## BURMA: Government by confusion & the un-rule of law

The first elections held in Burma for two decades on 7 November 2010 ended as most people thought they would, with the military party, the Union Solidarity and Development Party, taking a vast majority in the national parliament through rigged balloting. Almost a week later, after days of disgruntlement and debate about the outcome of the elections, the military regime released the leader of the National League for Democracy, Daw Aung San Suu Kyi, from house arrest.

Although Aung San Suu Kyi's release was expected, since November 13 was the deadline on the period of imprisonment imposed through a fraudulent criminal case against her in 2009, it perplexed many foreign observers, who asked questions about why the military would acquiesce to her release at a time that it may provoke and create unnecessary problems during the planned transition from full-frontal army dictatorship to authoritarian clique in civilian garb.

What most of these persons have not yet understood about the nature of the state in Burma is that government by confusion is an operating principle. For them, as military strategists and planners who think in terms of threats and enemies, the most effective strategies and plans are those where both outside observers and as many people in the domestic population as possible are left uncertain about what has happened and why, what may or may not happen next, and what it all means.

This principle of government by confusion underpins the un-rule of law in Burma to which the Asian Human Rights Commission has pointed, described and analyzed through careful study of hundreds of cases and attendant information over the last few years. Whereas the rule of law depends upon a minimum degree of certainty by which citizens can organize their lives, the un-rule of law depends upon uncertainty. Whereas rule of law depends upon consistency in how state institutions and their personnel operate, the un-rule of law depends upon arbitrariness. Whereas rule of law is intimately connected to the protection of human rights, the un-rule of law is associated with the denial of rights, and with the absence of norms upon which rights can even by nominally established. In this annual report, the AHRC points more explicitly to the links between this operating principle and the un-rule of law.

### Elections without norms

The operating principle of government by confusion was manifest throughout the holding of the November 7 elections and their aftermath: right up to the date of the elections, citizens and participating parties had little—and in some areas no—information on how ballots would be counted, tallied and reported. After the voting was completed and ballots were stuffed with thousands of so-called advance votes to ensure the success of military-backed candidates, there was no information on when and how official results would be made known: these details trickled out through a variety of sources over the coming days. And even with the results becoming known, the manner in which the parliament would be brought to assemble, the date that this would happen and other issues remained obscured, in accordance with the government-by-confusion principle.

But the election process in Burma on 7 November 2010 was farcical not so much because of the manner in which the elections themselves were conducted but because of the absence of a variety of minimum conditions for the holding of elections, which meant that irrespective of the specific procedures adopted for their undertaking, the results could not amount to anything other than what the military regime permitted. These absent minimum conditions included the absence of a judiciary capable of addressing and settling disputes arising from the electoral process; and, the absence of rights to associate or speak freely, or any guarantees for the protection of such rights.

The absence of a judiciary capable of settling disputes arising from the electoral process was manifest long before the elections themselves were held, in the handling of an application from the NLD to the Supreme Court on 23 March 2010. This party won 392 out of 405 seats in the 1990 election, but then—as in 2010—there was no judiciary capable of enforcing results. The party submitted a miscellaneous civil application to the court under the Judiciary Law 2000 and the Specific Relief Act 1887. It asked the court to examine provisions of the new Political Parties Registration Law 2010 that prohibit convicted serving prisoners from establishing or participating in political parties.

Whereas the 2008 Constitution prohibits convicted prisoners from being members of parliament, the new party registration law prohibits these persons from being involved in a political party at all. As the NLD has hundreds of members behind bars—and hundreds of others who could be detained, prosecuted and convicted at any time—its concern over these provisions is obvious. Nor is it the only party in this situation. The leaders of the Shan Nationalities League for Democracy, which obtained the second-largest number of votes in 1990, also remained imprisoned throughout 2010; the Working Group on Arbitrary Detention has opined that their detention is arbitrary (Opinion 26/2008, A/HRC/13/30/Add.1).

The NLD's approach to the court was premised on the notion that the Supreme Court would at very least be able to entertain its plaint. But according to the NLD, the application did not even go before a judge. Instead it was returned by lunchtime on the same day with an official giving the reason that, "We do not have jurisdiction." Subsequently, an attempt to approach the chief justice directly was also rebuffed.

