



Human Rights
Institute

Crackdown on Human Rights Defenders, Opposition, and the Right to a Fair Trial in Myanmar

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Executive Summary

Since the *coup d'état* on 1 February 2021, the transfer of all judicial, legislative and executive powers to the military has severely undermined the principle of separation of powers and the rule of law in Myanmar. Subsequent months have seen a crackdown on human rights defenders and the opposition. The increase in the number of arbitrary detentions of a broad range of human rights defenders, including those of defence lawyers, but also many high-level politicians, the conditions in which prisoners have been detained, the lack of access to legal counsel and the manner in which trials have been conducted, have resulted in many individuals being denied their right to a fair trial. Some of the challenges to the right to a fair trial pre-existed. However, the *coup d'état* exacerbated these challenges to the point that the right to a fair trial in Myanmar right now is an illusion.

Furthermore, as of 25 July 2022, and with first executions in over 30 years, people in Myanmar face yet another challenge - of killings under the pretext of enforcing legal judgments. It is highly likely that further executions will follow. With the serious issues in relation to the rule of law and the right to a fair trial in Myanmar, as examined in this report, the executions pose a significant risk to the people in Myanmar, and especially anyone seen as a threat by the military. Such abuses in the name of law cannot be tolerated and must be condemned by the international community.

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Foreword by Dr Mark Ellis

This report examines the crucial issues pertaining to the right to a fair trial in Myanmar, notably since February 2021. On 1 February 2021, Myanmar's military, the Tatmadaw, deposed democratically elected members of the country's ruling party, the National League for Democracy, and vested power in a military junta. The *coup* has posed significant challenges to the right to a fair trial in Myanmar, adding to others already present. This report discusses these challenges, where evidence is available. As we observe the deteriorating situation in Myanmar under military rule, and especially the curtailing of human rights, it is important to note that the situation did not emerge overnight.

Myanmar's military, under General Ne Win, seized power in a coup in 1962, imprisoned the Chief Justice, subjugated the judiciary and destroyed rule of law. During Ne Win's rule, the army embarked on a systematic campaign of hatred against ethnic minorities, committed endless atrocities and deliberately exacerbated mistrust between the Burman ethnic majority and the ethnic minorities.

In 1988, the military brutally suppressed pro-democracy demonstrations and killed thousands of people. Daw Aung San Suu Kyi and others established the National League for Democracy (NLD) and campaigned for an end to military rule and for it to be replaced with democracy. She also supported the establishment of a national bar association, the Independent Lawyers' Association of Myanmar (ILAM), which was created through the efforts of the IBA. However, a new military regime took power and continued the brutal oppression of the Myanmar people. During the period from 1989 to 2010, the military held Daw Aung San Suu Kyi under house arrest for 15 years.

Prior to the 2021 *coup*, the military stood accused of committing some of the country's worst atrocities, including genocide against the Rohingya. This act resulted in close to one million of the Rohingya fleeing to Bangladesh. The military also stood accused of violating the human rights of other communities and critics of the government, as well as interfering with the judiciary.

In all these acts, and more, the military has enjoyed blatant impunity. Most significantly, the genocide against the Rohingya, (which meets the legal definition of genocide in Article II of the Convention on the Prevention and Punishment of the Crime of Genocide), has not been investigated and prosecuted in Myanmar. With the military now in power, it is clear that no investigation nor proceedings against those responsible for the Rohingya genocide will be initiated, as it is the very military in power that is accused of committing the crimes. This intolerable fact is crucial to understanding the current state of affairs in Myanmar.

The genocide against the Rohingya refers to the events from October 2016 when the Tatmadaw and other Myanmar security forces initiated a widespread and systematic campaign of violence against the Rohingya, an ethno-religious group. The atrocities were perpetrated with the specific intent to destroy them as a group, in whole or in part. In April 2022, the US State Department formally recognised the atrocities as genocide and

crimes against humanity. In addition, these atrocities were well documented by UN bodies, including the Independent International Fact-Finding Mission on Myanmar and the Independent Investigative Mechanism for Myanmar. The atrocities are currently being investigated by the International Court of Justice, in proceedings initiated by The Gambia, and by the International Criminal Court, which has recognised its jurisdiction in the border-crossing case of Myanmar/Bangladesh.

Thus, internationally, steps are being taken to ensure justice and accountability for the Rohingya. However, domestically, justice and accountability are a total illusion. An initial investigation into the atrocities in Myanmar was a sham and there have been no prosecutions of those responsible for the Rohingya genocide. This demonstrates much about the state of the rule of law in Myanmar.

Even more distressing was the resounding silence of State Counsellor Daw Aung San Suu Kyi, in speaking out against the genocide, or even acknowledging its existence. Her position was that if crimes did, in fact, occur, it was a matter for Myanmar's military justice system to investigate and prosecute. Moreover, in subsequent years when the horrifying scale of the atrocities against the Rohingya was even more irrefutable, the crimes were again denied by Myanmar and State Counsellor Daw Aung San Suu Kyi when she defended the military before the International Court of Justice, testifying that the atrocities against the Rohingya were *not* genocide, calling the allegations 'misleading.' Her personal advocacy, in the face of an overwhelming case, resulted in outrage from much of the international legal community and placed a dark shadow over her legacy. Some months later, the same military she had defended turned against her, detained her and brought numerous charges against her.

The lack of access to justice for over a million Rohingya who have been subjected to a long list of atrocities is one of the most glaring violations of the right to a fair trial in recent years. That issue requires a further and separate inquiry.

Impunity always begets further crimes and human rights violations. To paraphrase Pastor Martin Niemöller, when the military came for the Rohingya, State Counsellor Daw Aung San Suu Kyi made a shameful decision not to speak out. Then they came for her, and for lawyers, human rights defenders, and many others, and there was no one left to speak for them. It was all foreseeable. Today in Myanmar, we see once again what happens when impunity overrides accountability.

The military takeover targeted opposing politicians, human rights defenders, lawyers, journalists and many others. As they continue to be arrested and detained, they are denied the fundamental right to a fair trial and face a Kafkaesque process. We have seen this in the case of State Counsellor Daw Aung San Suu Kyi and other political leaders, and most distressing we have seen this in cases of thousands of other victims, whose voices will never be heard. All of them must be granted the right to a fair trial, in accordance with international standards. However, as long as the military clings to power, the right to a fair trial in Myanmar will continue to be denied and a charade of justice presented to the world.

Dr Mark Ellis

Executive Director of the International Bar Association

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(The foreword was written by Dr Mark Ellis and attributed solely to him)

1. Introduction

In February 2021, State Counsellor Daw Aung San Suu Kyi and President U Win Myint were arrested, deposed and charged with multiple offences. The high-profile nature of the cases - involving top political leaders - the significant implications of the trials on human rights and concerns about the general state of rule of law in Myanmar, led the IBAHRI to work with experts to monitor the trials. Initially, the IBAHRI was tasked to provide a secretariat to a panel that was meant to conduct an independent assessment of the trials of State Counsellor Daw Aung San Suu Kyi and President U Win Myint and be a signatory to periodic written reports detailing whether the trials conform to due process requirements and internationally accepted standards on fair trials. However, as the panel was not able to conduct a trial monitor, its work ceased.

This report examines some of the recent concerning reports about issues pertaining to the right to a fair trial, both before and after the *coup d'état*. **Section two** explains the *coup d'état* of 1 February 2021 and the targeting of human rights defenders, lawyers, politicians and others that followed. **Section three** discusses the right to a fair trial, both under international law and domestic law in Myanmar and summarises some general fair trial and due process concerns as expressed by governments, UN mechanisms and NGOs. **Section four** delves into specific concerns. **Section five** comments on the case of State Counsellor Daw Aung San Suu Kyi and President U Win Myint. **Section six** provides concluding remarks and calls for action.

2. The *Coup d'état* on 1 February 2021

On 1 February 2021, the Myanmar military overthrew the civilian government in a *coup d'état*. After announcing itself as the 'State Administrative Council' (SAC), according to many reports coming from reliable international and domestic sources, the junta began its campaign of terror perpetrating human rights violations, including killings, assaults, torture, arbitrary detention, and probable enforced disappearances, and much more. The SAC also enforced legislation and policies to suppress freedom of expression, freedom of peaceful assembly and association, and the right to privacy. As the UN commented on the developments, 'the coup completely overturned the rule of law in Myanmar.'¹ Among the human rights violations was the crackdown on politicians, human rights defenders, lawyers and many others. In July 2022, the the Independent Investigative Mechanism for Myanmar found that 'since the military takeover in February 2021, crimes have been committed in Myanmar on a scale and in a manner that constitutes a widespread and systematic attack against a civilian population. The available evidence suggests that the crimes against humanity of murder; torture; deportation and forcible transfer; rape and other forms of sexual violence; persecution; and imprisonment have been committed.'²

The Targeting of Human Rights Defenders, Lawyers and Others

In September 2021, Thomas H. Andrews, the UN Special Rapporteur on the situation of human rights in Myanmar, reported the *de facto* situation in the country finding that the use of collective punishment and hostage-taking have been particularly problematic since the coup.³ The junta forces have arbitrarily detained at least 177 individuals as punishment and/or as hostages after their initial target evaded arrest. Furthermore, according to Human Rights Watch, the authorities have detained more than 100 politicians, election officials, journalists, activists, and protesters, and refused to confirm their whereabouts or conditions of detention.⁴

As of 31 August 2021, at least 7,701 people had been detained since the coup and 6,069 of those were currently detained and/or sentenced.⁵ The UN Special Rapporteur on the situation of human rights in Myanmar stated that 'these mass arbitrary detentions violate Articles 9, 10, and 11 of the Universal Declaration of Human Rights.'⁶ Concerns have been raised about the move of judicial proceedings into prisons and the impact this will have on fair trial rights and access to legal counsel.⁷

1 UN Human Rights Council, 'Report of the Special Rapporteur on the situation of human rights in Myanmar, Thomas H. Andrews', UNHRC 46th Session, UN Doc. A/HRC/46/56.

