

Mandate of the Special Rapporteur on the independence of judges and lawyers

Ref.: AL OTH 74/2023

(Please use this reference in your reply)

30 June 2023

Senior General Min Aung Hlain

I address you in my capacity as Special Rapporteur on the independence of judges and lawyers, pursuant to Human Rights Council resolution 44/8.

In this connection, I would like to bring to your attention information I have received concerning **measures taken by the State Administration Council (SAC), which have harmed judicial independence, the right to a fair trial, and the work of lawyers in Myanmar.**

According to the information received:

The court system and judicial independence

Within days of a coup d'état on 1 February 2021, the State Administration Council (SAC) dismissed several Supreme Court justices and appointed individuals affiliated with the military to fill the vacancies. Military leaders, through these appointments and holdovers appointed by the previous military junta, have appointed all sitting members of the Supreme Court. The Court is empowered to supervise all other courts and plays a significant role in the functioning of the Bar Council, the entity that oversees admission and discipline of lawyers to practice law.

After the coup, military leaders rearranged the country's court system, relocating township and district trial courts within prisons. The trial courts within prisons—which are distinct from the military tribunals discussed below—are overburdened and required to handle a number of cases significantly exceeding their capacity. Some courts reportedly hear more than 100 cases per day. The information received indicates that the courts are guarded by heavily armed soldiers, as well as police and prison officials, and that they are often extremely overcrowded.

Justice institutions such as the Union Attorney General's Office (now, the Ministry of Legal Affairs), the Office of the Supreme Court of the Union, and the lower-level judiciary were taken over by the military. The SAC has also introduced new laws, and amended others, so as to restrict freedoms and obstruct access to a remedy for rights violations.

The SAC made amendments to the penal code to include new 'political' offenses – most notoriously, the expansive new section 505A. In addition to imposing these unwelcome changes to the law, it also revived old, or established new, institutions to enforce these laws and impose severe penalties upon those who violate them.

Senior General Min Aung Hlaing

The SAC introduced ‘Special Courts’ to handle violations of selected provisions of the law, particularly violations of amended sections 121, 124 and 505 of the Penal Code, as well as provisions of the Counter-Terrorism Law, Unlawful Associations Act, and Explosive Substances Act. As a result, many cases that would have normally been heard before regular civilian courts at the township and district level are now under the jurisdiction of Special Courts.

Information suggests that defendants in cases considered to be politically sensitive are routinely not granted bail.

Defendants who are unwell are routinely refused access to needed medical treatment – even for problems due to torture or ill-treatment at the hands of the police and military personnel, who conduct regular interrogations.

Military tribunals

Military leaders also declared martial law in many areas, and reports indicate they began carrying out secret military tribunals in those areas. Military officials effectively exercise all executive, legislative and judicial power in these areas. Military tribunal proceedings typically consist of closed-door, summary hearings, and lack fair trial guarantees, such as the right to be present at one’s trial, the right to be represented by counsel and the right to appeal, including in instances where the defendants risk the death penalty. There is no meaningful opportunity to appeal in the military tribunals.

As of March 28, 2023, a reported 108 political prisoners are on death row, with the majority of the death sentences handed down since the coup emanating from the military tribunals. In July 2022, Myanmar carried out its first executions in over 30 years, when it executed four opposition figures following their conviction and sentencing to death in military courts. Reports allege their proceedings lacked basic fair trial guarantees. In December 2022, a military tribunal sentenced seven university students to death following closed-door summary trials with no access to legal counsel.

Attacks on lawyers

Since the coup, information suggests that lawyers have faced arrest, gag orders, and detention. An estimated minimum of 38 lawyers remain in detention as of March 28, 2023. Many face charges of interfering with the military under section 505A of the Penal Code or for opposition activities that the SAC broadly labels as “terrorism” under the Counterterrorism law. They often face sentences ranging from three years to life.

Defense lawyers reportedly face charges related to their work representing political prisoners, including anti-coup protestors, elected leaders, and democracy activists. Lawyers have been accused of being members of the resistance groups with which their clients were allegedly involved, or even accused of participating in crimes allegedly committed by their clients. Evidence presented against lawyers has, on multiple occasions, lacked specificity or substantiation. Lawyers also face charges that reportedly relate to participation in protests and sharing information perceived as anti-military

on social media. SAC officials, unable to locate lawyers they wish to arrest, have reportedly taken family members into custody.

Information suggests that lawyers also are facing incidents of threats and harassment by the police, military personnel, and even judges.