In some countries, courts without effective authority over matters that are technically within their domain go through the pretence of hearing and deciding on these things at least to impress on the government and public that they are cognizant of their responsibilities, even if they cannot carry them out. They may still have a degree of self respect that requires the keeping up of appearances. But the courts in Burma have lost even these minimal qualities of a judiciary. Therefore, it is no exaggeration to say that Burma is without a judiciary—at least as far as any planned elections are concerned—and that as a consequence the notion of an electoral process as understood elsewhere was in Burma not surprisingly an absurdity.

The government also in 2010 set down in new laws conditions for the forming of political parties that would have people associate in order to participate in the elections, but nowhere and in no way was the right to associate itself guaranteed in any of these laws, let alone in reality. While parties were required to have at least a thousand members to enlist for the national election—500 for regional assemblies—a host of extant security laws circumscribed how, when and in what numbers persons can associate. The notion of association without the right to associate is manifest in the Political Parties Registration Law 2010, which has written into it references to some preexisting laws that circumscribe free association. According to section 12,

> "A party that infringes [the law in the manner of] any of the following will cease to have authorization to be a political party: ... (3) Direct or indirect communication with, or support for, armed insurgent organisations and individuals opposing the state; or organisations and individuals that the state has designated as having committed terrorist acts; or associations that have been declared unlawful; or these organisations' members."

As in present-day Burma anybody can be found guilty of having supported insurgents, of having been involved in terrorist acts, and above all, of having contacted unlawful associations, the law effectively allows the authorities to de-register any political party at any time. The Asian Human Rights Commission has documented many such cases. For instance, in 2010 34-year-old tuition teacher Maung Nyo and 27-year-old tour guide Ma Thanda Htun were tried for having travelled illegally to Thailand in 2008 and 2009 where they allegedly met with members of a group of Buddhist monks opposed to the government of Burma. Both of the accused had been involved in arranging for support, together with religious groups, for victims of Cyclone Nargis in 2008 and according to persons close to the case, it was for this reason that they travelled to Thailand. Notwithstanding, the police took the accused to an interrogation centre where they kept them illegally for over a month, during which time they allegedly tortured the two to get false confessions, upon which they were sentenced to five years' jail in a case that was conducted in a closed court.

Similarly, the AHRC in 2010 issued an appeal on the case of U Gawthita, who along with seven other monks was detained at the airport in Rangoon on return from Taiwan in August 2009. The authorities later released the other monks but accused Gawthita of having met and obtained support from anti-government groups in Thailand. They kept him at a special interrogation facility for a month before he was charged with having allegedly gone to Thailand illegally earlier in the year to meet with and get support from anti-government groups there. Gawthita, who had no involvement in earlier political activism by monks in Burma, denies the charges and according to him he was merely collecting support for relief of cyclone victims and other humanitarian activities. Politically active monks from Burma in Thailand have also denied that he came to meet them. Photographs that the police used in court to show that Gawthita had gone to meet exile monks were not taken in Thailand at all but at an earlier time in Burma. However, the closed court ignored the lack of evidence and a multitude of flaws in the case, and in February 2010 sentenced Gawthita to seven years in jail.

## Constitutional un-rule of law

One consequence of the November 7 elections was to usher Burma back into an era of formal constitutionalism. But it is not a constitutionalism that can in any sense of the word be associated with the rule of law. This is because the 2008 Constitution is from a human rights perspective a norm-less constitution. All rights under the type of constitutionalism that the army in Burma aims to practice are qualified with ambiguous language that permits exemptions under circumstances of the state's choosing. For instance, the right to association, described above as absent from the electoral process in 2010, is in the 2008 Constitution confined to whatever the state allows, rather than a right in any sense of the word as ordinarily understood. Under its section 354, citizens have a "right" to form associations that do not contravene statutory law on national security and public morality: which again can be construed to mean literally anything.

## Extracts from the 2008 Constitution of Myanmar

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.

20. (b) The Defence Services has the right to independently administer and adjudicate all affairs of the armed forces… (f) The Defence Services is mainly responsible for safeguarding the Constitution.