2 UN HRC, Report of the Independent Investigative Mechanism for Myanmar (12 July 2022), A/HRC/51/4. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/405/24/PDF/G2240524.pdf?OpenElement>.

3 UN General Assembly, Situation of human rights in Myanmar, UNGA 76th Session. UN Doc. A/76/314.

4 Ibid.

5 Ibid.

6 UN Human Rights Council, 'Report of the Special Rapporteur on the situation of human rights in Myanmar, Thomas H. Andrews', UNHRC 46th Session, UN Doc. A/HRC/46/56.

7 UN General Assembly, Situation of human rights in Myanmar, UNGA 76th Session. UN Doc. A/76/314. para. 63

Myanmar's junta has also arrested defence lawyers. Targeting lawyers for their work defending political prisoners contravenes the United Nations Basic Principles on the Role of Lawyers. Under the Basic Principles, lawyers must be permitted to perform all of their professional functions without intimidation, hindrance, harassment, or improper interference, and should not be subject to civil or criminal penalties for good faith statements made in defence of their clients.

Human Rights Watch reported that security forces have frequently detained family members of individuals when they were unable to find the person that they sought to arrest.⁸ Such arrests of family members included children and elderly. The collective punishment of family members is a violation of their right to liberty and security of person as well as a violation of their right to a fair trial.

In 2022, media reported on several trials of young activists and their harsh sentencing, including the death sentence. Among others, a student activist was arrested after putting up posters that criticised the junta and was later given a three-year prison sentence.⁹ The harsh sentencing of young people is aimed at discouraging other young people from protesting.

In June 2022, the military announced that it would proceed with some of the executions, for the first time since taking over the power and conducting a crackdown on opposition activists, human rights defenders, journalists and others, and first judicial executions in more than 30 years. On 25 July 2022, four democracy activists, Ko Jimmy (also known as Kyaw Min Yu), Phyo Zeya Thaw, Hla Myo Aung and Aung Thura Zaw, were executed by Myanmar's military.¹⁰ This was the first execution in Myanmar since 1988. Shortly after, the Independent Investigative Mechanism for Myanmar commented on these cases finding that, 'None of the trial proceedings were public and the judgments are not publicly accessible. A fundamental attribute of a fair trial under international law is that it be held in public to the greatest extent possible, with exceptions tailored as narrowly as possible to the justification, such as national security considerations. **Yet the imposition of sentences on the basis of secret proceedings is indicative of the commission of the crime of imprisonment and, in the case of the imposition of the death penalty, could constitute the crime of murder, openly carried out by an organ of government.**¹¹

The Targeting of Political Leaders

Government dissent leaders and protesters have been facing extrajudicial killings, torture, arbitrary arrests, among others.¹² Many elected representatives and civil society leaders are now hiding from the military and police. Amnesty International's Crisis Evidence Lab reported security forces to appear to be implementing

8 Human Rights Watch, 'Myanmar: Events of 2021' (World Report, 2022). Available at: <https://www.hrw.org/world-report/2022/country-chapters/myanmar-burma>.

9 See: <https://www.myanmar-now.org/en/news/student-activist-handed-three-year-sentence-by-insein-prison-court>.

10 Zubaidah Abdul Jalil, 'Myanmar: Military executes four democracy activists including ex-MP' BBC (25 July 2022). Available at: <https://www.bbc.co.uk/news/world-asia-62287815>.

11 UN HRC, Report of the Independent Investigative Mechanism for Myanmar (12 July 2022), A/HRC/51/4. Available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G22/405/24/PDF/G2240524.pdf?OpenElement>.

12 Pwint Htun, "Beyond the Coup in Myanmar: In Accordance With the Law"- How the Military Perverts Rule of Law to Oppress Civilians' (Just Security Series, 21 April 2021). Available at: <https://www.justsecurity.org/75904/beyond-the-coup-in-myanmar-in-accordance-with-the-law-how-the-military-perverts-rule-of-law-to-oppress-civilians/>.

planned, systematic strategies including the ramped-up use of lethal force.¹³ Among such planned and systematic strategies, representatives from the National League for Democracy (NLD) have been arrested, tortured, and killed as well.¹⁴

On 1 February 2021, State Counsellor Daw Aung San Suu Kyi and President U Win Myint were arrested, at what should have been the opening of the new parliament, remanded in custody until 15 February 2021 and subsequently detained. Both have been facing several charges in three courts. Han Thar Myint, politician who sat on the NLD Central Executive Committee (CEC), and U Nyan Win, lawyer and CEC member of the NLD, were also detained.

On 6 December 2021, State Counsellor Daw Aung San Suu Kyi and President U Win Myint were found guilty of the offence under Section 505(b) of the Penal Code (offence of incitement) and under Section 25 of the Disaster Management Law (offence of breaking Covid rules). Both political leaders were each sentenced to four years, later reduced to two. On 10 January 2022, State Counsellor Daw Aung San Suu Kyi received a two-year sentence for breaching the export-import law by importing and owning walkie-talkies, one year for having a set of signal jammers. In April 2022, a court sentenced State Counsellor Daw Aung San Suu Kyi to five years in jail after finding her guilty on 11 counts of corruption. On 4 May 2022, the Supreme Court struck down an appeal from State Counsellor Daw Aung San Suu Kyi against the jail sentence for the corruption charges. In June 2022, State Counsellor Daw Aung San Suu Kyi was moved to solitary confinement inside a prison compound in Naypyidaw.¹⁵

¹³ Amnesty International, 'Myanmar: Vast arsenal and notorious troops deployed during nationwide 'killing spree' protest crackdown- new research' (News, 11 March 2021). Available at: <https://www.amnesty.org/en/latest/news/2021/03/myanmar-arsenal-troops-deployed-crackdown/>

¹⁴ Irrawaddy, 'Another NLD member dies while detained by Myanmar junta forces' (News, 9 March 2021). Available at: <https://www.irrawaddy.com/news/burma/another-nld-member-dies-detained-myanmar-junta-forces.html>.

¹⁵ See for example: <https://www.theguardian.com/world/2022/jun/23/aung-san-suu-kyi-trial-moved-to-prison-in-myanmars-capital>.

3. The Right to a Fair Trial in Myanmar

The following section identifies some of the international standards on the right to a fair trial and the specific provisions in the domestic law of Myanmar.

1. The International Law

The right to a fair trial is entrenched in international law, by the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). The UDHR is not legally binding, however, many of its provisions constitute part of customary international law, and as such, bind all States. Furthermore, Myanmar voted in favour of the UDHR, thus establishing its support. While Myanmar has not ratified the ICCPR, nonetheless, the articles on due process and the right to a fair trial within this international covenant are reflective of customary international law. As Clooney and Webb note, 'there is strong evidence that the right [to a fair trial] as a whole, as well as most of the 13 component rights set out in Article 14 of the ICCPR, have achieved customary status.'¹⁶ As they argue, the factors in support of recognition the right to a fair trial as part of customary international law include: 'treaty practice, the law applicable in armed conflicts, its non-derogable nature, suggestions that it is a peremptory norm of general international law (*jus cogens*), and the practice on reservations.'¹⁷

The UDHR

Article 10 of the UDHR sets out the right to a fair trial: 'Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.' Further relevant provisions include:

Article 3: The right to life, liberty and security;

Article 5: The prohibition against torture or cruel, inhuman or degrading treatment or punishment;

Article 6: The right to recognition everywhere as a person before the law;

Article 7: Equality before the law;

Article 8: The right to an effective remedy;

¹⁶ Amal Clooney and Philippa Webb, *The Right to a Fair Trial in International Law* (Oxford University press, 2021) 13. See also: Judge Patrick Robinson, 'The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY' (2009) 3 Berkeley Journal for International Law 5.

¹⁷ Ibid., 14.

Article 9: The prohibition of arbitrary arrests or detentions; and

Article 11: The right to presumption of innocence and no ex-post-facto law.

ICCPR

Article 14 of the ICCPR affirms that:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

Other relevant provisions include:

Article 6: The right to life;

Article 7: The right not to be tortured or subject to cruel, inhuman or degrading treatment or punishment;

Articles 9 and 10: The rights to liberty and habeas corpus;

Article 11: The right not to be imprisoned due to a contractual obligation;

Article 15: No ex-post-facto laws;

Article 16: The right to equal recognition before the law; and

Article 26: The right to non-discrimination and equal protection of the law.

Myanmar is one of 10 signatories to the Association of Southeast Asian Nations (ASEAN) Charter¹⁸ Article 2(h) requires states to adhere to the rule of law, good governance, the principles of democracy, and constitutional government. According to Article 2(i), Member States must respect fundamental freedoms and promote and protect human rights. Article 5(2) obligates States to take all necessary measures, including the enactment of appropriate domestic legislation, to effectively implement the provisions of the Charter. In case of a serious breach of the Charter or non-compliance, under Article 20(4), the matter is referred to the ASEAN summit for decision.

¹⁸ The ASEAN Charter 2007. Available at: <https://asean.org/wp-content/uploads/images/archive/publications/ASEAN-Charter.pdf>.

2. The Domestic Law

The law of Myanmar contains several provisions with elements pertaining to the right to a fair trial including the Constitution of the Republic of the Union of Myanmar (2008) (the 2008 Constitution) as well as several provisions on criminal procedure, such as the Code of Criminal Procedure (Code of Civil Procedure [India Act V, 1908] (as amended 2014); the Penal Code [India Act XLV, 1860] (as amended 2016); and the Code of Criminal Procedure [India Act V, 1898] (as amended 2016).

Chapter I of the 2008 Constitution, contains 48 articles which are the basic principles of the Union. Among them, Article 6 of the 2008 Constitution states that 'The Union's consistent objectives are: (...) enhancing the eternal principles of Justice, Liberty and Equality in the Union.'

