See: www.icrc.org/eng/where-we-work/asia-pacific/myanmar/overview-myanmar.htm.

Recommendations

To the government of Myanmar, the national parliament, appropriate judicial authorities, civil society organisations and other concerned institutions

On the protection and promotion of fundamental rights in general

- Sign, ratify and implement effectively those core human rights treaties to which Myanmar is not yet a party, including all those referred to in section 3.2.
- Promote awareness of those legal provisions that exist to remedy violations of rights protected by the 2008 Constitution and other domestic laws, including Article 378 of the Constitution, section 25 of the Judiciary Law, and §100 of the Criminal Procedure Code.
- Consider extending the above remedies and, in particular, make provision for victims to obtain pecuniary and injunctive relief.
- Clarify that the Supreme Court of Myanmar may set aside or ignore old laws and regulations that are inconsistent with modern reforms, and that Articles 445 and 446 of the Constitution do not operate to prevent such judicial action.
- Undertake a systematic review of all detentions that are arguably based on political grounds, taking account of submissions made by any interested parties, and allow detainees themselves to make representations if it is decided not to release them.

On legislative changes

- Publish lists of proposed reforms in advance and invite interested parties to submit observations throughout the drafting and enactment process.
- Prioritise the revision of those statutes that impinge on those fundamental rights protected by Chapter VIII of the 2008 Constitution, including sections 141–3, 145, 151, 505(b) of the Penal Code, the Unlawful Associations Act 1908, the Burma Official Secrets Act 1923, the Wireless Telegraphy Act 1933, the Emergency Provisions Act 1950, the Habitual Offenders Restriction Act 1961, the State Protection Act 1975, the Television and Video Law 1985, the Organizations Law 1988, the Computer Science Development Law 1996, the Motion Picture Law 1996, the Internet Law 2000, and the Electronic Transactions Law 2004.
- Make appropriate provision in the 2008 Constitution, the Criminal Procedure Code, the Penal Code, and other relevant legislation, for acknowledgment of the presumption of innocence, the right to be heard, the right to challenge adverse evidence, and a protection from double jeopardy.
- Promote, prepare and enact legislation to improve prison conditions, taking account of the UN Standard Minimum Rules for the Treatment of Prisoners, the UN General Assembly's Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and the UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules).

- Consider amending section 3 of the Burma Citizenship Law 1982 with a view to maximising the categories of people eligible for citizenship, minimising statelessness within the nation's borders, and ensuring that no one is denied their fundamental rights (including the right to equal treatment) by reason of their status as a non-citizen.

On institutional changes

- Establish a permanent law reform commission, with a view to the systematic revision of existing statutes and decrees that are susceptible to abusive enforcement (including all those listed above), and the promotion of consistency in future legislative reforms.
- Regulate the Press Scrutiny and Censorship Board with a view to promoting legitimate free expression, in order to ensure that newspaper editors and journalists are better able to understand their publication rights in advance and better able to challenge improper penalties imposed by the Board after publication.
- Extend recent moves by the government to regulate the conduct of the military and to grant NGOs access to conflict zones; in particular, facilitate the collaboration of international human rights bodies with Myanmar's Defence Services, having regard to recent initiatives between the armed forces and both UNICEF and the ILO.
- Consult all interested parties, including officers of the Tatmadaw, representatives of previously armed insurrectionary movements, and alleged victims of historical abuses, with a view to developing a domestic procedure that will allow Myanmar to come to terms with its recent past and offer an appropriate remedy to those people who are proved to have suffered a legal wrong.
- Reconsider the Attorney General of the Union Law 2010, with a view to:
 - enhancing the Attorney General's role as chief legal counsel to the government, by equipping him with better resources to represent the Union government as plaintiff and defendant, and enumerating a list of specific criminal offences over which he will retain ultimate responsibility to conduct or terminate;
 - placing most ordinary prosecutorial functions in the hands of a new public prosecution service, organised consistently with the UN Guidelines on the Role of Prosecutors and the Standards of the International Association of Prosecutors; and
 - creating a new Ministry of Justice that is responsible for administering the courts system.
- Create a Judicial Appointments Board, to promote the independence of the judiciary.
- Reconsider those constitutional provisions that currently govern the Constitutional Tribunal, so as to fortify its independence from the executive branch, by staggering the appointment of members, extending their period of service, and/or ensuring that all its members are not replaced at the same time as the presidency and parliament.
- Strengthen the autonomy and effectiveness of the Myanmar National Human Rights Commission, in accordance with the Paris Principles Relating to the Status of National Human Rights Institutions, by ensuring that:

- Commissioners are appointed for a fixed period by an independent appointments body;
- Commissioners fully reflect Myanmar’s diverse population, in terms of gender, ethnicity, employment background and life experience;
- the MNHRC’s funding is adequate and guaranteed;
- the MNHRC is enabled to conduct meaningful investigations, to publicise human rights, to encourage the ratification of international human rights instruments, to assist in formulating human rights educational programmes, and to publicise its activities on a website;
- the MNHRC is required to promote ‘equal rights’ for all persons in Myanmar (not just citizens), as guaranteed by Article 347 of the Constitution;
- the MNHRC is required to furnish practical assistance to people whom it considers entitled to a legal remedy under (for example) Article 378 of the Constitution;
- the MNHRC reconsider its reluctance to investigate historical complaints; and
- the MNHRC draw the government’s attention to situations in any part of the country where human rights are violated, proposing improvements where appropriate.

On the judiciary and legal profession

- Amend the Bar Council Law 1989 so as to ensure that the Bar Council once again becomes a body that represents the interests of the legal profession, rather than those of the state, the government, or the judiciary. It should provide for the majority to be elected from the ranks of advocates in independent practice, and grant other officials a role that is never more than advisory.
- Lend the Bar Council’s lawyer members any assistance they might request in drawing up:
 - fair disciplinary procedures that give lawyers suspected of misconduct notice of a charge, an opportunity to be heard, and an opportunity to challenge adverse decisions by way of judicial review;
 - a revised Code of Conduct for all lawyers; and
 - training courses, dealing with (among other things) legal ethics and international humanitarian law, with a view to expanding them into a continuing professional education programme.
- Having regard to the United Nation’s Basic Principles on the Role of Lawyers, ascertain if lawyers may still be improperly penalised; rectify any past injustices that continue to affect people’s liberty, reputation or livelihood; and establish:
 - how many lawyers remain imprisoned, disbarred and suspended;
 - the basis on which such actions were taken;
 - what remedies are available to the people concerned;

- what guarantees the government might make to ensure that lawyers are free to attend international conferences in future; and
 - what guarantees the government might make to ensure that lawyers in exile are welcome to return to Myanmar without risk of punishment.
- Amend the Organizations Law 1988, the Bar Council Law 1989 and/or the Courts Manual so as to ensure that lawyers enjoy freedoms of speech and association that are consistent with the United Nation’s Basic Principles on the Role of Lawyers.
 - Develop training programmes designed to enable village chiefs to discharge their quasi-judicial powers.
 - Clarify for the sake of state officials and courts that customary international norms are already directly applicable within Myanmar.
 - Improve training programmes for judges, paying particular attention to the UN’s Basic Principles on the Independence of the Judiciary, and the particular importance of ethical training.

On international aid and assistance

- Support Myanmar’s reform process by gaining familiarity with the country’s needs and the opportunities for assistance that exist.
- Use best efforts to ensure that all donors coordinate their programmes of assistance, between themselves and with the Myanmar authorities.
- Pending revision of the Burma Citizenship Law 1982, target programmes and funding initiatives to meet the needs of all persons in Myanmar (not just ‘citizens’), unless there is a compelling reason to do otherwise.