354. Every citizen shall be at liberty in the exercise of the following rights, if not contrary to the laws, enacted for Union security, prevalence of law and order [rule of law], community peace and tranquillity or public order and morality: (a) to express and publish freely their convictions and opinions; (b) to assemble peacefully without arms and holding procession; (c) to form associations and organizations; (d) to develop their language, literature, culture they cherish, religion they profess, and customs without prejudice to the relations between one national race and another or among national races and to other faiths.

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.

417. If there arises or if there is sufficient reason for a state of emergency to arise that may disintegrate the Union or disintegrate national solidarity or that may cause the loss of sovereignty, due to acts or attempts to take over the sovereignty of the Union by insurgency, violence and wrongful forcible means, the President may, after co-ordinating with the National Defence and Security Council, promulgate an ordinance and declare a state of emergency.

418. (a) In the matter concerning the declaration of the state of emergency according to Section 417, the President shall declare the transferring of legislative, executive and judicial powers of the Union to the Commander-in-Chief of the Defence Services to enable him to carry out necessary measures to speedily restore its original situation in the Union…

419. The Commander-in-Chief of the Defence Services to whom the sovereign power has been transferred shall have the right to exercise the powers of legislature, executive and judiciary. The Commander-in-Chief of the Defence Services may exercise the legislative power either by himself or by a body including him. The executive power and the judicial power may be transferred to and exercised by an appropriate body that has been formed or a suitable person.

420. The Commander-in-Chief of the Defence Services may, during the duration of the declaration of a state of emergency, restrict or suspend as required, one or more fundamental rights of the citizens in the required area.

To take another example, the right not to be held in custody for more than 24 hours before being brought before a magistrate, which already exists in the Criminal Procedure Code, is under the new constitution delimited by an exception for "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" (section 376). This provision effectively legalizes arbitrary

detention of the sort that is already rife in Burma. Other provisions that purport to guarantee rights do so only to the extent permitted by other laws, and in so far as they do not threaten the security of the state or contravene undefined standards of public morality. The constitution allows for rights to be revoked at any time and for their suspension during a state of emergency. The cumulative effect of these qualifications is to render all guarantees of rights meaningless. It is, thus, to introduce a type of constitutional un-rule of law.

A key feature of the constitutional un-rule of law is that ostensibly legal institutions work to prohibit rather than protect the enjoyment of human rights. For instance, the police force does not perform its functions as a discrete professional civilian force but as a paramilitary and intelligence agency under command of the armed forces. Policing functions are also shared among other parts of the state apparatus, including with executive councils at all levels that supervise and oversee other agencies, and with other local bodies, including the fire brigade and a government-organized mass group. At the same time, specialized agencies, in particular the Special Branch, operate as proxies for military intelligence, rather than as autonomous investigators of crime. Consequently, the characteristics of policing and prosecutions in Burma include: routine arbitrary arrest and detention; common use of torture and other forms of cruel and inhuman treatment, and frequent deaths in custody; coerced signing of documents that have no basis in law; baseless and duplicated charges; and fabricated cases.

As the courts are subordinate to the executive, they can neither function in accordance with the laws that they are purported to uphold nor in a manner that can defend, let alone implement human rights. Some of their features include:

a. Closed and unreported trials: The law ostensibly guarantees open trial, but politically motivated cases are tried in closed courts inside prison facilities. Ordinary cases are held in public; however, a lack of media reporting and the enclosed character of the judiciary mitigate the usefulness of open trial even where it occurs.

b. Procedurally-incorrect cases: Breaches of legal procedure are routine in all types of cases. In politically motivated cases, breaches occur because of the imperative to arrive at predetermined verdicts; in ordinary cases, because of the general debasement of the judiciary under the un-rule of law and because of endemic corruption, as discussed further below.

c. Evidence-less cases: Accused persons in criminal cases are routinely imprisoned without evidence for the same reasons that cause procedural incorrectness.

d. Denial of defendants' rights and targeting of defence lawyers: The denial of the right to a defence occurs in two forms. First, defendants are unrepresented in court either because they are unable to afford or find a lawyer or do not know what one is (see 2009 report of the Special Rapporteur, A/HRC/10/19, para. 20); or because despite their efforts to obtain a lawyer they are denied one. Second, defendants are represented in court but the lawyer is unable to present the case in accordance with law. The judge may deny requests to call witnesses, deny cross-examination and threaten to or in fact take disciplinary or legal action against the attorney, by way of suspension or revocation of license, or threat of imprisonment for contempt of court.

e. Lack of means for redress: There are no effective means for redress to victims of human rights through the courts in Burma, other than in certain types of cases that correspond with state directives, such as under the Anti-Trafficking in Persons Law. In these cases,

the courts are effectively performing an administrative function, not a judicial one, by implementing policy that has been written into law. Where law does not correspond with policy, the courts do not enforce it. Consequently, many legitimate complainants are instead themselves made the targets of counter-complaints and prosecution by state agents.