Additional forms of interference with the free and independent exercise of the legal profession

Lawyers face a number of additional barriers in performing their duties. Information suggests that evidence used against defendants is often not shared with lawyers prior to hearings of the case or filed with the court. Unlike prosecutors, defence lawyers must pay to obtain the records of their clients from the court, and defence lawyers report that they have been charged the equivalent of hundreds of US dollars to copy client files.

Within regard to military proceedings, lawyers have reportedly been unable to attend hearings or represent clients. With regard to non-military tribunal proceedings, there are routine major limitations on attorney-client privileged communications. Meetings may be highly limited in duration, and subject to the condition that guards or police be present and conversations recorded. In other cases, lawyers have been reportedly barred from meeting with detained clients, or not permitted to meet clients until they were in the courtroom about to go before a judge.

Members of the Independent Lawyers Association of Myanmar were arrested or went into hiding for fear of their safety. Members of the Union Legal Aid Board, an organization intended to provide access to legal services, also faced arrest. The Board is now comprised of military-aligned officials.

The military junta also amended the act establishing the Bar Council, changing the process for its selection. Previously, the Bar Council Act enabled licensed lawyers to elect the majority of the Council's members. Under the amended Act, the Council is now led by the Chief Justice of the Supreme Court and the Attorney General, and constituted by members appointed by those offices.

Without wishing to prejudge the accuracy of the information received, I express my serious concerns regarding the intentional collapse of the rule of law, the subjugation of the judiciary to the military, manifestly unjust legal proceedings, attacks against lawyers, and other severe incursions on the free exercise of the legal profession.

If the allegations above were confirmed, they suggest severe incursions on the independence of the judiciary. The requirement of an independent and impartial tribunal is an absolute right not subject to any exception, and it is key to the realization of Myanmar's obligations under international law. As set out in the Basic Principles on the Independence of Judges, judges must be able to decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect. Sanctions against judges for decisions they have taken in the exercise of their profession, and indications that members of the judiciary feel compelled to reach certain decisions regardless of their analysis, are signs of extreme

and deeply troubling political interference with judicial independence. The conditions as described in ordinary township and district-level trial courts and military tribunals also represent grave departures from due process and fair trial requirements.

The allegations above describe extremely concerning interference with the free and independent exercise of the legal profession. As affirmed by the Basic Principles on the Role of Lawyers, Governments should ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; not suffer prosecution or other sanctions for any action taken in accordance with recognized professional duties; and not be identified with their clients or their clients' causes as a result of discharging their functions. Lawyers should also be able to consult with their clients freely and confidentially, and enjoy access to appropriate files in sufficient time to provide effective legal assistance. They are also entitled to freedom of expression, belief, association and assembly. Threats, arrests, and prosecution of lawyers related to their professional duties, and especially related to their work providing defense to political prisoners, is highly problematic and would demonstrate disregard for the rule of law and the essential role of lawyers in providing access to justice. Interference with professional associations and the erection of barriers to providing effective legal assistance are also gravely worrying.

In connection with the above alleged facts and concerns, please also refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to our attention, please respond to the allegations regarding attacks on lawyers, and the incursions into the independence of the judiciary. Please provide information on whether any investigations have been carried out to address alleged threats, harassment, and targeting of lawyers on the basis of their professional activities.

I would appreciate receiving a response within 60 days. Past this period, this communication and any response received will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

While awaiting a reply, I urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person(s) responsible for the alleged violations.

I may publicly express my concerns in the near future as, in my view, the information upon which such an expression would be based is sufficiently reliable to indicate a matter warranting immediate attention. I also believe the wider public should be alerted to the potential implications of the above-mentioned allegations. Any press release would indicate that I have been in contact with you to clarify the issue/s in question.

Furthermore, I emphasize that the human rights of individuals and groups must be respected, protected and fulfilled, irrespective of the character of the perpetrator(s). At a minimum, actors exercising either government-like functions or de facto control

over territory and population must respect and protect the human rights of individuals and groups.

Finally, I stress that this letter does not in any way imply the recognition, as a matter of international law, the State Administration Council as the legitimate government of Myanmar and is without prejudice to the United Nations positions on these matters.

Margaret Satterthwaite
Special Rapporteur on the independence of judges and lawyers

Annex

Reference to international human rights law

In connection with the above alleged facts and concerns, I would like to draw your attention to the applicable international human rights norms and standards, as well as authoritative guidance on their interpretation.

In particular, I highlight articles 8 and 10 of the Universal Declaration of Human Rights. While Myanmar is not a party to the International Covenant on Civil and Political Rights, the language of the right to a fair trial established under the Declaration – and the Universal Declaration of Human Rights, which provides global standards in human rights for all States – is materially similar to article 14 of the Covenant.