Annexe A

General Assembly Resolution 66/102 on the Rule of Law at the National and International Levels

66/102. The rule of law at the national and international levels

The General Assembly,

Recalling its resolution 65/32 of 6 December 2010,

Reaffirming its commitment to the purposes and principles of the Charter of the United Nations and international law, which are indispensable foundations of a more peaceful, prosperous and just world, and reiterating its determination to foster strict respect for them and to establish a just and lasting peace all over the world,

Reaffirming that human rights, the rule of law and democracy are interlinked and mutually reinforcing and that they belong to the universal and indivisible core values and principles of the United Nations,

Reaffirming also the need for universal adherence to and implementation of the rule of law at both the national and international levels and its solemn commitment to an international order based on the rule of law and international law, which, together with the principles of justice, is essential for peaceful coexistence and cooperation among States,

Convinced that the advancement of the rule of law at the national and international levels is essential for the realization of sustained economic growth, sustainable development, the eradication of poverty and hunger and the protection of all human rights and fundamental freedoms, and acknowledging that collective security depends on effective cooperation, in accordance with the Charter and international law, against transnational threats,

Reaffirming the duty of all States to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes and principles of the United Nations and to settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered, in accordance with Chapter VI of the Charter, and calling upon States that have not yet done so to consider accepting the jurisdiction of the International Court of Justice in accordance with its Statute,

Convinced that the promotion of and respect for the rule of law at the national and international levels, as well as justice and good governance, should guide the activities of the United Nations and of its Member States,

Recalling paragraph 134(e) of the 2005 World Summit Outcome,²¹⁷

1. *Takes note* of the annual report of the Secretary-General on strengthening and coordinating United Nations rule of law activities;²¹⁸
2. *Reaffirms* the role of the General Assembly in encouraging the progressive development of international law and its codification, and reaffirms further that States shall abide by all their obligations under international law;
3. *Reaffirms* also the imperative of upholding and promoting the rule of law at the international level in accordance with the principles of the Charter;
4. *Welcomes* the dialogue initiated by the Rule of Law Coordination and Resource Group and the Rule of Law Unit with Member States on the topic “Promoting the rule of law at the international level”, and calls for the continuation of this dialogue with a view to fostering the rule of law at the international level;
5. *Stresses* the importance of adherence to the rule of law at the national level and the need to strengthen support to Member States, upon their request, in the domestic implementation of their respective international obligations through enhanced technical assistance and capacity-building, based on greater coordination and coherence within the United Nations system and among donors, and reiterates its call for greater evaluation of the effectiveness of such activities, including possible measures to improve the effectiveness of those capacity-building activities;
6. *Calls*, in this context, for dialogue to be enhanced among all stakeholders with a view to placing national perspectives at the centre of rule of law assistance in order to strengthen national ownership;
7. *Calls* upon the United Nations system to systematically address, as appropriate, aspects of the rule of law in relevant activities, including the participation of women in rule of law-related activities, recognizing the importance of the rule of law to virtually all areas of United Nations engagement;
8. *Expresses* full support for the overall coordination and coherence role of the Rule of Law Coordination and Resource Group within the United Nations system within existing mandates, supported by the Rule of Law Unit in the Executive Office of the Secretary-General, under the leadership of the Deputy Secretary-General;
9. *Requests* the Secretary-General to submit, in a timely manner, his next annual report on United Nations rule of law activities, in accordance with paragraph 5 of its resolution 63/128 of 11 December 2008;
10. *Recognizes* the importance of restoring confidence in the rule of law as a key element of transitional justice;

²¹⁷ See resolution 60/1.

²¹⁸ A/66/133.

11. *Encourages* the Secretary-General and the United Nations system to accord high priority to rule of law activities;
12. *Invites* the International Court of Justice, the United Nations Commission on International Trade Law and the International Law Commission to continue to comment, in their respective reports to the General Assembly, on their current roles in promoting the rule of law;
13. *Invites* the Rule of Law Coordination and Resource Group and the Rule of Law Unit to continue to interact with Member States on a regular basis, in particular in informal briefings;
14. *Stresses* the need to provide the Rule of Law Unit with the necessary funding and staff in order to enable it to carry out its tasks in an effective and sustainable manner, and urges the Secretary-General and Member States to continue to support the functioning of the Unit;
15. *Recalls* its decision to convene a high-level meeting of the General Assembly on the topic “The rule of law at the national and international levels” during the high-level segment of its sixty-seventh session, and decides that the organizational arrangements for the high-level meeting should be as follows:
 - (a) The high-level meeting will be held as a one-day plenary on Monday, 24 September 2012;
 - (b) The President of the General Assembly, the Secretary-General, the President of the International Court of Justice, the President of the Security Council, the United Nations High Commissioner for Human Rights, the Administrator of the United Nations Development Programme, the Executive Director of the United Nations Office on Drugs and Crime, the Chair of the International Law Commission, Member States and observers, as well as a limited number of representatives of non-governmental organizations active in the field of the rule of law,²¹⁹ will be invited to speak at the plenary;
 - (c) The President of the General Assembly shall draw up a list of representatives of non-governmental organizations in consultative status with the Economic and Social Council who will participate in the high-level meeting;
 - (d) The President of the General Assembly shall draw up a list of representatives of civil society organizations, including non-governmental organizations active in the field of the rule of law and, taking into account the principle of equitable geographical representation, submit the list to Member States for consideration on a no-objection basis, for participation in the high-level meeting;
16. *Decides* that the high-level meeting will result in a concise outcome document, and requests the President of the General Assembly to produce a draft text, in consultation with Member States, and to convene inclusive informal consultations at an appropriate date in order to enable sufficient consideration and agreement by Member States prior to the meeting;

219 To speak on a non-objection basis in accordance with past practice.

17. *Requests* the President of the General Assembly, in consultation with Member States, to finalize the organizational arrangements of the meetings, including the list of speakers for the plenary, taking into account the length of the high-level meeting, the level of representation, equitable geographical representation and the need to ensure that all listed speakers will have the opportunity to speak;
18. *Requests* the Secretary-General to submit a report for the consideration of Member States in preparation for the high-level meeting, no later than March 2012;
19. *Decides* to include in the provisional agenda of its sixty-seventh session the item entitled “The rule of law at the national and international levels”;
20. *Invites* Member States as well as the Secretary-General to suggest possible sub-topics for future Sixth Committee debates for inclusion in the forthcoming annual report, with a view to assisting the Sixth Committee in choosing future sub-topics.

82nd plenary meeting

9 December 2011

Annexe B

The Peaceful Demonstration and Gathering Act 2012

The Right to Peaceful Assembly and Peaceful Procession Act

(2011 Union Hluttaw Law No 15)

7th day of the Waxing Moon of Nadaw in 1373

(2nd December 2011)

Introduction

In Article 354 Section (B) of the Union Republic of Myanmar Constitution Law, it is prescribed that if not contrary to the laws enacted for Union security, rule of law, community peace and tranquility, or public morality, every citizen shall be at liberty to assemble and hold a procession peacefully without arms. So that citizens can exercise these rights legally, Pyidaungsu Hluttaw has enacted this law.