The cumulative effect of all these failings is that the legal system becomes completely perverted, with its actual activities more and more remote from stated practices, and thus more and more in conformity with the nature of government through confusion. Since what the system is supposed to do is nowhere to be found in its actual operations, what it in fact does can change from day to day, generating profound uncertainty among all persons caught up in the system and leading to Kafkaesque scenarios in which accused know not of what they are guilty or why, let alone how long they will be made to suffer for some supposed crimes. In particular, the system becomes increasingly directed towards the raising of income for its personnel through endemic corruption, and also becomes increasingly worn down and dangerous through coercive use of force and violence on the part of police and other state security personnel. These two aspects of systemic dysfunction in Burma are discussed in the next two sections.

## Endemic corruption

Successive governments in Burma, including the current administration, have themselves acknowledged the incidence of corruption either directly or indirectly, including in the judiciary. However, because this corruption is intimately linked to the operating principle of government by confusion, it cannot be addressed in any meaningful way. On the contrary, anecdotal evidence points to its persistent increase with the privatization of state-owned enterprises and the increase in market-style economics in Burma. With the emergence of a semi-elected, semi-civilian but undemocratic parliament, this corruption is likely to escalate dramatically, as rampant cronyism and wanton opportunism combine with continued military control of the state in Burma and powerful persons look for every chance they can get to make the largest amount of money through the easiest possible means within the shortest period of time.

Practically every step in an ordinary criminal case in Burma can be accompanied by payments of one kind or another, which have a profound effect on the already extraordinarily limited avenues that citizens have available to them for redress of wrongs. Payments occur to get a case registered, to get it lodged in court, to get it heard as scheduled, to receive copies of documents, to secure a conviction or acquittal, to get the case accepted on appeal, and so on. The following true examples show something of the mechanics of corruption in Burma and how all parts of the system work to defeat the interests of justice and undermine human rights.

1. In 2007 a police special drug squad arrested a notorious dealer in possession of a small amount of amphetamines. The immediate concern of the local police was to help get the accused out of custody. They nominated a lawyer for him. This is a common practice in all types of ordinary criminal cases in Burma, in which there is also a standard commission of 30 per cent that goes back to the police station chief. After being hired, the lawyer went to meet with the judge and prosecutor handling the case. His main function was to act as a broker. This is why the lawyer in such cases needs to be nominated by the police or another official. Judges will only bargain with a lawyer whom they can trust. In this case, the judge

explained to the lawyer that the problem was because of the notoriety of his client, there was local and official interest in the case and the judge could not just let the client off without risking accusations of corruption and loosing face in the local community. So they arranged the case in a way that would get the client off, give the judge credibility and make everyone money. Payments were made both to the judge and the prosecutor. During the hearings, they deliberately botched the case. The judge admitted evidence that cast doubt on the allegations, and the prosecutor asked questions that supported the defence. Some prosecution witnesses were made hostile and their evidence recorded fully in the judgement. The judge convicted the accused, and public interest in the case ceased. But the verdict was flawed. The case was appealed to the district court. Here there were no public hearings and no knowledge of what was going on. The judge in the court of first instance had already contacted the judge in the higher court, and had given money to him. The higher court acquitted the accused.

2. A government car driver living with his son in modest conditions, a few years from retirement was in 2007 approached by a group of men, who asked to rent his house. The amount they offered was far above the market value. The occupant consulted with local government administrators whom he knew as friends. They advised him that the group apparently wanted the house for gambling, but that there was nothing to worry about and that he should do it. He rented the house and received a year's payment in advance. After two months a group of special vice squad police arrested the gang. The manager of the gambling operation used his contacts with the police to have the house owner pose as the key accused, securing bail for himself and his men. He told the owner that if he went along with the scheme then he wouldn't have to repay the year's rent, and that he would also get him released after a short time. He also threatened him that if he didn't cooperate then the gang would implicate his son. In the end, the house owner and two junior members of the gang faced court, with the owner in jail and the others on remand. In 2008 the court convicted the owner and freed the other two for lack of evidence. On appeal the elderly man was conditionally released, taking into account time served, but without his knowing the prosecutor appealed to a higher court and the original sentence was re-imposed; the police again arrested him and he is serving the remaining time. The gang has moved elsewhere.