Article 19 of the 2008 Constitution further affirms that:

The following are prescribed as judicial principles:

- a. to administer justice independently according to law;
- b. to dispense justice in open court unless otherwise prohibited by law;
- c. to guarantee in all cases the right of defence and the right of appeal under law.

Other fair trial rights within the basic principles of the 2008 Constitution include:

Article 11: Separation of powers among the three branches of government;

Article 21(a): Every citizen shall enjoy the right of equality, the right of liberty and the right of justice, as prescribed in this Constitution;

Articles 43: No Penal law shall be enacted to provide retrospective effect.;

Article 44: No penalty shall be prescribed that violates human dignity.

Chapter VIII contains provisions on citizens, fundamental rights and duties of the citizens. Among others, Article 375 of the 2008 Constitution affirms that 'An accused shall have the right of defence in accord with the law.'

Other fair trial rights within Chapter VIII of the 2008 Constitution include:

Article 347: The right to equal rights and protection before the law;

Article 348: The right to non-discrimination;

Articles 353 and 376: The rights to life and liberty, including that a person shall not be held in detention for longer than 24 hours without the order of a judge (subject to exceptions for security, law and order and the public's interest);

Articles 373: The rights to no ex post facto laws and no excessive punishments;

Article 374: The right to be free from double jeopardy; and

Articles 378(a): The right to file writ petitions, including (1) habeas corpus.

3. General Fair Trial and Due Process Concerns

While the aforementioned law should provide a foundation for the right to a fair trial, the empirical reality suggests otherwise. Several international and regional bodies and other actors have assessed that the right to a fair trial is not respected in Myanmar.¹⁹

Among some of the most serious concerns raised is the issue of courts being used for political ends. Indeed, the US State Department assessed that 'the government [of Myanmar] manipulated the courts for political ends and sometimes deprived citizens of due process and the right to a fair trial, particularly in freedom of expression cases.'²⁰ There is a serious threat to the separation of powers principle due to the close relationship between the military and courts, whereby 'the military and the government directly and indirectly exerted influence over the outcome of cases.'²¹ For example, it was reported that ex-military personnel, who served in key positions, pressured judicial officials in cases involving military interests, such as investments in military-owned enterprises.²² This is a concern that existed even before the 2021 coup. However, as the military is now in power, it is clear that their influence over the judiciary will only increase.

Reportedly, corruption is a significant challenge in Myanmar. According to civil society reports, there is evidence that 'officials at all levels received illegal payments at all stages of the legal process for purposes ranging from influencing routine matters, such as access to a detainee in police custody, to substantive decisions, such as fixing the outcome of a case.'²³

The Working Group on the Universal Periodic Review found that:

18. OHCHR stated that the weakness and **lack of independence of the judiciary** remained detrimental to the rule of law. **The influence of the military over civilian court proceedings, widespread corruption, violations of basic fair trial rights, and the reluctance of the prosecution to accept petitions from victims of gross human rights violations to initiate criminal proceedings**, affected both minorities and the majority population. Legal representation and access to judicial remedies were further compromised by the difficult economic situation of most victims. The barriers routinely faced in the justice system by minorities, particularly women, and the general mistrust of the State, meant that the majority of people did not utilise formal justice mechanisms. **Lawyers, and victims or their families, were often subjected**

19 See for example, US Department of State, 2020 Country Reports on Human Rights Practices: Burma, (30 March 2021). Available at: <https://www.state.gov/reports/2020-country-reports-on-human-rights-practices/burma/>.

20 Ibid.

21 bid.

22 Ibid.

23 Ibid.

to intimidation, reprisals and disciplinary action. The Special Rapporteur on Myanmar recommended that all actors in the justice sector genuinely implement the reforms that had been undertaken, and meaningfully engage in further reforms to improve the independence of the judiciary and respect for fair trial rights. Other mechanisms made similar recommendations.²⁴

Furthermore, the Working Group on the Universal Periodic Review provided a summary of stakeholders' submissions noting the following:

20. ICJ and JS9 noted that the **judiciary lacked independence** and judges were not accustomed to holding the Government accountable. The executive branch, particularly **the military and the police, continued to wield undue influence on the judiciary. (...)**

24. JS10 highlighted that Myanmar had not consistently upheld the necessary guarantees for the proper functioning of the legal profession to fulfil the requirements set out in the UN Basic Principles on the Role of Lawyers. **Some lawyers working on sensitive cases had been subjected to or threatened with prosecution.**

25. JS10 expressed concern that the Myanmar Bar Council was not yet completely independent while welcoming the establishment of the Independent Lawyers' Association of Myanmar.²⁵

In their submission to the stakeholders' report, Amnesty International expressed concern that the 2008 Constitution perpetuated a culture of impunity for military violations as it established military control over military judicial processes.²⁶ Furthermore, Myanmar security forces continued to enjoy widespread impunity and that crucial trial safeguards were missing.

The situation has only deteriorated after the 2021 coup. On 24 April 2021, ASEAN leaders convened a meeting to discuss the developments in Myanmar, express their concern on the situation in the country and work towards a resolution. The leaders, in their five-point consensus, requested: 'the immediate cessation of violence in Myanmar; constructive dialogue among all parties concerned to seek a peaceful solution in the interests of the people; mediation to be facilitated by an envoy of ASEAN's chair, with the assistance of the secretary-general; humanitarian assistance provided by ASEAN's AHA Centre;²⁷ and a visit by the special envoy and delegation to Myanmar to meet all parties concerned.'²⁸

In July 2021, the American Bar Association wrote to Senior General Min Aung Hlaing regarding the Rule of Law, Independence of the Judiciary and Legal Profession, and Respect for Human Rights in Myanmar, raising concerns about the human rights violations since the 2021 coup. As it noted:

24 UN HRC, Working Group on the Universal Periodic Review, Compilation on Myanmar, 12 November 2020, UN Doc. A/HRC/WG.6/37/MMR/2. [emphasis added]

25 UN HRC, Working Group on the Universal Periodic Review, Summary of Stakeholders' submissions on Myanmar, 12 November 2020, UN Doc. A/HRC/WG.6/37/MMR/3.

26 Amnesty International, Amnesty International submission for the Universal Periodic Review of Myanmar (March 2020). Available at: <https://uprdoc.ohchr.org/uprweb/downloadfile.aspx?filename=8305&file=EnglishTranslation>.

27 ASEAN Coordinating Centre for Humanitarian Assistance on disaster management.

28 Ry Sochan, Cambodia PM to continue pushing for adherence to ASEAN 5-point consensus, (Asia News Network, 8 February 2022). Available at: <https://asianews.network/cambodia-pm-to-continue-pushing-for-adherence-to-asean-5-point-consensus/>.

These actions, contrary to Myanmar's obligations under Article 2h of the ASEAN Charter to "[adhere] to the rule of law, good governance, the principles of democracy and constitutional government," have displaced Myanmar civilian rule, failed to respect the results of the November 2020 election, and resulted in the failure to seat all duly elected members of Parliament, including those in the Committee Representing Pyidaungsu Hluttaw. The ABA also condemns the military's actions that undermine Myanmar's judicial system and the independence of its lawyers and judges. These include the declaration of Martial Law Orders by its State Administration Council that usurp judicial powers in six townships. Further, the ABA expresses serious concern about the arrests and detention of defence attorneys, an issue of particular importance to the ABA because of their impact on the rule of law in Myanmar and contravention of the principle of independence of lawyers.²⁹

As the UN Special Rapporteur on the situation of human rights in Myanmar, Thomas H. Andrews, emphasised in his 2021 report: 'The junta has steadily eroded the rule of law in Myanmar.'³⁰ In the Country Annual Results Report for Myanmar, the UN raised the issue of the detention of the democratically elected political leaders and the transfer of all legislative, executive and judicial powers to the military that occurred in February 2021.³¹

In September 2021, the International Commission of Jurists drew attention to the number of arbitrary arrests, detainments and the detainees not being granted the right to a fair trial.³² Additionally, they raised concerns about the continuous threats faced by lawyers used as a means to deter them from representing their clients. This demonstrates a further restriction on detainees' rights to a fair trial. Finally, they highlighted the lack of national measures to hold to account those responsible for gross human rights violations.

As stated by Rupert Colville, Spokesperson for the UN High Commissioner for Human Rights, in December 2021, 'More than 10 months since Myanmar's military overthrew the democratically elected Government in a February coup, the country's human rights situation is deepening on an unprecedented scale, with serious violations reported daily of the rights to life, liberty and security of person, the prohibition against torture, the right to a fair trial, and freedom of expression.'³³ Further similar concerns followed in subsequent months.

29 American Bar Association, Letter Re Rule of Law, Independence of the Judiciary and Legal Profession, and Respect for Human Rights in Myanmar (5 July 2021). Available at: https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/aba-president-letter-rule-of-law-myanmar.pdf.

30 UN General Assembly, Situation of human rights in Myanmar, UNGA 76th Session. UN Doc. A/76/314. para. 59

31 UN Development Coordination Office, 2020 UN Country Annual Results Report Myanmar (September 2021). Available at: https://myanmar.un.org/sites/default/files/2021-09/UNCT%20Annual%20Report%202020_Web.pdf.

32 International Commission of Jurists, 'Myanmar: ICJ expresses concern at UN at human rights and rule of law situation' (23 September 2021). Available at: <https://www.icj.org/myanmar-icj-expresses-concern-at-un-at-human-rights-and-rule-of-law-situation/#:~:text=Myanmar%3A%20ICJ%20expresses%20concern%20at%20UN%20at%20human,update%20by%20the%20High%20Commissioner%20for%20Human%20Rights.>

33 Rupert Coville, Press briefing notes on Myanmar (10 December 2021). Available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27948>.

4. Specific Rights and Concerns

This section considers the specific concerns in relation to the different aspects of the right to a fair trial.

1. Rights to Liberty and Not to be Arbitrarily Detained

International law

International law affirms the rights to liberty and not to be arbitrarily detained. Article 3 of the UDHR states that: 'everyone has the right to life, liberty and security of person' while Article 9 of the ICCPR expands this by legislating that: 'No one shall be subject to arbitrary arrest or detention or shall be deprived of his or her liberty except in accordance with procedures established by law.'