Chapter (1) Terms and Definitions

1. This law shall be called the law of peaceful assembly and peaceful procession.
2. Words in this law shall have the following meanings:
 - (a) A **citizen** refers to a person who is born to parents both of whom are nationals of the Union Republic of Myanmar and is a legal citizen on the day the constitution is confirmed and enacted.
 - (b) A **peaceful** assembly refers to a peaceful gathering of more than one person, unarmed and following the rules, and giving speeches in permitted public places according to this law for the purpose of expressing their wishes and convictions.
 - (c) A **peaceful** procession refers to more than one person having a peaceful procession in an orderly fashion, unarmed and following the rules, on a permitted public road for the purpose of expressing their wishes and convictions.
 - (d) A **permit** refers to the permission given in accordance to this Act to allow a peaceful gathering or peaceful procession.
 - (e) A **poster** refers to an expression that does not harm the dignity of a person; it be in words, signs, images, photographs, paintings, cartoons, statues, television broadcast, or something expressed in any other way, and held in hand, placed in the ground, pasted on another item or some other way, for the purpose of expressing one's wishes and convictions.
 - (f) A **sign** refers to an expression that does not harm the dignity of a person; it includes the name of a party or an association or an organization in words, to be held in hand, placed in the ground, or hung or expressed in some other ways, for the purpose of expressing one's wishes and convictions.

- (g) **Arms** refer to weapons and equipment, the definitions of which provided in Weapons and Explosives Act, as well as things that can be dangerous to another person.
- (h) A **flag** refers to flags of the Union, official parties, and official associations and organizations.

Chapter (2) Purpose

- 3. The purpose of this Act is as follows:
 - (a) For Union security, rule of law, community peace and tranquility, or public morality;
 - (b) For the citizens, as defined by the Union Republic of Myanmar Constitution, to be able to systematically exercise their basic right to peaceful assembly and peaceful procession and to provide them with legal protection;
 - (c) To protect the public from harassment, danger, harm, and obstruction from those who are exercising their right to peaceful assembly and peaceful procession.

Chapter (3) Applying for Permission

- 4. The citizens or organizations that want to exercise the right to peaceful assembly and peaceful procession and express themselves must apply for the permission at least five days in advance by using the form, including the following information, to the Chief of the Township Police Force.
 - (a) Purpose of the peaceful assembly, the site, the date and time, the topic at the assembly, and the chants;
 - (b) Purpose of the peaceful procession, the route, the date and time, and the chants;
 - (c) The person applying for the permit for peaceful assembly and peaceful procession, and biographies of the leader and the speaker;
 - (d) The schedule of peaceful assembly or peaceful procession and approximate number of attendees;
 - (e) If an organization is conducting the peaceful assembly or peaceful procession, record of that organization's decision or supporting document;
 - (f) If permission is given, the agreement to abide by the rules in this Act as well as the permission.

Chapter (4) Issuance and Denial of Permission

- 5. When the Chief of the Township Police Force receives an application from a citizen or citizens, or an organization, submitted in accordance with the rules for permission, the permission can be issued or denied with approval from the Chief Administrator of the Township Department of General Administration from the township concerned. However, it cannot be denied when it is not in breach of the security of the State, rule of law, community's peace and tranquility, and public morality.

6. The permission or denial of permission must be reported by the Chief of Township Police Force to the Chief of the District Police Force and by the Chief Administrator of the Township Department of General Administration to the Chief Administrator of the District Department of General Administration promptly.
7. Chief of the Township Police Force concerned must do the following:
 - (a) If permission is granted, notify the applicant at least 48 hours in advance of the date and time for the peaceful assembly or peaceful procession;
 - (b) If permission is denied, notify the reason for denial at least 48 hours in advance of the date and time for the peaceful assembly or peaceful procession on the application.
8. The following information must be included in the permission:
 - (a) Date, place, and time of the peaceful assembly;
 - (b) Date, route, and time of the peaceful procession;
 - (c) Number of people given permission to participate in the peaceful assembly and peaceful procession;
 - (d) Name(s) and address(es) of the person or persons given permission to speak;
 - (e) Local rules.
9. Appeals to the denial of permission can be made in the following way:
 - (a) Appeals can be made to the Chief of the Region or State Police Force concerned within seven days of the receipt of the notification of denial.
 - (b) With approval from the Chief Administrator of the Department of Regional or State General Administration, Chief of the Region or State Police Force concerned must make a decision on the appeal, made in accordance with sub-section (a), within 14 days of its receipt.
 - (c) The decision made by Chief of the Region or State Police force, in accordance with sub-section (b) is final.

Chapter (5) Rules

10. A peaceful assembly is to be made only at the site assigned in the permission.
11. When having a peaceful procession, so as not to disturb the public, people are given permission to gather only at the assigned starting point of the route and to proceed peacefully along the assigned route.
12. Those who participate in a peaceful assembly and a peaceful procession must obey the following rules:
 - (a) They must not talk or behave in a way to cause any disturbance or obstruction, annoyance, danger, or a concern that these might take place.

- (b) They must not behave in a way that could destroy the government, public, or private properties or pollute the environment.
- (c) They must not obstruct or disturb vehicles, pedestrians, and people.
- (d) They must not carry any weapons during a peaceful assembly and a peaceful procession.
- (e) They must not say things or behave in a way that could affect the country or the Union, race, or religion, human dignity and moral principals.
- (f) They must not spread rumors or incorrect information.
- (g) They can carry and display flags, posters, and signs during a peaceful assembly and a peaceful procession.
- (h) During a peaceful procession, they must not use loudspeakers other than the approved hand-held ones; they must not recite or shout chants other than the ones approved.
- (i) They must obey the supervision and enforcement of rules by the officials.
- (j) They must obey necessary notices, orders, and instructions issued.
- (k) If permission is revoked, they must not continue but disperse.

Chapter (6) Taking Action

13. A police officer with a rank of no less than a deputy is to give necessary protection to the attendees of a peaceful assembly and peaceful procession, conducted in accordance with the law, so that there can be no harassment, destruction, or obstruction.
14. A police officer no less than a deputy is to do the following:
 - (a) Warn the leader of the peaceful assembly and peaceful procession of any breach to the rules in these Acts at the site.
 - (b) Report to the Chief of Township Police Force when the warning in sub-section (a) is not heeded.
15. At the receipt of the report submitted according to Section 14 sub-section (b), the Chief of Township Police Force must immediately report it to the Chief Administrator of the Department of Township General Administration and get an approval and revoke either the permission for a peaceful assembly or a peaceful procession. The official must first make a verbal announcement of the revocation and give a written notice within 24 hours.
16. If the violation of the rules continues after the announcement of the revocation of the permit, the Chief of the Township Police Force must continue to take an action in accordance with the existing laws, bylaws, policies, and procedures.

Chapter (7) Crime and Punishment

17. If there is evidence that a person disturbs, destroys, obstructs, annoys, assaults, bullies, or harms the attendees of a peaceful assembly or a peaceful procession conducted in accordance with a given permission, he or she must receive a maximum sentence of two years imprisonment or a maximum fine of fifty thousand kyat or both.
18. If there is evidence that a person is guilty of conducting a peaceful assembly or a peaceful procession, he or she must receive a maximum sentence of one year imprisonment or a maximum fine of thirty thousand kyat or both.
19. If there is evidence that a person violates a rule in Section 8 Sub-section (e) or a rule in Sections 10, 11, and 12, that person must receive a maximum sentence of six months imprisonment or a fine of ten thousand kyat or both.

Chapter (8) General

20. The crime against which an action is taken by this law is considered a crime actionable by the police.
21. During a permitted peaceful assembly or a peaceful procession, if anyone breaches security of the country, rule of law, peace and tranquility of the community, and the laws prescribed to protect public morality, or hurt anyone else, action must be taken against these violations according to the existing laws.
22. When exercising their right to a peaceful procession and a peaceful expression of their wishes and opinions freely, each citizen must follow the provisions in this Act.
23. When a citizen or an organization with a permit no longer wants to conduct a peaceful assembly or a peaceful procession due to various reasons, they must report this to the Chief of Township Police Force within 24 hours.
24. When implementing the provisions in this Act, the Ministry of Home Affairs:
 - (a) Can issue bylaws or rules and regulations with approval from the Union Government;
 - (b) Can issue necessary announcements, orders, instructions, and procedures.