3. The son of an army officer posted to a regional command in 2008 allegedly attempted to rape a classmate together with a companion. The family of the victim took the unusual step of strongly supporting her complaint against the two accused. The case attracted local interest because of the status of the alleged perpetrator as a family member of the ruling military class. At first the charge against the two was attempted rape. They were held as VIP detainees in a room next to the police station chief's own office that the police normally use for playing cards and drinking. The army officer's son received bail on the basis of a supposed health problem that required medical treatment; his companion was held in remand, but in the same room as before. After preliminary hearings and payment of money, the judge ordered that the charge be altered to assault on a woman, which is a much lower offence for which bail is habitually given, and the second accused also was released. Finally both accused were acquitted of that charge on the benefit of the doubt, the judge implying that the victim had misled the two accused and at first consented to sex.

Among the most important parts of the profit-making process in Burma's legal system is the granting of bail. Like in those cases described above, the methods of using and manipulating bail involve all parties in the system, including the police, prosecutor and judge, who at various stages have different important roles to play. In the beginning, the police are the most important persons for an arrestee. The police will initially lodge--or threaten to lodge--a non-bailable charge against the accused. In some cases an accused may

be able to negotiate with the police to switch to a bailable charge. This depends in part on whether or not the police have taken the initiative to lodge the charge, or whether someone has paid them to do it, in which case they may take money only not to maltreat the detainee, but will not take money to alter or drop the charge, depending on the amount paid by the other party. Where a detainee cannot get the police to alter the charge, the matter goes to the prosecutor. The prosecutor, or law officer, is responsible for lodging the charge in court. If the accused is able to negotiate effectively with the prosecutor, through his lawyer, then the prosecutor will agree to lodge a bailable offence in court.

Whether the decision to lodge a bailable offence is made by the police or by the prosecutor, the judge makes the final decision on whether to finally grant bail or not. At this stage the detainee must again have made arrangements through the lawyer to ensure that bail is granted. In fact, it is in the interests of the judge and of all parties not only that the threat of remand is used to identify detainees with the means to pay their way out of custody, but that those detainees who do have the means are given bail. The reason is that once a price is fixed the detainee will usually make a down payment but then have to raise the rest of the money. This is not easy to do while in custody. Therefore, bail is granted so that the defendant can raise the money.

One of the ways in which the institutionalisation of corruption can be identified in Burma is through the standardization of its practices. For instance, fairly standard amounts are paid for certain services, such as the 30 per cent commission from police-nominated lawyers back to the police, and fixed payments per time per person to deliver food to a detainee. Another feature is the itemization of payments. Thus, it is reportedly common for appeal judges to receive payment per annum for imposition or reduction of a sentence. The appellant in a case before the Supreme Court, the plaintiff, paid a judge the equivalent of USD 10,000 to get his opponent imprisoned for five years, calculated not as a lump sum but at the rate of USD2000/year of imprisonment.

An attendant feature of systemic corruption is the failure of procedures on which the system is dependent. When the failure reaches the proportions found in Burma, it ceases to be a justice system at all. Charges are argued even though patently in violation of the law. Judges take up cases involving minors that should be handled by juvenile courts. Sometimes judges are paid to falsify records so that minors appear as adults. Search and seizure forms also are invariably incomplete or wrongly recorded. Under the law, they must be filled out at the place searched and where the items are seized. In fact, police collect items at the site of an incident and bring them back to the police station where they complete the records. They use standard witnesses instead of those at the scene of the search as required by law. And in court, it is a requirement that a witness testimony be read out before he or she sign it; however, very often this requirement is dispensed with and a witness simply told to sign after they have spoken and the written record is ready. This allows both the judge and the clerk to change the contents of the record to suit one party or another. These methods defeat the whole purpose of these records, as there is no longer any accurate picture of what has happened during the police, prosecution or court work. In the absence of any kind of reliable record keeping, anything else also is possible; confusion reigns, not as a matter of circumstances but as a matter of policy, and with it so too does systemic violence.