Article 9(3) of the ICCPR provides that: 'It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and should occasion arise, for the execution of the judgement.'

According to international law, pre-trial detention should only be used in exceptional circumstances, for example, where it is likely that the accused would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party.³⁴ As such, the courts must consider the alternatives to pre-trial detention.³⁵

Article 14(2) of the ICCPR³⁶ is also relevant as persistent, arbitrary deprivations of liberty may amount to a violation of an individual's right to be presumed innocent until proven guilty.

³⁴ *Hill and Hill v Spain*, UN Human Rights Committee, Communication No 526/1993, UN Doc CCPR/C/59/D/526/1993, 12.3.

³⁵ UN Human Rights Committee, General Comment No 35: Article 9 – Right to liberty and security of person, UN Doc CCPR/C/GC/35, 38.

³⁶ UN Human Rights Committee, General Comment No 32: Article 14 – Right to equality before courts and tribunals and to a fair trial, UN Doc CCPR/C.GC/32, 39.

Domestic law

The right to liberty is affirmed in Article 21(b) and Article 376 of the 2008 Constitution³⁷ as consolidated by the Code of Criminal Procedure.³⁸ An accused may be remanded in custody during the police investigation for 15 days where their potential punishment is fewer than seven years or 30 days where they may face seven or more years.³⁹ Any extension would need to be reviewed by a judge at the end of the period, and can only be granted where 'sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand.'⁴⁰

According to Section 1785 of the Burma Police Manual,⁴¹ 'bail is a right of those accused and is fixed with reference to the social status of the prisoner and character of the offence. Detention is viewed as an alternative punishment but should not be the original order.' Furthermore, as per Section 36(g) of the Attorney-General of the Union Law 2010,⁴² law officers have a duty to 'scrutinis[e] as to whether or not the request of remand by the prosecuting body is in conformity with the existing laws, orders and directives.' Bail applications must be made regardless of how an offence is categorised, with the exception of death penalty cases when there are reasonable grounds for believing that the accused committed the offence.

37 Article 21(b) of the 2008 Constitution: 'No citizen shall be placed in custody for more than 24 hours without the permission of a Court.'

Article 376: 'No person shall, except matters on precautionary measures taken for the security of the Union or prevalence of law and order, peace and tranquillity in accord with the law in the interest of the public, or the matters permitted according to an existing law, be held in custody for more than 24 hours without the remand of a competent magistrate.'

38 Code of Criminal Procedure 1898.

Section 61: 'No police-officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to [the police-station, and from there to the Magistrate's Court].'

Section 167: '(1) Whenever any person is arrested and detained in custody, and if appears that the investigation cannot be completed within the period of twenty four hours fixed by section 61, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police-station or the police-officer making the investigation (***)

(Note) shall forthwith transmit to the nearest Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(Note)(2) The Magistrate to whom the accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time authorise the detention of the accused in such custody as such Magistrate thinks fit. But the detention of such person shall not exceed in the whole 30 days where a person is accused of an offence punishable with rigorous imprisonment for a term of not less than seven years, and where a person is accused of an offence punishable with rigorous imprisonment for a term of less than seven years, the detention of such person shall not exceed 15 days in the whole. If such Magistrate has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction: Provided that no Magistrate of the third class, shall authorise detention in the custody of the police

(3) A Magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing.

(4) If such an order is given by a Magistrate other than the District Magistrate or Subdivisional Magistrate, he shall forward a copy of his order, with his reasons for making it, to the Magistrate to whom he is immediately subordinate.'

39 Section 167(2) of the Code of Criminal Procedure.

40 Section 344 of the Code of Criminal Procedure: '(1) If, from the absence of a witness or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of, or adjourn any inquiry or trial, the Court may, if it thinks fit, by order in writing stating the reasons therefor, from time to time, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody: Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time.

(2) Every order made under this section by a Court other than the High Court shall be in writing signed by the presiding Judge or Magistrate.

Explanation. ---- If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.'

41 The Burma Police Manual, 1940, VII, 5th edition. Available at: https://www.burmalibrary.org/docs17/Police_Manual-Vol.2ocr-bw-en.pdf.

42 Union Attorney General's Office, Myanmar Laws, (2010), 496. Available at: https://www.burmalibrary.org/docs23/SPDC_laws_2010-tpo.pdf.

Notably, according to Section 17(a) of the Myanmar Police Force's Maintenance of Discipline Law, 'If a person subject to this Law: (a) unnecessarily detains a person who should not be arrested under the law, in arrest or confinement or fails to bring his case before the proper authority for investigation... he shall, on conviction by a Police Court, be punished with imprisonment for a term which may extend to 3 years or such less punishment as is mentioned in this Law.'⁴³ This demonstrates that domestic legislation exists to hold to account officers who breach the right to liberty and not to be arbitrarily detained.

Reported Violations

Post-Coup

The report of the UN High Commissioner for Human Rights on the situation of human rights in Myanmar since February 2021 identified a number of violations of this right.⁴⁴ Among others, the State Administration Council illegally amended legislation allowing security forces extended powers of arrest and detention, which have been employed to threaten and intimidate those opposing the military rule. The report highlights how the laws were initially used to detain hundreds of government officials. However, subsequently doctors, nurses, students, educators, those willing to criticise the coup and participate in peaceful demonstrations began to be targeted. The UN reports that between 1 February 2021 and 15 March 2022, 12,500 people were detained by security forces.⁴⁵

Specific violations have also been reported.

Myanmar's junta has arrested, at least, six defence lawyers: Thein Hlaing Tun, Ayar Linn Htut, Thet Tun Oo, May Zun Ko, Nilar and Hpone Myat Thu.⁴⁶

Mr. U Thein Hlaing Tun, a lawyer representing another of Myanmar's jailed elected leaders was arrested in May 2021 as he tried to meet with his client at the same special court in Naypyidaw where State Counsellor Daw Aung San Suu Kyi appeared.⁴⁷ Mr. Thein Hlaing Tun was charged with violating a section of the penal code criminalising perceived slights against the Tatmadaw.

On 1 May 2021, Daw May Zun Ko was beaten and arrested by SAC junta forces in Mandalay where she provided free legal representation to detained child protesters.⁴⁸

On 27 May 2021, lawyer Ayar Linn Htut was arrested while representing political prisoners. The arrest took place at Hinthada District Court, in Ayeyarwady Region. Ayar Linn Htut has since been charged under Section 505(a) of the Penal Code at the Hinthada Police Station.⁴⁹

43 The Myanmar Police Force's Maintenance of Discipline Law, No.4/95m 1995.

44 UN Human Rights Council, Situation of human rights in Myanmar since 1 February 2021 (15 March 2022), UN Doc. A/HRC/49/72.

45 See: <https://news.un.org/en/story/2022/03/1113972>.

46 Human Rights Watch, Myanmar: Security Forces Arrest Defence Lawyers: 'Wrongful Prosecutions Violate Rights to Counsel, Fair Trial of Accused' (News, 2021). Available at: <https://www.hrw.org/news/2021/07/02/myanmar-security-forces-arrest-defense-lawyers>.

47 Irrawaddy News, Twitter Post. Available at: <https://twitter.com/irrawaddynews/status/1396804810339352578>.

48 IAPL Monitoring Committee on Attacks on Lawyers, 'Burma: Rights Lawyer Daw May Zun Ko Arrested' (Post, 2021). Available at: <https://defendlawyers.wordpress.com/2021/05/02/burma-rights-lawyer-daw-may-zun-ko-arrested/>.

49 Assistance Association for Political Prisoners 'Daily Briefing in Relation to the Military Coup' (Briefing Update 2021). Available at: <https://aappb.org/?p=15407>.

On 2 June 2021, Thet Tun Oo, who is defending more than 120 political prisoners in Kachin State, was arrested by security forces as he had been acting as defence for one of his clients in Myitkyina.⁵⁰

In June 2021, Nilar and Hpone Myat Thu were arrested and charged with incitement under Section 505a of the Penal Code while near the border crossing gate to Thailand.⁵¹ Both Nilar and Hpone Myat Thu had been involved in defending political prisoners such as Kayin State's ousted chief minister Nan Khin Htwe Myint and the principal of Hpa-An Technical High School, Cho Yu Mon, both arrested days after the 2018 coup for participating in anti-regime protests.⁵²

2. Prohibition of Cruel, Inhuman and Degrading Treatment

International law

Prohibition of cruel, inhuman and degrading treatment is enshrined in several provisions, including Article 1 of the UDHR (the right to human dignity) and Article 5 (prohibition of the use of torture or cruel, inhuman or degrading treatment or punishment), and Article 7 of the ICCPR (prohibition of cruel, inhuman or degrading treatment or punishment) among others.

According to General Comment No 32, 'Article 14, paragraph 3 (g), guarantees the right not to be compelled to testify against oneself or to confess guilt. This safeguard must be understood as the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt.'⁵³ Furthermore, 'A fortiori, it is unacceptable to treat an accused person in a manner contrary to Article 7 of the Covenant in order to extract a confession. Domestic law must ensure that statements or confessions obtained in violation of Article 7 of the Covenant are excluded from the evidence, except if such material is used as evidence that torture or other treatment prohibited by this provision occurred, and that in such cases the burden is on the State to prove that statements made by the accused have been given of their own free will.'⁵⁴

Domestic law

Article 44 of the 2008 Constitution affirms the protection of human dignity. Article 353 affirms the right to life and states that: 'Nothing shall, except in accord with existing laws, be detrimental to the life and personal freedom of any person.'

Section 17(g) of the Myanmar Police Force's Maintenance of Discipline Law renders it an offence to strike or otherwise ill-treat any prisoner, person in custody or detainee.

⁵⁰ Human Rights Watch, 'Myanmar: Security Forces Arrest Defence Lawyers' (News, 2021). Available at: <https://www.hrw.org/node/379126/printable/print>.