I sign this in accordance with the constitution.

Thein Sein
President of the Country
Union Republic of Myanmar

Annexe C

Principles Relating to the Status of National Institutions (The Paris Principles)

Adopted by The United Nations General Assembly resolution 48/134 of 20 December 1993

Competence and Responsibilities

1. A national institution shall be vested with competence to promote and protect human rights.
2. A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence.
3. A national institution shall, inter alia, have the following responsibilities:
 - (a) To submit to the Government, Parliament and any other competent body, on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights; the national institution may decide to publicize them; these opinions, recommendations, proposals and reports, as well as any prerogative of the national institution, shall relate to the following areas:
 - (i) Any legislative or administrative provisions, as well as provisions relating to judicial organizations, intended to preserve and extend the protection of human rights; in that connection, the national institution shall examine the legislation and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as it deems appropriate in order to ensure that these provisions conform to the fundamental principles of human rights; it shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures;
 - (ii) Any situation of violation of human rights which it decides to take up;
 - (iii) The preparation of reports on the national situation with regard to human rights in general, and on more specific matters;
 - (iv) Drawing the attention of the Government to situations in any part of the country where human rights are violated and making proposals to it for initiatives to put an end to such situations and, where necessary, expressing an opinion on the positions and reactions of the Government;
 - (b) To promote and ensure the harmonization of national legislation regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation;

- (c) To encourage ratification of the above-mentioned instruments or accession to those instruments, and to ensure their implementation;
- (d) To contribute to the reports which States are required to submit to United Nations bodies and committees, and to regional institutions, pursuant to their treaty obligations and, where necessary, to express an opinion on the subject, with due respect for their independence;
- (e) To cooperate with the United Nations and any other organization in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the promotion and protection of human rights;
- (f) To assist in the formulation of programmes for the teaching of, and research into, human rights and to take part in their execution in schools, universities and professional circles;
- (g) To publicize human rights and efforts to combat all forms of discrimination, in particular racial discrimination, by increasing public awareness, especially through information and education and by making use of all press organs.

Composition and guarantees of independence and pluralism

4. The composition of the national institution and the appointment of its members, whether by means of an election or otherwise, shall be established in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights, particularly by powers which will enable effective cooperation to be established with, or through the presence of, representatives of:
 - (a) Non-governmental organizations responsible for human rights and efforts to combat racial discrimination, trade unions, concerned social and professional organizations, for example, associations of lawyers, doctors, journalists and eminent scientists;
 - (b) Trends in philosophical or religious thought;
 - (c) Universities and qualified experts;
 - (d) Parliament;
 - (e) Government departments (if these are included, their representatives should participate in the deliberations only in an advisory capacity).
5. The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence.
6. In order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured.

Methods of operation

Within the framework of its operation, the national institution shall:

- (a) Freely consider any questions falling within its competence, whether they are submitted by the Government or taken up by it without referral to a higher authority, on the proposal of its members or of any petitioner;
- (b) Hear any person and obtain any information and any documents necessary for assessing situations falling within its competence;
- (c) Address public opinion directly or through any press organ, particularly in order to publicize its opinions and recommendations;
- (d) Meet on a regular basis and whenever necessary in the presence of all its members after they have been duly convened;
- (e) Establish working groups from among its members as necessary, and set up local or regional sections to assist it in discharging its functions;
- (f) Maintain consultation with the other bodies, whether jurisdictional or otherwise, responsible for the promotion and protection of human rights (in particular ombudsmen, mediators and similar institutions);
- (g) In view of the fundamental role played by the non-governmental organizations in expanding the work of the national institutions, develop relations with the non-governmental organizations devoted to promoting and protecting human rights, to economic and social development, to combating racism, to protecting particularly vulnerable groups (especially children, migrant workers, refugees, physically and mentally disabled persons) or to specialized areas.

Additional principles concerning the status of commissions with quasi-judicial competence

A national institution may be authorized to hear and consider complaints and petitions concerning individual situations. Cases may be brought before it by individuals, their representatives, third parties, non-governmental organizations, associations of trade unions or any other representative organizations. In such circumstances, and without prejudice to the principles stated above concerning the other powers of the commissions, the functions entrusted to them may be based on the following principles:

- (a) Seeking an amicable settlement through conciliation or, within the limits prescribed by the law, through binding decisions or, where necessary, on the basis of confidentiality;
- (b) Informing the party who filed the petition of his rights, in particular the remedies available to him, and promoting his access to them;
- (c) Hearing any complaints or petitions or transmitting them to any other competent authority within the limits prescribed by the law;

(d) Making recommendations to the competent authorities, especially by proposing amendments or reforms of the laws, regulations and administrative practices, especially if they have created the difficulties encountered by the persons filing the petitions in order to assert their rights.

Annexe D

UN Basic Principles on the Independence of the Judiciary

Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985

Whereas in the Charter of the United Nations the peoples of the world affirm, inter alia, their determination to establish conditions under which justice can be maintained to achieve international co-operation in promoting and encouraging respect for human rights and fundamental freedoms without any discrimination,

Whereas the Universal Declaration of Human Rights enshrines in particular the principles of equality before the law, of the presumption of innocence and of the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights both guarantee the exercise of those rights, and in addition, the Covenant on Civil and Political Rights further guarantees the right to be tried without undue delay,

Whereas frequently there still exists a gap between the vision underlying those principles and the actual situation,

Whereas the organization and administration of justice in every country should be inspired by those principles, and efforts should be undertaken to translate them fully into reality,

Whereas rules concerning the exercise of judicial office should aim at enabling judges to act in accordance with those principles,

Whereas judges are charged with the ultimate decision over life, freedoms, rights, duties and property of citizens,

Whereas the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, by its resolution 16, called upon the Committee on Crime Prevention and Control to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors,

Whereas it is, therefore, appropriate that consideration be first given to the role of judges in relation to the system of justice and to the importance of their selection, training and conduct,

The following basic principles, formulated to assist Member States in their task of securing and promoting the independence of the judiciary should be taken into account and respected by Governments within the framework of their national legislation and practice and be brought to the attention of judges, lawyers, members of the executive and the legislature and the public in general. The principles have been formulated principally with professional judges in mind, but they apply equally, as appropriate, to lay judges, where they exist.

Independence of the judiciary

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.
4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.
5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.
6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.
7. It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions.

Freedom of expression and association

8. In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.
9. Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence.

Qualifications, selection and training

10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no

discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

Conditions of service and tenure

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.
12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.
13. Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience.
14. The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration.

Professional secrecy and immunity

15. The judiciary shall be bound by professional secrecy with regard to their deliberations and to confidential information acquired in the course of their duties other than in public proceedings, and shall not be compelled to testify on such matters.
16. Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions.

Discipline, suspension and removal

17. A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.
18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.
19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.
20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.