## Endemic violence & torture

Anecdotally, the use of assault and torture in Burma is extremely common. The police resort to violence quickly and with an expectation that they will escape punishment, as in a case from Pegu, north of Rangoon, on which the AHRC issued an appeal in September 2010. According to the appeal, on the night of 11 August 2010, Maung Kyaw Thura and his brother were travelling by motorcycle when they saw five persons beating up four others at the front of divisional courthouse in Pegu town, north of Rangoon. The four had come from a bar and were urinating on the roadside when the group of five—four police and a civilian approached them and saying that they were police, began beating them.

*A victim of police assault shows his injuries*

As none of the police were in uniforms, Maung Kyaw Thura and brother also stopped to see what was happening. At that time the brother received a call on his mobile phone. One of the police, commander of Police Station No. 1 in Pegu, Inspector Kaung Zan, walked over and apparently thinking that Aung Win Htaik was taking a photo of the fight with the mobile, he grabbed the phone and threw it into the street. The police, whose breath smelled of alcohol, then started assaulting the two brothers with fists and sticks.

After the police beat up the six on the roadside, they took them back to the police station via trishaw. According to the victims, inside the barracks the police said that they would "teach [them] to know [their] place" and forced them to lie prone on the floor. Then the four police beat each of the men around 50 times with metal-buckled belts, kicked them and trampled on them. If the victims made any sound or tried to talk, they were beaten more and for longer. The police also broke a second mobile phone and took money.

After continuing like this for some time, the police separated the two brothers from the others in the group. Then they ordered the brothers to strip naked and continued to assault them. They also allegedly set fire to newspaper and the station commander himself used it to burn the men's genitalia. At about 3am, the police put the men inside the lockup. At about 9:30am the next morning, they returned only some of the money and a broken telephone and released the men. The brothers then went to get medical treatment at the town hospital, and have detailed medical records and photographs that attest to the alleged assault. At least one of the victims subsequently complained of the alleged assault to the home affairs minister after the incident; however, no action has so far seemingly been taken to investigate or prosecute the police officers involved, despite the medical evidence of assault and detailed depositions of the alleged police violence.

Not long after the above incident occurred, soldiers in Pegu also shot and killed two youths during an argument. The news was widely reported and on September 10 the state-run media announced that the shooting occurred during a "drunken brawl" in which the two

victims were among a larger group who assaulted a security officer. The state media accused foreign media and others of misrepresenting the case. According to the government in a letter to the Special Rapporteur on human rights in Myanmar, the soldiers involved in the incident are being court-martialed (A/65/368, 15 September 2010, Annex paragraph 7). In any event, impunity for abuses of this sort is systemic in Burma, and the prospects of justice for most families are very slim indeed.

Torture is committed in various facilities in Burma, and although it is prevalent in a wide variety of cases, many of the cases where the accused suffer the most grievous forms of torture are cases of political or national security concern. In 2010, three cases of extreme torture that the AHRC worked on were the cases of Nyi Nyi Htun, Than Myint Aung and Phyo Wai Aung, as outlined briefly in turn below.

In the contents of a letter from May 2010 Nyi Nyi Htun had a letter of complaint submitted on his behalf to the Minister for Home Affairs, who is responsible for overseeing the police force. Nyi Nyi Htun, a 47-year-old editor of a news journal, explained that the police arrested him in October 2009 and accused him of involvement in a bombing plot. According to the complaint, thereafter the police tortured him continuously for six days at the Rangoon Divisional Police Headquarters in the following manner:

*Nyi Nyi Htun*

"From the day Nyi Nyi Htun was arrested and thus detained, 16 police including Inspector Aung Soe Naing interrogated him in pairs on rotation continuously for the six days… He was not fed throughout the 6 days and was given only two handfuls of water per day. Nyi Nyi Htun was hit in the face and on the cheeks with shoes; was kicked and stomped on the head while his hands were tied with rope at the rear; was forced to kneel on gravel for 30 minutes at a time; had his fingers squeezed together with ball pens between them; had a truncheon pushed into his anus; and, was beaten with truncheons on his back, chest and feet, resulting in serious injuries to his body."