⁵¹ Myanmar Now, 'Two lawyers arrested in Myawaddy on charges of incitement' (Myanmar Now, 2021). Available at: <https://www.myanmar-now.org/en/news/two-lawyers-arrested-in-myawaddy-on-charges-of-incitement>.

⁵² Ibid.

⁵³ UN Human Rights Committee, General Comment No 32, Art 14, Right to equality before courts and tribunals and to fair trial, 41.

⁵⁴ Ibid.

Law enforcement may use reasonable force but only where it is 'exceptional and to the minimum extent required'.⁵⁵

Reported Violations

Post-Coup

The UN Special Rapporteur on the situation of human rights in Myanmar, Thomas H. Andrews, reported a number of areas where torture and inhumane and degrading treatment has been prevalent. In prisons and labour camps, prisoners face harsh conditions. Among others, the military routinely forces prisoners to carry heavy loads of ammunition and other supplies during military operations.⁵⁶

Human Rights Watch 2022 Report recorded that many detainees, incarcerated for partaking in pro-democracy demonstrations, mentioned the torture they endured during their imprisonment. The reported methods of torture included beatings, mock executions with guns, burning with cigarettes, and rape and threatened rape.⁵⁷

The UN High Commissioner for Human Rights' 2022 report highlighted that ill-treatment and torture in custody have featured greatly since the 2021 coup.⁵⁸ Individuals have spent lengthy time periods in military facilities facing torture and other forms of ill-treatment throughout interrogations:

In Yangon Region, interviewees described detainees being held for an average of two weeks at military facilities, undergoing questioning by groups of five or more interrogators and being ill-treated until they provided some information. In Mandalay Region, one interviewee noted that, after September 2021, individuals were almost always sent to military interrogation centres for one to three weeks, during which time they were subjected to abusive treatment possibly amounting to torture. Another interviewee reported that, starting in July 2021, in Ayeyarwaddy Region, the military generally kept detainees in its custody and subjected them to treatment that may have amounted to torture. Specifically, the detainees were beaten and verbally abused, were suspended from the ceiling without food or water, were forced to stand in solitary confinement for extended periods of time, had water dripped onto the shaved frontal region of the scalp, were electrocuted, sometimes while also being injected with unidentified drugs, were forced to appear naked in front of others, were subjected to sexual violence, including rape, and were forced to ingest lard if they were Muslims.⁵⁹

The report concludes that hundreds, and potentially thousands, of people have been subjected to torture in prison in the last year.⁶⁰

55 Union Attorney-General's Office, Fair Trial Guidebook for Law Officers (2018) 18.

56 UN Human Rights Council, 'Report of the Special Rapporteur on the situation of human rights in Myanmar, Thomas H. Andrews', UNHRC 46th Session, UN Doc. A/HRC/46/56.

57 Human Rights Watch, 'Myanmar Events of 2021' (World Report, 2021). Available at: <https://www.hrw.org/world-report/2022/country-chapters/myanmar-burma>.

58 UN Human Rights Council, Situation of human rights in Myanmar since 1 February 2021 (15 March 2022), UN Doc. A/HRC/49/72.

59 Ibid., 36

60 Ibid., 70

Children have not been spared torture. According to credible reports, in Kachin State in April 2021, junta forces detained two boys, starved them for two days and interrogated them separately for five days.⁶¹ Reportedly, during interrogation, soldiers beat them, burned their legs with scalding iron rods, fired guns very close to the boys' ears and cut the ears of one of the boys with a scalpel. They were both finally released after 12 days in custody.

3. The Presumption of Innocence and the Right to Remain Silent

International Law

International law guarantees the right of every person charged with a criminal offence to be presumed innocent until proven guilty.⁶² Furthermore, Article 14(3)(g) of the ICCPR affirms that an individual cannot 'be compelled to testify against himself or to confess guilt.'

Domestic Law

The domestic law in Myanmar does not affirm the presumption of innocence or the right to remain silent. However, the presumption of innocence is specifically mentioned in the guidance produced by the Union Attorney-General's Office, 'the Fair Trial Guidebook for Law Officers.'⁶³ The document further acknowledges that during the investigation period, the accused has the right to remain silent and not to be compelled to incriminate themselves.⁶⁴

Section 256(2) of Myanmar's Code of Criminal Procedure states that: 'on entering upon his defence the accused shall be asked whether he desires to give evidence on his own behalf and the Magistrate shall warn him in the manner required by subsection (1) of section 342. If the accused decides to give evidence, his evidence shall next be taken, and after his cross-examination -and re-examination (if any) the evidence of witnesses for the defence (if any) shall be taken. If the accused declines to give evidence, he shall, before the evidence of the witnesses for the defence is taken, be examined in the manner provided by sub-section (2) of section 342.'

Furthermore, according to 342(2) of Myanmar's Code of Criminal Procedure:

(i) Notwithstanding anything contained in sub-section (1) for purpose of enabling the accused to explain any circumstances appearing evidence against him the Court may, at stage of any inquiry or trial previously warning the accused, put such questions to him as the Court considers necessary, and shall, when the accused declines to give evidence on his own behalf, for the purpose aforesaid, question him generally on the case the witnesses for the prosecution have been examined and before he is on for his defence.

(ii) The answers given by the accused to the questions put to him under the provisions of clause (i) may be taken into consideration in such inquiry or trial.

61 UN General Assembly, Situation of human rights in Myanmar, UNGA 76th Session. UN Doc. A/76/314. para. 27.

62 Article 14(2) of the ICCPR, Article 11(1) of the UDHR. See also: General Comment No 32.

63 See: Union Attorney-General's Office, Fair Trial Guidebook for Law Officers (2018) 14.

64 Ibid., 29.

(iii) The accused shall not render himself liable to punishment by refusing to answer any questions put to him under clause (i) or by giving false answers to them; but the Court and the jury (if any) may draw such inference from such refusal or answers as it thinks just.

(iv) No oath shall be administered to the accused in connection with any examination under this subsection.

The judge must inform the accused about the consequences of confessing⁶⁵ and that the court may make an adverse inference against the accused who remains silent.⁶⁶

Reported Violations

Pre-Coup

Frequent reports by defence lawyers in Myanmar regarding concern that the accused are often not afforded the presumption of innocence in practice have been documented. Lawyers expressed that judicial officers would regularly, 'treat the accused as criminals prior to hearing evidence in the case, and convict defendants even where little or no evidence is presented.'⁶⁷

Post-Coup

According to the United Nations High Commissioner for Human Rights, 'between 1 February 2021 and 31 January 2022, at least 740 individuals were sentenced, including 84 persons, two of whom were children, to death, following trials that did not meet fair trial standards.'⁶⁸ The arbitrary detentions carried out by the junta since the 2021 coup have infringed upon the right of people to be presumed innocent until proven guilty.

Judge Min Naung Khine, a member of the Civil Disobedience Movement, gave evidence of what occurs during the military trials.⁶⁹ He reported that when prisoners plead 'not guilty', the prison guards would pretend to consider the verdict, despite having already been told what the verdict will be. He stated that 'the judicial system has been destroyed and is incapable of delivering justice in cases involving politically motivated charges.'⁷⁰ Labelling defendants as criminals and convicts prior to rendering judgement demonstrates bias, and suggests that guilt has been predetermined.

65 Sections 256 and 342 of the Code of Criminal Procedure.

66 Sections 289(1) and 342(1)(b)(c) of the Code of Criminal Procedure.

67 Justice Base, 'Legal Practice Brief: 3 Presumption of Innocence and Burden of Proof' (Report 2019). Available at: <https://drive.google.com/file/d/1WM671VVOmdqTAJ-DQvbz7LMi2wMEsot8/view>.

68 UN, Report of the United Nations High Commissioner for Human Rights, Situation of human rights in Myanmar since 1 February 2021, A/HRC/49/72. para. 41.

69 Frontier, 'No justice behind bars: the coup and the judiciary' (Frontier, 17 March 2022). Available at: <https://www.frontiermyanmar.net/en/no-justice-behind-bars-the-coup-and-the-judiciary/>.

70 Ibid.

4. The Right to Necessary Guarantees for Defence

International Law

Article 11 of the UDHR affirms all necessary guarantees for defence. Article 14(3) of the ICCPR asserts that these defences include the right to legal representation, adequate time to prepare a defence and to communicate with legal representation, and this from the beginning, including during questioning by the police. Furthermore, in accordance with Principle 16 of the Basic Principles on the Role of Lawyers, the legal representation must: '(a) [be] able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) [be] 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 recognised professional duties, standards and ethics.' The Basic Principles on the Role of Lawyers prescribe that where lawyers are under threat as a result of their work, they should be provided with safeguards by the authorities.⁷¹

Similarly, several standards for prosecutors set out how they should discharge their duties. According to Principle 12 of the Guidelines on the Role of Prosecutors, they are to '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.' Furthermore, they are to: '(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; (...) and (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.'⁷²

The duties of lawyers 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.'⁷³ They are further 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'⁷⁴ and 'always loyally respect the interests of their clients.'⁷⁵

Domestic Law

Article 19(c) of the 2008 Constitution upholds the right to defence. The accused is to be given sufficient time to prepare the defence and sufficient facilities, including access to evidence that may assist the defence. As per Section 162(2) of the Code of Criminal Procedure, an accused may request and must be provided with written

⁷¹ Principle 17 of the Basic Principles on the Role of Lawyers.

⁷² Principle 13 of the Guidelines on the Role of Prosecutors.

⁷³ Principle 13 of the Basic Principles on the Role of Lawyers.

⁷⁴ Principle 14 of the Basic Principles on the Role of Lawyers.