Annexe E

UN Basic Principles on the Role of Lawyers

Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

Whereas in the Charter of the United Nations the peoples of the world affirm, inter alia, their determination to establish conditions under which justice can be maintained, and proclaim as one of their purposes the achievement of international cooperation in promoting and encouraging respect for human rights and fundamental freedoms without distinction as to race, sex, language or religion,

Whereas the Universal Declaration of Human Rights enshrines the principles of equality before the law, the presumption of innocence, the right to a fair and public hearing by an independent and impartial tribunal, and all the guarantees necessary for the defence of everyone charged with a penal offence,

Whereas the International Covenant on Civil and Political Rights proclaims, in addition, the right to be tried without undue delay and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law,

Whereas the International Covenant on Economic, Social and Cultural Rights recalls the obligation of States under the Charter to promote universal respect for, and observance of, human rights and freedoms,

Whereas the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that a detained person shall be entitled to have the assistance of, and to communicate and consult with, legal counsel,

Whereas the Standard Minimum Rules for the Treatment of Prisoners recommend, in particular, that legal assistance and confidential communication with counsel should be ensured to untried prisoners,

Whereas the Safe guards guaranteeing protection of those facing the death penalty reaffirm the right of everyone suspected or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings, in accordance with article 14 of the International Covenant on Civil and Political Rights,

Whereas the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power recommends measures to be taken at the international and national levels to improve access to justice and fair treatment, restitution, compensation and assistance for victims of crime,

Whereas adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession,

Whereas professional associations of lawyers have a vital role to play in upholding professional standards and ethics, protecting their members from persecution and improper restrictions and infringements, providing legal services to all in need of them, and cooperating with governmental and other institutions in furthering the ends of justice and public interest, The Basic Principles on the Role of Lawyers, set forth

below, which have been formulated to assist Member States in their task of promoting and ensuring the proper role of lawyers, should be respected and taken into account by Governments within the framework of their national legislation and practice and should be brought to the attention of lawyers as well as other persons, such as judges, prosecutors, members of the executive and the legislature, and the public in general. These principles shall also apply, as appropriate, to persons who exercise the functions of law.

Access to lawyers and legal services

1. All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.
2. Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.
3. Governments shall ensure the provision of sufficient funding and other resources for legal services to the poor and, as necessary, to other disadvantaged persons. Professional associations of lawyers shall cooperate in the organization and provision of services, facilities and other resources.
4. Governments and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms. Special attention should be given to assisting the poor and other disadvantaged persons so as to enable them to assert their rights and where necessary call upon the assistance of lawyers.

Special safeguards in criminal justice matters

5. Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.
6. Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.
7. Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.
8. All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.

Qualifications and training

9. Governments, professional associations of lawyers and educational institutions shall ensure that lawyers have appropriate education and training and be made aware of the ideals and ethical duties of the lawyer and of human rights and fundamental freedoms recognized by national and international law.
10. Governments, professional associations of lawyers and educational institutions shall ensure that there is no discrimination against a person with respect to entry into or continued practice within the legal profession on the grounds of race, colour, sex, ethnic origin, religion, political or other opinion, national or social origin, property, birth, economic or other status, except that a requirement, that a lawyer must be a national of the country concerned, shall not be considered discriminatory.
11. In countries where there exist groups, communities or regions whose needs for legal services are not met, particularly where such groups have distinct cultures, traditions or languages or have been the victims of past discrimination, Governments, professional associations of lawyers and educational institutions should take special measures to provide opportunities for candidates from these groups to enter the legal profession and should ensure that they receive training appropriate to the needs of their groups.

Duties and responsibilities

12. Lawyers shall at all times maintain the honour and dignity of their profession as essential agents of the administration of justice.
13. The duties of lawyers towards their clients shall include:
 - (a) Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients;
 - (b) Assisting clients in every appropriate way, and taking legal action to protect their interests;
 - (c) Assisting clients before courts, tribunals or administrative authorities, where appropriate.
14. Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognized by national and international law and shall at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession.
15. Lawyers shall always loyally respect the interests of their clients.

Guarantees for the functioning of lawyers

16. Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

17. Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.
18. Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions.
19. No court or administrative authority before whom the right to counsel is recognized shall refuse to recognize the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law and practice and in conformity with these principles.
20. Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority.
21. It is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients. Such access should be provided at the earliest appropriate time.
22. Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential.

Freedom of expression and association

23. Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession.

Professional associations of lawyers

24. Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.
25. Professional associations of lawyers shall cooperate with Governments to ensure that everyone has effective and equal access to legal services and that lawyers are able, without improper interference, to counsel and assist their clients in accordance with the law and recognized professional standards and ethics.

Disciplinary proceedings

26. Codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by legislation, in accordance with national law and custom and recognized international standards and norms.
27. Charges or complaints made against lawyers in their professional capacity shall be processed expeditiously and fairly under appropriate procedures. Lawyers shall have the right to a fair hearing, including the right to be assisted by a lawyer of their choice.
28. Disciplinary proceedings against lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review
29. All disciplinary proceedings shall be determined in accordance with the code of professional conduct and other recognized standards and ethics of the legal profession and in the light of these principles.

Annexe F

International Bar Association (IBA) Standards for the Independence of the Legal Profession

Adopted by the Council of the IBA, 1990

WHEREAS:

The independence of the legal profession constitutes an essential guarantee for the promotion and protection of human rights and is necessary for effective and adequate access to legal services:

An equitable system of administration of justice which guarantees the independence of lawyers in the discharge of their professional duties without any improper restrictions, pressures or interference, direct or indirect is imperative for the establishment and maintenance of the rule of law.

It is essential to establish conditions in which all persons shall have effective and prompt access to legal services provided by an independent lawyer of their choice to protect and establish their legal, economic, social, cultural, civil and political rights.

Professional associations of lawyers have a vital role to uphold professional standards and ethics, to protect their members from improper restrictions and infringements, to provide legal services to all in need of them, and to co-operate with governmental and other institutions in furthering the ends of justice.

NOW THEREFORE the following standards are established by the International Bar Association to assist in the task of promoting and ensuring the proper role of lawyers which should be taken into account and respected by Governments within the framework of their national legislation and practice and should be brought to the attention of lawyers, judges, members of the executive and the legislature and the public in general.

Entry into the legal professional and legal education

1. Every person having the necessary qualifications in law shall be entitled to become a lawyer and to continue in practice without discrimination.
2. Legal education shall be open to all persons with requisite qualifications and no one shall be denied such opportunity by reason of race, colour, sex, religion, political or other opinion, national or social origin, property, birth, status or physical disability.
3. Legal education shall be designed to promote knowledge and understanding of the role and the skills required in practising as a lawyer, including awareness of the legal and ethical duties of a lawyer and of the human rights and fundamental freedoms recognised within the given jurisdiction and by international law.
4. Programmes of legal education shall have regard to the social responsibilities of the lawyer, including co-operation in providing legal services to the needy and the promotion and defence of legal rights of whatever nature whether economic, social, cultural, civil and political and specially rights of such nature in the process of development.

Education of the public concerning the law

5. It shall be a responsibility of the legal profession and state organs to educate the members of the public about the principles of the rule of law, the importance of the independence of the judiciary and of the legal profession and to inform them about their rights and duties and the relevant and available remedies.