Notwithstanding the accused man's complaint of torture, on 13 October 2010, a court convicted Nyi Nyi Htun to a total of eight years in prison for allegedly having had contact with an outlawed group abroad.

Similarly, on 4 March 2010 police arrested Than Myint Aung in relation to a small explosion that caused no deaths or injuries in Sanchaung, and together with his mother took him to the Rangoon Divisional Police Headquarters. They later released Than Myint Aung's mother but accused him of crimes unrelated to the explosion. He was instead accused of having met with outlawed dissidents in Malaysia during 2007 and of having used the Internet illegally.

According to Than Myint Aung's depositions in court, on the way to the police station the officers tied a cloth over his face. At the station, they did not take off the cloth but started interrogating him by punching him repeatedly from different sides. Then one forced him to sit on the floor with his forehead also pressed on the floor while the officer stamped on his spine. After that they assaulted him with a rubber truncheon around his thighs, groin and back, and on his knuckles. They also put ball pens between his fingers and squeezed them together. That night they took him to search his in-laws' house but did not find anything to connect him to the alleged crime.

Than Myint Aung alleged in court that not only on the first day but for the next month of his illegal detention at the division police headquarters (he had not been brought before a judge or charged with any offence within 24 hours as required by the Criminal Procedure Code) he was kept awake at night by police beating him, and that for 15 days straight he was prevented from sleeping by being forced to stand or kneel continuously; if he sat down normally he was hit. He was also stripped naked and had rubber truncheons run up and down his shins. He was allegedly beaten on the soles of his feet and had hot water poured onto his genitals. He was not given food or water, other than being force-fed hot chili.

After a month of torture in custody at the divisional headquarters, Than Myint Aung was transferred to the Sanchaung township police, who noticing his condition took him to the general hospital. X-rays revealed that his skull had been fractured. After that he was sent to Insein Central Prison.

In court the police presented documents that Than Myint Aung was forced to sign while blank, during interrogation and torture. They presented no credible material evidence to support the allegations against him, and a police inspector acknowledged that they had obtained no evidence related to the explosion, but rather, during the course of the investigation had uncovered his connection with other crimes. The policeman also admitted that they had held the accused and interrogated him for almost a month, although he could not recall the exact amount of time.

Despite the detailed depositions that he gave during the trial about torture, the judge in the township court recorded only that he had testified that he had been tortured in order to confess to his offences. Under paragraph 605 of the Courts Manual, the judge had a responsibility not only to hear and record the allegations but also to inquire into them: this would include calling for staff from the hospital, and requesting the records showing Than Myint Aung's injuries, and for other evidence that might shed light on what happened to him; however, she completely ignored all these aspects of his testimony. The district court judge also ignored his allegations and sentenced him to 10 years in prison on 16 July 2010 under the Electronic Transactions Law, in addition to another five years that he had already received in a lower court.

Like Nyi Nyi Htun and Than Myint Aung, Phyo Wai Aung was accused of involvement in a bombing plot, in his case, a series of blasts on 15 April 2010 during a traditional carnival. According to a complaint made on behalf of this accused, a 31-year-old electrical engineer, after he was arrested at his house and taken to the Special Branch facility at Aungthapyay interrogation centre on 22 April 2010. He was unlawfully detained and tortured over approximately nine days, according to the complaint, in the following manner:

*Phyo Wai Aung*

"Phyo Wai Aung was forced to stand throughout interrogation for two whole days and nights with his hands cuffed behind his back. He was forced to sit and hit and kicked in the head; stepped on on the crook of the knee and hit with a broom; boxed simultaneously on both ears; stripped naked and forced to kneel on gravel with arms raised; burned on his genitals with paper that had been set alight; had hot wax dripped onto his genitals; was blindfolded throughout various types of torture; was forced to sit down and stand up repeatedly for over an hour at a time; and was forced to stay seated in a chair for five days without sleeping."

After Phyo Wai Aung could not tolerate the torture any longer he agreed to confess. The police let him sleep and gave him food for three days, then tutored him on how to confess and threatened him that if he said something wrong "it will hurt". After that, they took him to the Hlaing Township Court where he confessed on 3 May 2010 and was then taken to the Insein Prison.