⁷⁵ Principle 15 of the Basic Principles on the Role of Lawyers.

statements made to police officers, unless 'the Court is of opinion that any part of such statement is not relevant to the subject-matter of the inquiry or trial, or that its disclosure to the accused is not essential in the interest of justice and is also inexpedient in the public interest, it shall record such opinion (but not the reason there for) and shall exclude such part from the copy of the statement furnished to the accused.'⁷⁶ Furthermore, as per section 103(A)(10) of the Courts Manual, 'parties are entitled to obtain copies of police papers which have been admitted as exhibits and confessions which have not been admitted as exhibits either the whole or part of the proceeding at any stage.'

Reported Violations

Pre-Coup

Between 2013 and 2015, Justice Base conducted research that revealed significant concerns relating to the necessary guarantees for defence:

In 135 cases out of 155, the defendant did not receive legal representation until the first day of the inquiry stage or later. This means that in 87 percent of observed cases, partner lawyers were not present during remand hearings, which determine whether the court will detain an accused person during the investigation period. This is a crucial moment for a defendant's liberty and without representation, it is likely that most accused individuals are detained without an argument on their behalf.⁷⁷

Defendants often faced significant roadblocks to obtaining legal representation including discouragement from authorities even when aware of the right to a lawyer. Reports of police officers coercing defendants into forgoing their right to a lawyer and instead confessing to a judge in open court to reduce their sentences have been recorded. Reportedly, defendants have also been told if they retain a lawyer and exercise their right to a fair trial they would be convicted and receive a harsher sentence.⁷⁸

Challenges to the rule of law pertaining to the quality of legal representation have also been documented by Justice Base:

representation did not guarantee effective advocacy. Lawyers often failed to make relevant and necessary applications. For example, in one observed case, lawyers did not raise the issue of a juvenile defendant's age, which would have invoked special privileges under the Child Law, or the possibility of the defendant's mental illness with the court. Similarly, lawyers rarely challenged the admissibility of potentially prejudicial evidence. For 40 observations for which data is available, lawyers from either side only objected to the submission of evidence in six separate instances.⁷⁹

76 Section 162(2) of the Code of Criminal Procedure: 'When any such statement as aforesaid has been reduced into writing the Court shall, on the request of the accused, direct that the accused be furnished with a copy thereof: Provided that if the Court is of opinion that any part of such statement is not relevant to the subject-matter of the inquiry or trial, or that its disclosure to the accused is not essential in the interest of justice and is also inexpedient in the public interest, it shall record such opinion (but not the reason there for) and shall exclude such part from the copy of the statement furnished to the accused.'

77 Justice Base, 'Monitoring in Myanmar: an analysis of Myanmar compliance with fair trial rights' (2017). Available at: <https://www.myjusticemyanmar.org/sites/default/files/Justice-Base-Monitoring-in-Myanmar-An-Analysis-of-Myanmars-Compliance-with-Fair-Trial-Rights-ENG.pdf>.

78 Ibid.

79 Ibid.

Lawyers often refused to bring grievances to the Court regarding the treatment of detained defendants.⁸⁰ This reluctance often came from the fear that lawyers would then receive unfair treatment by judges in future cases. Mistreatment of the defendant while detained has gone unaddressed. Reportedly, 'in twelve cases where a defendant was forced to sign a search form or confess before a judge or reported that he or she had suffered ill-treatment by police authorities while in custody, observers only saw one lawyer raise the issue of his or her client's treatment in court.'⁸¹

Post-Coup

The UN Special Rapporteur on the situation of human rights in Myanmar, Thomas H. Andrews, reported that the junta had arbitrarily detained at least 15 attorneys in the course of their representation of clients.⁸² This not only prevents defence lawyers from providing legal representation to their clients but also creates a chilling effect on the willingness of lawyers to represent those detained.

According to a lawyer, the military courts are not following normal legal procedures: 'the code of criminal procedure stipulates some rights for defendants, but they didn't get them under this judicial system. We [lawyers] are also not able to freely meet with our clients to take instructions from them.'⁸³

The UN Special Rapporteur on the situation of human rights in Myanmar has commented on the transfer of judicial proceedings from courthouses to prisons, which has raised serious concerns regarding the right to a fair trial and access to legal counsel.⁸⁴

Challenges to the legal field as a paid profession include the unaffordability of legal representation, lack of income for lawyers, pressure from clients' families, political instability, the junta and security concerns.⁸⁵

5. The Right to a Competent, Independent and Impartial Tribunal

International Law

Article 10 of the UDHR affirms that 'everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.' This is further reaffirmed in Article 14(1) of the ICCPR. The right is absolute, and as such, is not subject to exceptions, as confirmed in General Comment No 32.⁸⁶

80 Ibid.

81 Ibid.

82 UN Human Rights Council, 'Report of the Special Rapporteur on the situation of human rights in Myanmar, Thomas H. Andrews', UNHRC 46th Session, UN Doc. A/HRC/46/56.

83 Frontier, 'No justice behind bars: the coup and the judiciary' (Frontier, 17 March 2022). Available at: <https://www.frontiermyanmar.net/en/no-justice-behind-bars-the-coup-and-the-judiciary/>.

84 UN, Report of the Special Rapporteur on the situation of human rights in Myanmar, Thomas H. Andrews, A/76/314.

85 Jurist, 'Myanmar dispatches: lawyers are starting to think that there is no point searching for justice when it does not exist anymore' (2021). Available at: <https://www.jurist.org/news/2021/09/myanmar-dispatches-lawyers-are-starting-to-think-that-there-is-no-point-searching-for-justice-when-it-does-not-exist-anymore/>.

86 General Comment No 32, 19.

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.⁸⁷ The principle of the independence of the judiciary further entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.⁸⁸

The judiciary shall:

2. ... 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. ... 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.⁸⁹

Domestic Law

Article 19(a) of the 2008 Constitution is the legal provision committing to the independence of the judiciary. Judicial independence is further guaranteed in Article 11(a): '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 Code of Judicial Ethics for Myanmar requires judges to act competently. They are further required to be responsible for the general management and control of the Court and its business and the supervision of the establishment to ensure that all duties are performed properly and all regulations are observed. Finally, the code clarifies that the discharge of judicial functions is incomplete without constant attention to administrative matters.⁹⁰

Reported Violations

Pre-Coup

Challenges to the rule of law in Myanmar, particularly competent, independent, and impartial tribunals include the instability and uneven application of laws. Human Rights Watch notes that the criminal justice system

87 Principle 1 of the Basic Principles on the Independence of the Judiciary.

88 Principle 6 of the Basic Principles on the Independence of the Judiciary.

89 Principles 2-4 of the Basic Principles on the Independence of the Judiciary.

90 Section 13 of the Code of Judicial Ethics for Myanmar.

in Myanmar does not function independently from government, military, or political influence.⁹¹ For decades, Myanmar's leaders have used the military as 'the commander-in-chief's personal army while the courts have been used to protect that army from any serious accountability.'⁹²

Post-Coup

While the judiciary may be 'acting in accordance with the law', the judiciary functions largely as a dependent body, improperly influenced, induced, pressured, threatened, and interfered with by the military.

Human Rights Watch reported sudden drastic changes in the law to suppress human rights defenders, activists, journalists, and dissenters after the 2021 coup.⁹³ In February 2021, new restrictions to then-existing telecommunications laws were added by the military to *legalise* military interception of all communications, including text messages and social media.⁹⁴ Since its adoption on 16 February 2021, hundreds of activists have been arrested without a warrant under section 505(A) of the Criminal Procedure. The amendment by the military renders any criticism of the military or the coup a criminal offence, enabling the arrest of anyone expressing dissent and subjecting them to imprisonment.⁹⁵ This applies to online or public protest. Military forces enjoy legal impunity under the military-drafted 2008 Constitution. For example, Article 445 grants blanket immunity to members of the military government, protecting them from legal accountability. Section 505(a) of Myanmar's Penal Code has been used to target media workers, as it prohibits the circulation of any information that could cause government employees or soldiers to mutiny.⁹⁶

Reported corruption within access to legal representation includes court clerks making 'deals' with lawyers to bring clients through biased suggestions due to the lack of legal knowledge and guidance for Myanmar lay-people who do not know what kind of lawyer they should choose for the legal matter they're facing.⁹⁷

The UN High Commissioner for Human Rights reported that the States Administration Council established special courts - military tribunals within prison compounds to stage trial proceedings. This removed the guarantee of judicial independence.⁹⁸ An individual reported that the court acknowledged his innocence but were under instructions to convict.

91 HRW, 'Q&A: Justice for International Crimes in Myanmar' (10 September 2018). Available at: <https://www.hrw.org/news/2018/09/10/qa-justice-international-crimes-myanmar>.

92 Pwint Htun, 'Beyond the Coup in Myanmar: "In Accordance with the Law" – How the Military Perverts Rule of Law to Oppress Civilians' (2011) Harvard Human Rights Program and International Human Rights Clinic. Available at: <https://hrp.law.harvard.edu/myanmar/beyond-the-coup-in-myanmar-in-accordance-with-the-law/>. See also: <https://www.justsecurity.org/75904/beyond-the-coup-in-myanmar-in-accordance-with-the-law-how-the-military-perverts-rule-of-law-to-oppress-civilians/>.

93 Human Rights Watch, 'Myanmar: Post-Coup Legal Changes Erode Human Rights' (HRW, 2021). Available at: <https://www.hrw.org/news/2021/03/02/myanmar-post-coup-legal-changes-erode-human-rights>.

94 Pwint Htun, 'Beyond the Coup in Myanmar: "In Accordance with the Law" – How the Military Perverts Rule of Law to Oppress Civilians' (2011) Harvard Human Rights Program and International Human Rights Clinic. Available at: <https://hrp.law.harvard.edu/myanmar/beyond-the-coup-in-myanmar-in-accordance-with-the-law/>.

95 Ibid.

96 Jayanta Kalita, 'India Must Break its 'Silence' on Myanmar Coup to Avoid Global Embarrassment' (The Irrawaddy Report, 2021). Available at: <https://www.irrawaddy.com/news/burma/india-must-break-silence-myanmar-coup-avoid-global-embarrassment.html>.