Rights and duties of lawyers

6. Subject to the established rules, standards and ethics of the profession the lawyer in discharging his or her duties shall at all times act freely, diligently and fearlessly in accordance with the legitimate interest of the client and without any inhibition or pressure from the authorities or the public.
7. The lawyer is not to be identified by the authorities or the public with the client or the client's cause, however popular or unpopular it may be.
8. No lawyer shall suffer or be threatened with penal, civil, administrative, economic or other sanctions or harassment by reason of his or her having legitimately advised or represented any client or client's cause.
9. No court or administrative authority shall refuse to recognise the right of a lawyer qualified in that jurisdiction to appear before it for his client.
10. A lawyer shall have the right to raise an objection for good cause to the participation or continued participation of a judge in a particular case, or to the conduct of a trial or hearing.
11. Save as provided in these principles, a lawyer shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in his or her professional appearances before a court, tribunal or other legal or administrative authority.
12. The independence of lawyers in dealing with persons deprived of their liberty shall be guaranteed so as to ensure that they have free, fair and confidential legal assistance, including the lawyer's right of access to such persons. Safeguards shall be built to avoid any possible suggestion of collusion, arrangement or dependence between the lawyer who acts for them and the authorities.
13. Lawyers shall have all such other facilities and privileges as are necessary to fulfil their professional responsibilities effectively, including:
 - (a) confidentiality of the lawyer-client relationship, including protection of the lawyer's files and documents from seizure or inspection and protection from interception of the lawyer's electronic communications;
 - (b) the right to travel and to consult with their clients freely both within their own country and abroad;
 - (c) the right freely to seek, to receive and, subject to the rules of their profession, to impart information and ideas relating to their professional work

14. Lawyers shall not by reason of exercising their profession be denied freedom of belief, expression, association and assembly; and in particular they shall have the right to:
- (a) take part in public discussion of matters concerning the law and the administration of justice;
 - (b) join or form freely local, national and international organisations;
 - (c) propose and recommend well considered law reforms in the public interest and inform the public about such matters.

Legal service for the poor

15. It is a necessary corollary of the concept of an independent bar that its members shall make their services available to all sectors of society so that no one may be denied justice.
16. Lawyers engaged in legal service programmes and organisations, which are financed wholly or in part from public funds, shall enjoy full guarantees of their professional independence in particular by:
- (a) the direction of such programmes or organisations being entrusted to an independent board with control over its policies, budget and staff;
 - (b) recognition that, in serving the cause of justice, the lawyer's primary duty is towards the client, who must be advised and represented in conformity with professional conscience and judgement.

Lawyers' Associations

17. There shall be established in each jurisdiction one or more independent self-governing associations of lawyers recognised in law, whose council or other executive body shall be freely elected by all the members without interference of any kind by any other body or person. This shall be without prejudice to their right to form or join in addition other professional associations of lawyers and jurists.

Functions of the Lawyers' Associations

18. The functions of the appropriate lawyers' association in ensuring the independence of the legal profession shall be inter alia:
- (a) to promote and uphold the cause of justice, without fear or favour;
 - (b) to maintain the honour, dignity, integrity, competence, ethics, standards of conduct and discipline of the profession; and to protect the intellectual and economic independence of the lawyer from his or her client;
 - (c) to defend the role of lawyers in society and preserve the independence of the profession;
 - (d) to protect and defend the dignity and independence of the judiciary;

- (e) to promote free and equal access of the public to the system of justice, including the provision of legal aid and advice;
 - (f) to promote the right of everyone to a prompt, fair and public hearing before a competent, independent and impartial tribunal and in accordance with proper and fair procedures in all matters;
 - (g) to promote and support law reform, and to comment upon and promote public discussion on the substance, interpretation and application of existing and proposed legislation;
 - (h) to promote a high standard of legal education as a prerequisite for entry into the profession and the continuing education of lawyers and to educate the public regarding the role of a Lawyers' Association;
 - (i) to ensure that there is free access to the profession for all persons having the requisite professional competence, without discrimination of any kind, and to give assistance to new entrants into the profession;
 - (j) to promote the welfare of members of the profession and the rendering of assistance to members of their families in appropriate cases;
 - (k) to affiliate with and participate in the activities of international organisations of lawyers.
19. Where a person involved in litigation wishes to engage a lawyer from another country to act with a local lawyer, the appropriate association of lawyers shall co-operate in assisting a foreign lawyer to obtain the necessary right of audience provided that he or she has the qualifications and fulfils the conditions required to obtain that right.
20. To enable the lawyers' association to fulfil its function of preserving the independence of lawyers it shall be informed immediately of the reason and legal basis for the arrest or detention and place of detention of any lawyer; and the lawyers' association shall have access to the lawyer arrested or detained.

Disciplinary proceedings

21. Lawyers' associations shall adopt and enforce a code of professional conduct of lawyers.
22. There shall be established rules for the commencement and conduct of disciplinary proceedings that incorporate the rules of natural justice.
23. The appropriate lawyers' association will be responsible for or be entitled to participate in the conduct of disciplinary proceedings.
24. Disciplinary proceedings shall be conducted in the first instance before a disciplinary committee of the appropriate lawyers' association. The lawyer shall have the right to appeal from the disciplinary committee to an appropriate and independent appellate body.

Annexe G

UN Guidelines on the Role of Prosecutors

Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990

Whereas in the Charter of the United Nations the peoples of the world affirm, inter alia, their determination to establish conditions under which justice can be maintained, and proclaim as one of their purposes the achievement of international cooperation in promoting and encouraging respect for human rights and fundamental freedoms without distinction as to race, sex, language or religion,

Whereas the Universal Declaration of Human Rights enshrines the principles of equality before the law, the presumption of innocence and the right to a fair and public hearing by an independent and impartial tribunal,

Whereas frequently there still exists a gap between the vision underlying those principles and the actual situation,

Whereas the organization and administration of justice in every country should be inspired by those principles, and efforts undertaken to translate them fully into reality,

Whereas prosecutors play a crucial role in the administration of justice, and rules concerning the performance of their important responsibilities should promote their respect for and compliance with the above-mentioned principles, thus contributing to fair and equitable criminal justice and the effective protection of citizens against crime,

Whereas it is essential to ensure that prosecutors possess the professional qualifications required for the accomplishment of their functions, through improved methods of recruitment and legal and professional training, and through the provision of all necessary means for the proper performance of their role in combating criminality, particularly in its new forms and dimensions,

Whereas the General Assembly, by its resolution 34/169 of 17 December 1979, adopted the Code of Conduct for Law Enforcement Officials, on the recommendation of the Fifth United Nations Congress on the Prevention of Crime and the Treatment of Offenders,

Whereas in resolution 16 of the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, the Committee on Crime Prevention and Control was called upon to include among its priorities the elaboration of guidelines relating to the independence of judges and the selection, professional training and status of judges and prosecutors,

Whereas the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted the Basic Principles on the Independence of the Judiciary, subsequently endorsed by the General Assembly in its resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985,

Whereas the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power recommends measures to be taken at the international and national levels to improve access to justice and fair treatment, restitution, compensation and assistance for victims of crime,

Whereas, in resolution 7 of the Seventh Congress the Committee was called upon to consider the need for guidelines relating, inter alia, to the selection, professional training and status of prosecutors, their expected tasks and conduct, means to enhance their contribution to the smooth functioning of the criminal justice system and their cooperation with the police, the scope of their discretionary powers, and their role in criminal proceedings, and to report thereon to future United Nations congresses,

The Guidelines set forth below, which have been formulated to assist Member States in their tasks of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings, should be respected and taken into account by Governments within the framework of their national legislation and practice, and should be brought to the attention of prosecutors, as well as other persons, such as judges, lawyers, members of the executive and the legislature and the public in general. The present Guidelines have been formulated principally with public prosecutors in mind, but they apply equally, as appropriate, to prosecutors appointed on an ad hoc basis.

Qualifications, selection and training

1. Persons selected as prosecutors shall be individuals of integrity and ability, with appropriate training and qualifications.
2. States shall ensure that:
 - (a) Selection criteria for prosecutors embody safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of race, colour, sex, language, religion, political or other opinion, national, social or ethnic origin, property, birth, economic or other status, except that it shall not be considered discriminatory to require a candidate for prosecutorial office to be a national of the country concerned;
 - (b) Prosecutors have appropriate education and training and should be made aware of the ideals and ethical duties of their office, of the constitutional and statutory protections for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognized by national and international law.