In this regard, I would like to refer to the principle enunciated in Human Rights Council Resolution 12/16, which calls on States to refrain from imposing restrictions which are not consistent with the criteria established by international human rights standards. Under these standards, limitations must be determined by law and must conform to the strict test of necessity and proportionality.

I recall that the right to a fair trial is one of the fundamental guarantees of human rights and the rule of law. It comprises various interrelated attributes and is often linked to the enjoyment of other rights, such as the right to life and the prohibition against torture. When confronting the challenge of terrorism in particular, the Human Rights Committee has stressed the importance of developing and maintaining effective, fair, humane, transparent and accountable criminal justice systems which provide access to a fair and public hearing and to independent and adequate legal representation in accordance with obligations under international law (HRC, general comment no. 32, CCPR/C/GC/32).

I would like to refer to the United Nations Safeguards guaranteeing protection of the rights of those facing the death penalty, which provide that capital punishment may be imposed only for the most serious crimes, after a legal process which gives all possible safeguards to ensure a fair trial, including the right of anyone suspected of or charged with a crime for which capital punishment may be imposed to adequate legal assistance at all stages of the proceedings. And that persons below 18 years of age at the time of the commission of the crime shall not be sentenced to death.

In its general comment no. 32 (2007), the Human Rights Committee explained that the right to communicate with counsel enshrined in article 14(3)(b) requires that the accused is granted prompt access to counsel. Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications. They should also be able “to advise and to represent persons charged with a criminal offence in accordance with generally recognised professional ethics without restrictions, influence, pressure or undue interference from any quarter” (CCPR/C/GC/32, para. 34).

The Committee further notes that “In cases of trials leading to the imposition of the death penalty scrupulous respect of the guarantees of fair trial is particularly important. The imposition of a sentence of death upon conclusion of a trial, in which the provisions of article 14 of the Covenant have not been respected, constitutes a

violation of the right to life (article 6 of the Covenant)” (CCPR/C/GC/32, para. 59).

Furthermore, the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, resolution 67/187 adopted in 2012, note in principle 2, that “States should consider the provision of legal aid their duty and responsibility”. When it comes to children, the Guidelines indicate in principle 11 that “legal aid provided to children should be prioritized, in the best interests of the child, and be accessible, age-appropriate, multidisciplinary, effective and responsive to the specific legal and social needs of children”.

With regard to the expressions made by the human rights defenders, I would like to refer to the fundamental principles set forth in the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, also known as the UN Declaration on Human Rights Defenders. In particular, I would like to refer to articles 1 and 2 of the Declaration which state that everyone has the right to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels and that each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms.

In this context, I would also like to refer to Human Rights Council resolution 22/6, which called upon States to create a safe and enabling environment for the work of human rights defenders; and Human Rights Council resolution 31/32 which in paragraph 2 calls upon all States to take all measures necessary to ensure the rights and safety of human rights defenders, including those working towards realization of economic, social and cultural rights and who, in so doing, exercise other human rights, such as the rights to freedom of opinion, expression, peaceful assembly and association, to participate in public affairs, and to seek an effective remedy. It further underlines in paragraph 10 the legitimate role of human rights defenders in mediation efforts, where relevant, and in supporting victims in accessing effective remedies for violations and abuses of their economic, cultural rights, including for members of impoverished communities, groups and communities vulnerable to discrimination, and those belonging to minorities and indigenous peoples.

I would also like to refer to the Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Havana (Cuba), 27 August – 7 September 1990).

Principle 16 requires governments to take all appropriate measures to ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference, and to prevent that lawyers be threatened with prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

Principle 18 provides that lawyers shall not be identified with their clients or their clients’ causes as a result of discharging their functions. This principle must be read in conjunction with principle 16(c), referred to above, which requires national authorities to adopt all appropriate measures to ensure that lawyers are not subject to, or threatened with prosecution or any other administrative, economic or disciplinary sanctions for actions undertaken in good faith in the exercise of their professional

duties and responsibilities. The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, resolution 67/187 adopted in 2012, note in principle 2, that “States should consider the provision of legal aid their duty and responsibility”.

Furthermore, I refer to the provisions contained in the Declaration on Human Rights Defenders, adopted by the General Assembly in its resolution 53/144, which in its article 5 declares that, ‘[f]or the purpose of promoting and protecting human rights and fundamental freedoms, everyone has the right, individually and in association with others, at the national and international levels: (a) To meet or assemble peacefully’. We also wish to refer to article 6 points (b) and (c), which provides for the right to freely publish, impart or disseminate information and knowledge on all human rights and fundamental freedoms, and to study, discuss and hold opinions on the observance of these rights.