97 Jurist, 'Myanmar dispatches: 'lawyers are starting to think that there is no point searching for justice when it does not exist anymore' (2021). Available at: <https://www.jurist.org/news/2021/09/myanmar-dispatches-lawyers-are-starting-to-think-that-there-is-no-point-searching-for-justice-when-it-does-not-exist-anymore/>.

98 UN, Situation of human rights in Myanmar since 1 February 2021, Report of the UN High Commissioner for Human Rights (A/HRC/49/72) 39.

6. The Right to be Tried without Undue Delay

International Law

Article 9(3) of the ICCPR states that ‘anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release.’

Article 14(3)(c) of the ICCPR affirms that those charged with a criminal offence have the right to be tried without undue delay. General Comment No 32 clarifies that this right is not only designed to avoid keeping persons too long in a state of uncertainty about their fate and to ensure that such deprivation of liberty does not last longer than necessary in the circumstances of the specific case, but also to serve the interests of justice.⁹⁹ Furthermore, ‘this guarantee relates not only to the time between the formal charging of the accused and the time by which a trial should commence but also the time until the final judgement is on appeal.’¹⁰⁰

Domestic Law

Section 466 of the Court’s Manual states that the accused have the right to be tried as early as possible. It further affirms that: ‘the practice is prohibited of adjourning a case for days for want of time, and telling the witnesses to come again on another day... If a case cannot be taken up on the date fixed every endeavour should be made to take it up on the following day. In times of congestion of work in any Court, subordinate Magistrates should make an immediate report to the District Magistrate whenever they are forced by circumstances to adjourn a case, whether at the first or any later hearing, for any period longer than 15 days.’ According to Rule 109(e) of the Union Attorney General Rules, law officers shall conclude the original criminal case within six months otherwise, they are required to report the reason for the delay to the officer in charge.

Reported Violations

Pre-Coup

Reports suggest that hearings are typically delayed for one to two weeks; more than half of hearings are adjourned due to a police officer (functioning as the witness) being absent from the hearing.¹⁰¹ Reportedly, ‘Police officer witnesses called on behalf of law officers frequently do not appear in court when summoned. Judges enable this problem by freely granting adjournments due to the absence of witnesses. Frequent adjournments are especially concerning where defendants are denied bail pending the outcome of a trial.’¹⁰²

99 General Comment No 32, 35.

100 Ibid.

101 Justice Base, ‘Monitoring in Myanmar: an analysis of Myanmar compliance with fair trial rights’ (2017). Available at: <https://www.myjusticemyanmar.org/sites/default/files/Justice-Base-Monitoring-in-Myanmar-An-Analysis-of-Myanmars-Compliance-with-Fair-Trial-Rights-ENG.pdf>.

102 Ibid.

In order reports, Amnesty International noted that most political defendants were not permitted to seek counsel until charges were formally brought against them.¹⁰³ Police officials noted the maximum time someone may be held in custody without being charged or having access to a lawyer is two to four weeks, depending on the severity of the crime. This practice often caused undue delay in which a person was held in custody for up to a month without being formally charged or afforded legal representation as a violation of both international and domestic fair trial laws that guarantee the right to be tried without undue delay.¹⁰⁴

Post-Coup

Such delays have also been noted after the coup. For example, the deposition of State Counsellor Daw Aung San Suu Kyi has been postponed on several occasions. The official reason given has been due to Covid-19 restrictions.

7. The Right to a Public Hearing

International Law

Article 10 of the UDHR and Article 14(1) of the ICCPR state that 'Everyone is entitled in full equality to a fair and public hearing.' Article 14(1) of the ICCPR further adds that 'the press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.'

Domestic Law

Article 19(b) of the 2008 Constitution recognises the right to a public hearing. Among the exceptions is Section 14 of the Official Secrets Act which states that: 'in addition and without prejudice to any powers which a Court may possess to order the exclusion of the public from any proceedings, if, in the course of proceedings before a court against any person for an offence under this Act or the proceedings on appeal, or the course of the trial of a person under this Act, the application is made by the prosecution, on the ground that the publication of any evidence to be given or of any statement to be made in the course of the proceedings would be prejudicial to the safety of the State, that all or any portion of the public shall be excluded during any part of the hearing, the Court may make an order to that effect, but the passing of sentence shall, in any case, take place in public.'

Section 352 of the Code of Criminal Procedure states that individuals have the right to a public trial and all courts must be open to the public if space is available. However, the presiding Judge or Magistrate has the power, at any stage of the inquiry, to deny access to the general public or a particular person. This is supported

¹⁰³ Amnesty, 'Myanmar Justice on Trial' (Amnesty International, 2003). Available at: <https://www.amnesty.org/en/wp-content/uploads/2021/06/asa160192003en.pdf>.

¹⁰⁴ Ibid.

by Section 48(1) of the Courts Manual which states that, ‘a Sessions Judge or Magistrate has discretionary power to exclude the public generally, or any particular person, from the room or building used by him as a Court during the enquiry into, or trial of, any particular case. Apart from this provision of law he has the power to take such steps as may be necessary to maintain order and prevent disturbances in Court.’

Reported Violations

Pre-Coup

Amnesty International has commented on the number of trials held *in camera*.¹⁰⁵ The Special Court at the Insein Correctional Facility is a closed court and is often the location where political defendants are tried. There are documented challenges to obtaining information about ongoing trials:

It is not known if transcripts of trial proceedings are made available to the defendants, but it appears that they do not have such access. All these factors seriously hamper the ability of the defendant to appeal his/her sentence judicially, as they do not have the means to prepare an appeal.¹⁰⁶

Section 352 of the Criminal Procedure Code allows the Judge or Magistrate to order the court to be closed to the public ‘if he thinks fit.’ Since this provision does not specify precisely under which circumstances a trial may be held *in camera*, it cannot be excluded that political trials are intentionally closed to the public, especially considering the lack of independence of the judiciary system in Myanmar, and the influence of the military/government on judicial behaviour.¹⁰⁷

Post-Coup

Political trials are usually held in private and closed to the defendant’s families and the public.¹⁰⁸ The High Commissioner for Human Rights reported on the creation of special courts within prison compounds that are closed to the general public.¹⁰⁹ Lawyers providing evidence to Frontier have reported that the special courts in Insein hear cases mostly related to political offences, and these are carried out without the presence of family members.¹¹⁰

105 Amnesty, ‘Myanmar Justice on Trial’ (Amnesty International, 2003). Available at: <https://www.amnesty.org/en/wp-content/uploads/2021/06/asa160192003en.pdf>.

106 Ibid.

107 Ibid.

108 UN Human Rights Council, Situation of human rights in Myanmar since 1 February 2021 (15 March 2022), UN Doc. A/HRC/49/72. para. 39

109 UN Human Rights Council, Situation of human rights in Myanmar since 1 February 2021 (15 March 2022), UN Doc. A/HRC/49/72. para. 39

110 Frontier, ‘No justice behind bars: the coup and the judiciary’ (Frontier, 17 March 2022). Available at: <https://www.frontiermyanmar.net/en/no-justice-behind-bars-the-coup-and-the-judiciary/>.

Case Study:

State Counsellor Daw Aung San Suu Kyi and President U Win Myint

On 1 February 2021, State Counsellor Daw Aung San Suu Kyi and President U Win Myint were arrested, at what should have been the opening of the new parliament and remanded in custody until 15 February 2021 and then detained. Both faced multiple charges in three courts.

Charges

Charges against State Counsellor Daw Aung San Suu Kyi, before the Zabuthiri Special Court, included:

- Corruption, under **Section 55 of the Anti-Corruption Law**¹¹¹, for allegedly misusing land belonging to a charity foundation she chaired, and illegally accepting \$600,000 and 11 kg worth of gold while in office – with a maximum jail term of 15 years.
- Breach of **Article 67 of the Telecommunications Law**¹¹² for importing walkie-talkies – this carries a maximum jail term of a year.
- Breach of **Articles 5,**¹¹³ **of the Export and Import Law** due to possession of illegally imported walkie-talkies – the maximum prison for this violation is three years (**Article 8**).
- **Article 25 of the Natural Disaster Management Law**¹¹⁴ for breaching coronavirus regulations during the 2020 election campaign – this carries a maximum prison term of three years each.

111 Section 55: 'If any Political Post Holder is convicted for committing bribery, he/she shall be punished with imprisonment for a term of not more than 15 years and with a fine.' Translation available at: <https://www.myanmar-law-library.org/law-library/laws-and-regulations/laws/myanmar-laws-1988-until-now/union-solidarity-and-development-party-laws-2012-2016/myanmar-laws-2013/pyidaungsu-hluttaw-law-no-23-2013-anti-corruption-law-english.html>.

112 Article 67: Whoever keeps in possession or uses any Telecommunications Equipment restricted as requiring a licence without having such a licence shall, on conviction, be liable to imprisonment for a term not exceeding one year or to a fine or to both. The text is available at: https://www.burmalibrary.org/docs23/2013-10-08-Telecommunications_Law-en.pdf.

113 Article 5. No person shall export or import restricted, prohibited and banned goods. Text available at: [https://www.myanmartradeportal.gov.mm/uploads/legals/2018/7/The%20Export%20and%20Import%20Law%202012\(Eng\).pdf](https://www.myanmartradeportal.gov.mm/uploads/legals/2018/7/The%20Export%20and%20Import%20Law%202012(Eng).pdf).

114 Article 25: Whoever, if the natural disaster causes or is likely to be caused by any negligent act without examination or by wilful action which is known that a disaster is likely to strike, shall be punished with imprisonment for a term not exceeding three years and may also be liable to fine. Text available at: https://www.burmalibrary.org/sites/burmalibrary.org/files/obl/docs23/2013-07-31-Natural_Disaster_Management_Law-en.pdf.

- Intent to incite under **Article 505(b) Penal Code**¹¹⁵, after her party sent a letter in February to international organisations asking them not to cooperate with the junta – where imprisonment may extend to two years.