Status and conditions of service

3. Prosecutors, as essential agents of the administration of justice, shall at all times maintain the honour and dignity of their profession.
4. States shall ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability.
5. Prosecutors and their families shall be physically protected by the authorities when their personal safety is threatened as a result of the discharge of prosecutorial functions.
6. Reasonable conditions of service of prosecutors, adequate remuneration and, where applicable, tenure, pension and age of retirement shall be set out by law or published rules or regulations.

7. Promotion of prosecutors, wherever such a system exists, shall be based on objective factors, in particular professional qualifications, ability, integrity and experience, and decided upon in accordance with fair and impartial procedures.

Freedom of expression and association

8. Prosecutors like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional disadvantage by reason of their lawful action or their membership in a lawful organization. In exercising these rights, prosecutors shall always conduct themselves in accordance with the law and the recognized standards and ethics of their profession.
9. Prosecutors shall be free to form and join professional associations or other organizations to represent their interests, to promote their professional training and to protect their status.

Role in criminal proceedings

10. The office of prosecutors shall be strictly separated from judicial functions.
11. Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest.
12. Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.
13. In the performance of their duties, prosecutors shall:
 - (a) Carry out their functions impartially and avoid all political, social, religious, racial, cultural, sexual or any other kind of discrimination;
 - (b) Protect the public interest, act with objectivity, take proper account of the position of the suspect and the victim, and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;
 - (c) Keep matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise;
 - (d) Consider the views and concerns of victims when their personal interests are affected and ensure that victims are informed of their rights in accordance with the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.

14. Prosecutors shall not initiate or continue prosecution, or shall make every effort to stay proceedings, when an impartial investigation shows the charge to be unfounded.
15. Prosecutors shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences.
16. When prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights, they shall refuse to use such evidence against anyone other than those who used such methods, or inform the Court accordingly, and shall take all necessary steps to ensure that those responsible for using such methods are brought to justice.

Discretionary functions

17. In countries where prosecutors are vested with discretionary functions, the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution.

Alternatives to prosecution

18. In accordance with national law, prosecutors shall give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally, or diverting criminal cases from the formal justice system, with full respect for the rights of suspect(s) and the victim(s). For this purpose, States should fully explore the possibility of adopting diversion schemes not only to alleviate excessive court loads, but also to avoid the stigmatization of pre-trial detention, indictment and conviction, as well as the possible adverse effects of imprisonment.
19. In countries where prosecutors are vested with discretionary functions as to the decision whether or not to prosecute a juvenile, special consideration shall be given to the nature and gravity of the offence, protection of society and the personality and background of the juvenile. In making that decision, prosecutors shall particularly consider available alternatives to prosecution under the relevant juvenile justice laws and procedures. Prosecutors shall use their best efforts to take prosecutory action against juveniles only to the extent strictly necessary.

Relations with other government agencies or institutions

20. In order to ensure the fairness and effectiveness of prosecution, prosecutors shall strive to cooperate with the police, the courts, the legal profession, public defenders and other government agencies or institutions.

Disciplinary proceedings

21. Disciplinary offences of prosecutors shall be based on law or lawful regulations. Complaints against prosecutors which allege that they acted in a manner clearly out of the range of professional standards shall be processed expeditiously and fairly under appropriate procedures. Prosecutors shall have the right to a fair hearing. The decision shall be subject to independent review.
22. Disciplinary proceedings against prosecutors shall guarantee an objective evaluation and decision. They shall be determined in accordance with the law, the code of professional conduct and other established standards and ethics and in the light of the present Guidelines.

Observance of the Guidelines

23. Prosecutors shall respect the present Guidelines. They shall also, to the best of their capability, prevent and actively oppose any violations thereof.
24. Prosecutors who have reason to believe that a violation of the present Guidelines has occurred or is about to occur shall report the matter to their superior authorities and, where necessary, to other appropriate authorities or organs vested with reviewing or remedial power.

Annexe H

International Association of Prosecutors' Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors

Adopted by the International Association of Prosecutors on the twenty third day of April 1999

Foreword

The International Association of Prosecutors was established in June 1995 at the United Nations offices in Vienna and was formally inaugurated in September 1996 at its first General Meeting in Budapest. In the following year in Ottawa, the General Meeting approved the Objects of the Association which are now enshrined in Article 2.3 of the Association's Constitution. One of the most important of these Objects is to:

“.. promote and enhance those standards and principles which are generally recognised internationally as necessary for the proper and independent prosecution of offences.”

In support of that particular objective a committee of the Association, chaired by Mrs Retha Meintjes of South Africa, set to work to produce a set of standards for prosecutors. A first draft was circulated to the entire membership in July 1998 and the final version was approved by the Executive Committee at its Spring meeting in Amsterdam in April 1999.

The International Association of Prosecutors' Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors is a statement which will serve as an international benchmark for the conduct of individual prosecutors and of prosecution services. We intend that this should not simply be a bold statement but rather a working document for use by prosecution services to develop and reinforce their own standards. Much of the Association's efforts in the future will be directed to promoting the Standards and their use by working prosecutors throughout the world.

Standards of professional responsibility and statement of the essential duties and rights of prosecutors

WHEREAS the objects of the International Association of Prosecutors are set out in Article 2.3 of its Constitution and include the promotion of fair, effective, impartial and efficient prosecution of criminal offences, and the promotion of high standards and principles in the administration of criminal justice;

WHEREAS the United Nations, at its Eighth Congress on the Prevention of Crime and the Treatment of Offenders in Havana, Cuba in 1990, adopted Guidelines on the Role of Prosecutors;

WHEREAS the community of nations has declared the rights and freedoms of all persons in the United Nations Universal Declaration of Human Rights and subsequent international covenants, conventions and other instruments;

WHEREAS the public need to have confidence in the integrity of the criminal justice system;

WHEREAS all prosecutors play a crucial role in the administration of criminal justice;

WHEREAS the degree of involvement, if any, of prosecutors at the investigative stage varies from one jurisdiction to another;

WHEREAS the exercise of prosecutorial discretion is a grave and serious responsibility;

AND WHEREAS such exercise should be as open as possible, consistent with personal rights, sensitive to the need not to re-victimise victims and should be conducted in an objective and impartial manner;

THEREFORE the International Association of Prosecutors adopts the following as a statement of standards of professional conduct for all prosecutors and of their essential duties and rights:

1. Professional Conduct

Prosecutors shall: at all times maintain the honour and dignity of their profession; always conduct themselves professionally, in accordance with the law and the rules and ethics of their profession; at all times exercise the highest standards of integrity and care; keep themselves well-informed and abreast of relevant legal developments; strive to be, and to be seen to be, consistent, independent and impartial; always protect an accused person's right to a fair trial, and in particular ensure that evidence favourable to the accused is disclosed in accordance with the law or the requirements of a fair trial; always serve and protect the public interest; respect, protect and uphold the universal concept of human dignity and human rights.

2. Independence

2.1 The use of prosecutorial discretion, when permitted in a particular jurisdiction, should be exercised independently and be free from political interference.

2.2 If non-prosecutorial authorities have the right to give general or specific instructions to prosecutors, such instructions should be:

- transparent;
- consistent with lawful authority;
- subject to established guidelines to safeguard the actuality and the perception of prosecutorial independence.

2.3 Any right of non-prosecutorial authorities to direct the institution of proceedings or to stop legally instituted proceedings should be exercised in similar fashion.

3. Impartiality

Prosecutors shall perform their duties without fear, favour or prejudice.

In particular they shall:

- carry out their functions impartially;
- remain unaffected by individual or sectional interests and public or media pressures and shall have regard only to the public interest; act with objectivity;

- have regard to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect;
- in accordance with local law or the requirements of a fair trial, seek to ensure that all necessary and reasonable enquiries are made and the result disclosed, whether that points towards the guilt or the innocence of the suspect;
- always search for the truth and assist the court to arrive at the truth and to do justice between the community, the victim and the accused according to law and the dictates of fairness.

4. Role in criminal proceedings

4.1 Prosecutors shall perform their duties fairly, consistently and expeditiously.

4.2 Prosecutors shall perform an active role in criminal proceedings as follows: where authorised by law or practice to participate in the investigation of crime, or to exercise authority over the police or other investigators, they will do so objectively, impartially and professionally;

(b) when supervising the investigation of crime, they should ensure that the investigating services respect legal precepts and fundamental human rights; when giving advice, they will take care to remain impartial and objective;

(d) in the institution of criminal proceedings, they will proceed only when a case is well-founded upon evidence reasonably believed to be reliable and admissible, and will not continue with a prosecution in the absence of such evidence; throughout the course of the proceedings, the case will be firmly but fairly prosecuted; and not beyond what is indicated by the evidence; when, under local law and practice, they exercise a supervisory function in relation to the implementation of court decisions or perform other non-prosecutorial functions, they will always act in the public interest.

4.3 Prosecutors shall, furthermore; preserve professional confidentiality; in accordance with local law and the requirements of a fair trial, consider the views, legitimate interests and possible concerns of victims and witnesses, when their personal interests are, or might be, affected, and seek to ensure that victims and witnesses are informed of their rights; and similarly seek to ensure that any aggrieved party is informed of the right of recourse to some higher authority/court, where that is possible; safeguard the rights of the accused in co-operation with the court and other relevant agencies; disclose to the accused relevant prejudicial and beneficial information as soon as reasonably possible, in accordance with the law or the requirements of a fair trial; examine proposed evidence to ascertain if it has been lawfully or constitutionally obtained; refuse to use evidence reasonably believed to have been obtained through recourse to unlawful methods which constitute a grave violation of the suspect's human rights and particularly methods which constitute torture or cruel treatment; seek to ensure that appropriate action is taken against those responsible for using such methods; in accordance with local law and the requirements of a fair trial, give due consideration to waiving prosecution, discontinuing proceedings conditionally or unconditionally or diverting criminal cases, and particularly those involving young defendants, from the formal justice system, with full respect for the rights of suspects and victims, where such action is appropriate.

5. Co-operation

In order to ensure the fairness and effectiveness of prosecutions, prosecutors shall: co-operate with the police, the courts, the legal profession, defence counsel, public defenders and other government agencies, whether nationally or internationally; and render assistance to the prosecution services and colleagues of other jurisdictions, in accordance with the law and in a spirit of mutual co-operation.

6. Empowerment

In order to ensure that prosecutors are able to carry out their professional responsibilities independently and in accordance with these standards, prosecutors should be protected against arbitrary action by governments. In general they should be entitled: to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability; together with their families, to be physically protected by the authorities when their personal safety is threatened as a result of the proper discharge of their prosecutorial functions; to reasonable conditions of service and adequate remuneration, commensurate with the crucial role performed by them and not to have their salaries or other benefits arbitrarily diminished; to reasonable and regulated tenure, pension and age of retirement subject to conditions of employment or election in particular cases; to recruitment and promotion based on objective factors, and in particular professional qualifications, ability, integrity, performance and experience, and decided upon in accordance with fair and impartial procedures; to expeditious and fair hearings, based on law or legal regulations, where disciplinary steps are necessitated by complaints alleging action outside the range of proper professional standards; to objective evaluation and decisions in disciplinary hearings; to form and join professional associations or other organisations to represent their interests, to promote their professional training and to protect their status; and to relief from compliance with an unlawful order or an order which is contrary to professional standards or ethics.

Annexe I

The Venice Commission Report's Checklist for Evaluating the Rule of Law in Single States

1. Legality (supremacy of the law)

- (a) Does the State act on the basis of, and in accordance with the law?
- (b) Is the process for enacting law transparent, accountable and democratic?
- (c) Is the exercise of power authorised by law?
- (d) To what extent is the law applied and enforced?
- (e) To what extent does the Government operate without using law?
- (f) To what extent does the Government use incidental measures instead of general rules?
- (g) Are there exception clauses in the law of the State, allowing for special measures?
- (h) Are there internal rules ensuring that the state abides by international law?
- (i) Does the *nulla poena sine lege* system apply?

2. Legal certainty

- (a) Are all the laws published?
- (b) If there is any unwritten law, is it accessible?
- (c) Are there limits to the legal discretion granted to the executive?
- (d) Are there many exception clauses in the laws?
- (e) Are the laws written in an intelligible language?
- (f) Is retroactivity of laws prohibited?
- (g) Is there a duty to maintain the law?
- (h) Are final judgments by domestic courts called into question?
- (i) Is the case-law of the courts coherent?
- (j) Is legislation generally implementable and implemented?
- (j) Are laws foreseeable as to their effects?
- (k) Is legislative evaluation practised on a regular basis?

3. Prohibition of arbitrariness

- (a) Are there specific rules prohibiting arbitrariness?
- (b) Are there limits to discretionary power?
- (c) Is there a system of full publicity of government information?
- (d) Are reasons required for decisions?

4. Access to Justice before independent and impartial courts

- (a) Is the judiciary independent?
- (b) Is the department of public prosecution to some degree autonomous from the state apparatus? Does it act on the basis of the law and not of political expediency?
- (c) Are single judges subject to political influence or manipulation?
- (d) Is the judiciary impartial? What provisions ensure its impartiality on a case-by-case basis?
- (e) Do citizens have effective access to the judiciary, also for judicial review of governmental action?
- (f) Does the judiciary have sufficient remedial powers?
- (g) Is there a recognised, organised and independent legal profession?
- (h) Are judgments implemented?
- (i) Is respect of *res iudicata* ensured?

5. Respect for human rights

Are the following rights guaranteed (in practice)?

- (a) The right of access to justice: Do citizens have effective access to the judiciary?
- (b) The right to a legally competent judge
- (c) The right to be heard
- (d) *Ne bis in idem*
- (e) Non-retroactivity of measures
- (f) The right to an effective remedy
- (g) The presumption of innocence
- (h) The right to a fair trial

6. Non-discrimination and equality before the law

- (a) Are the laws applied generally and without discrimination?
- (b) Are there laws that discriminate against certain individuals or groups?
- (c) Are laws interpreted in a discriminatory way?
- (d) Are there individuals or groups with special legal privileges?

List of Acronyms

BSPP	Burma Socialist Programme Party
CAT	Convention Against Torture
CPC	Criminal Procedure Code
ECPM	Ensemble contre la peine de mort
HRDP	Human Rights Defenders and Promoters
IAP	International Association of Prosecutors
IBA	International Bar Association
IBAHRI	International Bar Association's Human Rights Institute
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ILO	International Labour Organization
IPU	International Parliamentary Union
MNHRC	Myanmar National Human Rights Commission
NLD	National League for Democracy
OHCHR	Office of the High Commissioner for Human Rights
PSRD	Press Scrutiny and Registration Division
SLORC	State Law and Order Restoration Council
SPDC	State Peace and Development Council
UN	United Nations
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHRC	United Nations Human Rights Council
UNODC	United Nations Office on Drugs and Crime
USDP	Union Solidarity and Development Party



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