Charges against President U Win Myint included:

- **Article 25 of the Natural Disaster Management Law**¹¹⁶ for breaching coronavirus regulations- this carries a maximum prison term of three years each.
- **Violation of Article 505(b) Penal Code**¹¹⁷ - a year.

Information Gathered

The information gathered by the IBAHRI revealed that State Counsellor Daw Aung San Suu Kyi and President U Win Myint have not been informed promptly and in detail of all charges against them. They have been provided with very little information. State Counsellor Daw Aung San Suu Kyi and President U Win Myint were arrested on 1 February 2021. The police deposed them on 3 February. They have been kept in incommunicado detention for two months.

As a consequence of this, State Counsellor Daw Aung San Suu Kyi and President U Win Myint were not allowed to access legal representation for two months, namely from the day of their arrest, including during questioning by the police, the virtual hearing on 16 February 2021 and until the first virtual meeting with a junior lawyer in April. From the beginning, State Counsellor Daw Aung San Suu Kyi has asked for a meeting with lawyers and demanded any lawyer prescribed by the Central Executive Committee. State Counsellor Daw Aung San Suu Kyi had her first virtual hearing on 16 February. At that hearing, she demanded an interview with lawyers. This was denied.

115 Article 505. Whoever makes, publishes or circulates any statement, rumour or report,— (a) with intent to -cause, or which is likely to cause, any officer, soldier, sailor or airman, in the Army, Navy or Air Force [* *] 1 to mutiny or otherwise disregard or fail in his duty as such; or (b) with intent to cause, or which is likely to cause, fear or alarm to the public or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquillity; or (c) with intent to incite, or which is likely to incite, any class or community of persons to commit any offence against any other class or community, shall be punished with imprisonment which may extend to two years, or with fine, or with both.

Exception.— It does not amount to an offence, within the meaning of his section, when the person making, publishing or circulating shy such statement, rumour or report has reasonable grounds for believing that such statement, rumour or report is true and makes, publishes or circulates it without any such intent as aforesaid.

The text is available at: https://www.burmalibrary.org/docs6/MYANMAR_PENAL_CODE-corr.1.pdf?__cf_chl_jschl_tk__=pmd_7dabf193bb7f8fa13044b7f110c155d262cb7fdd-1626781963-o-gqNtZGzNAfjcnBszQo6.

116 Article 25: Whoever, if the natural disaster causes or is likely to be caused by any negligent act without examination or by wilful action which is known that a disaster is likely to strike, shall be punished with imprisonment for a term not exceeding three years and may also be liable to fine. Text available at: https://www.burmalibrary.org/sites/burmalibrary.org/files/obl/docs23/2013-07-31-Natural_Disaster_Management_Law-en.pdf.

117 Article 505. Whoever makes, publishes or circulates any statement, rumour or report,— (a) with intent to -cause, or which is likely to cause, any officer, soldier, sailor or airman, in the Army, Navy or Air Force [* *] 1 to mutiny or otherwise disregard or fail in his duty as such; or (b) with intent to cause, or which is likely to cause, fear or alarm to the public or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquillity; or (c) with intent to incite, or which is likely to incite, any class or community of persons to commit any offence against any other class or community, shall be punished with imprisonment which may extend to two years, or with fine, or with both.

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The text is available at: https://www.burmalibrary.org/docs6/MYANMAR_PENAL_CODE-corr.1.pdf?__cf_chl_jschl_tk__=pmd_7dabf193bb7f8fa13044b7f110c155d262cb7fdd-1626781963-o-gqNtZGzNAfjcnBszQo6.

Even once they have been granted access to lawyers, their communications have been severely restricted. On every hearing day, the police granted 30 minutes to discuss the case with each defendant. The lawyers have used the time to explain the charges and their legal effects. However, the amount of time granted was not enough for the number of allegations against them. The lawyers were also limited (by the guards) in terms of what documents to bring to the meetings. The defence team requested more time with the defendants but were not granted it. Also, the defendants requested the police to give the legal representatives sufficient time. Again, their requests were not granted.

The IBAHRI has not seen any evidence of the defence team being subjected to direct intimidation but they may have been subjected to indirect intimidation. For example, after the first hearing, one of the lawyers that represented Dr Myo Aung (the Naypyidaw Council Chairman, charged together with State Counsellor Daw Aung San Suu Kyi and President U Win Myint), was arrested.¹¹⁸ The police said he was given an arrest warrant by the court in Yangon district. They did not indicate the reason. The lawyer was arrested in front of all other lawyers, he was grabbed by the neck, handcuffed, and put in a police car. As far as it is known, he has not been released to this day. Moreover, in October 2021, Reuters reported that the military authorities had imposed a gagging order on the head lawyer representing State Counsellor Daw Aung San Suu Kyi, barring him from speaking to media, diplomats, international organisations and foreign governments.¹¹⁹ Similar gagging orders have been then imposed on all her defence lawyers.¹²⁰ Furthermore, all defence lawyers have been subjected to various restrictions that affect all of her work. Among others, they have been subjected to strict searches before each meeting with the defendants and before each court sitting.

Also, the defence team has not been regarded as legal representation by the police. Documents of legal representation have not been signed by State Counsellor Daw Aung San Suu Kyi because the police didn't send those papers to her. This, again, would affect their work as they would not have been provided with all relevant information to be able to assist their clients.

The review revealed that the hearings have not been conducted with due respect to human dignity and upholding the human rights of the defendants. Before the hearings, and notwithstanding the fact that all the hearings were closed to the public, a person walked into the court and took photographs of the defendants in the courtroom (10-12 times). At a sitting at the end of July, the defence team objected to taking photographs of the defendants and requested the judge to hold the photographer in contempt of court. Only then did the photographer leave the court. The presiding judge confirmed that it was not a clerk to the court. While the presiding judge may not have been able to prevent the photographer from coming in and taking the photographs at the first sitting, he has not done anything to ban the photographer after the first incident and prevent the photographer from coming again, until this was objected to by the defence team. (Note: a few of these photographs ended in newspapers and were apparently credited to the military.)

118 See for example: <https://elevenmyanmar.com/news/lawyer-for-dr-myo-aung-arrested-after-nay-pyi-taw-court-proceedings>.

119 Martin Petty, 'Lawyer for Myanmar's Suu Kyi Says He Has Been Issued a Gag Order' (Reuters, 15 October 2021). Available at: <https://news.trust.org/item/20211015033429-8nfu0/>.

120 Associated Press, 'Aung San Suu Kyi testifies in Myanmar court as lawyers barred from speaking about her case' (The Guardian, 27 October 2021). Available at: <https://www.theguardian.com/world/2021/oct/27/aung-san-suu-kyi-testifies-in-myanmar-court-as-lawyers-barred-from-speaking-about-her-case> accessed 16 February 2022.

The defence team was given a chance to cross-examine the witnesses. Some of the questions were objected to by the court.

The IBAHRI is not able to effectively review whether the defendants are provided with an effective defence, since there was no possibility to have access to any hearing and to any trial document.

Convictions

On 6 December 2021, State Counsellor Daw Aung San Suu Kyi and President U Win Myint were found guilty of the offence under Section 505(b) of the Penal Code (offence of incitement) and under Section 25 of the Disaster Management Law (offence of breaking Covid rules). Both political leaders were each sentenced to four years, later reduced to two.

On 10 January 2022, State Counsellor Daw Aung San Suu Kyi received a two-year sentence for breaching the export-import law by importing and owning walkie-talkies, one year for having a set of signal jammers.

In April 2022, a court sentenced State Counsellor Daw Aung San Suu Kyi to five years in jail after finding her guilty in 11 corruption cases against her.

On 4 May 2022, the Supreme Court struck down an appeal from State Counsellor Daw Aung San Suu Kyi against the jail sentence for the corruption charges.

In June 2022, State Counsellor Daw Aung San Suu Kyi was moved to solitary confinement inside a prison compound in Naypyidaw.¹²¹

Given that there was no public trial that could be independently reviewed, these verdicts must be viewed, at best, as highly questionable and suspicious. As a matter of fact, according to international law standards and as also stated in the Myanmar's Fair Trial Guidebook adopted in 2018, a public hearing affords the parties and the public transparency, and lends credibility to the judges' ultimate verdict, including the notion that the decision was independent. The fact that the verdicts against high-profile political leaders comes after no-public hearings sheds shadows on their fairness.

Findings

Based on the information gathered by limited but reliable sources, the IBAHRI has expressed many times serious concerns regarding the Trials as failing to meet minimum fair trial standards established under international law.

¹²¹ See for example: <https://www.theguardian.com/world/2022/jun/23/aung-san-suu-kyi-trial-moved-to-prison-in-myanmars-capital>.

6. Conclusions

This report examines some of the issues pertaining to the right to a fair trial, looking at the situation after the *coup d'état* but also some of the challenges that pre-existed. After the *coup d'état* on 1 February 2021, which sought to establish the authority of the SAC, the transfer of all judicial, legislative and executive powers to the military has severely undermined the principle of separation of powers and the rule of law. Moreover, the increase in the number of arbitrary detentions (including those of many high-level politicians and defence lawyers), the conditions in which prisoners have been detained, the lack of access to legal counsel and the manner in which trials have been conducted have resulted in many individuals being denied their right to a fair trial.

The *coup d'état* was followed by reports of serious violations of human rights and a crackdown on human rights defenders and the opposition. In response, many UN bodies, ASEAN, and civil society organisations have called upon the Tatmadaw to stop the attack on civil liberties and restore rule of law in Myanmar. These remain unanswered to this day.

As of 25 July 2022, and with first executions in over 30 years, people in Myanmar face yet another challenge - of killings under the pretext of enforcing legal judgments. It is highly likely that further executions will follow. With the serious issues in relation to the rule of law and the right to a fair trial in Myanmar, the executions pose a significant risk to the people in Myanmar, and especially anyone seen as a threat by the military. Such abuses in the name of law cannot be tolerated and must be condemned by the international community.



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