On 6 May 2010 before any charges were brought against Phyo Wai Aung, the chief of police, Brigadier General Khin Yi (an army officer), gave a press conference which was reported in the official New Light of Myanmar newspaper the next day under the headline "MPF apprehends one of the offenders" in which he set out the accused man's alleged role in the bomb plot as a matter of fact and described him as a terrorist.

Meanwhile, at the central prison Phyo Wai Aung was put in solitary confinement. His family could visit him for the first time since arrest on May 11, and because he told them that he was innocent and that he was at work, giving details of others who could be witnesses that he was nowhere near the bombing scene, the following day the police again came and interrogated him for another six days straight. The police also used the names of his two alibis and made them come and give advance testimony in court that he was not at work on the day. Although there are many other people who could testify that he was there, the police did not allowed any more witnesses on this matter.

According to further information, the police warned Phyo Wai Aung not to hire a lawyer, and although he got one, he was not able to meet and talk with him freely. Anything they discussed, the prison personnel or police took notes. The lawyer was not able to get access to many of the case file documents and a police officer even ridiculed Phyo Wai Aung during testimony in court, saying that he had no need for a lawyer and what is true or false God alone would know. Also during the trial, when the lawyer tried to cross-examine a witness the judge became angry and reportedly said that, "You can do as you like in other special courts but you cannot in my court. I won't allow you to ask." For this and other reasons, Phyo Wai Aung tried to ask for a change of judge, but when a lawyer and relative went to apply to transfer the court, none of the officials would agree to do it.

The use of torture in criminal inquiries of the sort described above is by no means unique to Burma, and is unfortunately all too common in other countries of Asia and many around the world. However, in Burma the particular problem that complainants face is not only that they have been tortured to confess but also that there are literally no legal and institutional measures to support their complaints or bring action against the alleged torturers. There is no law to prohibit torture or institutions capable of investigating or prosecuting it. On the contrary, the courts and other parts of the legal system encourage the use of torture in cases like this, because they consistently admit evidence and confessions obtained from investigations in which the police have used torture, and because when accused persons retract their confessions and allege torture in court, the judges reject their allegations on the spurious basis that the defendants have no proof.

The institutional encouragement of torture is manifest in the belief in complete impunity among the police officers and other personnel who commit abuses of the sort described above. In Phyo Wai Aung's case, an officer named Inspector Swe Lin allegedly told him that, "If you die it's nothing to us", while another, Police Major Tin Kun, said that, "Since all the accused have absconded abroad, we'll interrogate until you can't take it. We'll call your family and torture you in front of them." These expressions are indicative of thinking in a police force in which torture is endemic and the police are predominant, as in Burma, where their power greatly exceeds that of the judiciary.

The institutional encouragement is also manifest in the complete lack of avenues for complaint or redress in Burma. According to the complaint in the case of Nyi Nyi Htun, after he was transferred into police custody at Aungthapyay camp the officers there in fact recorded his injuries and had a medical examination done before transferring him to prison for trial. In other settings, that an objective record of the injuries sustained to the victim through torture exists would be sufficient grounds to warrant special inquires. The written records and photographs could be scrutinized, the doctor who conducted the medical examination called and other steps taken to ascertain--perhaps under public pressure--what happened. But in Burma the victim can have no such expectations. The second police unit having taken the record seemingly buries it along with everything else, while the victim proceeds to jail, to some kind of trial, and back to jail. The victim may wind up making any number of urgent requests to the highest authorities for action to be taken against the alleged torturers, to no avail.

The lack of legal or judicial avenues for complaint and inquiry into allegations of torture is acknowledged by the fact that complainants in Burma can do no more than submit complaints to the national leadership to request that action be taken against perpetrators. Where these complaints go, who reads them and whether or not any action is ever in fact taken nobody knows. This process of complaint making is feudalistic, in that it resembles the making of plaints to an ancient absolute monarch with discretion to decide whose complaints are acted upon and whose are simply ignored. It is the exact opposite of what the contemporary human rights movement represents and aspires to and indeed, in this respect emblematic of the state of human rights in Burma as a whole.

Despite these feudalistic conditions, the international community has played along with the charade that some sort of means do exist to protect human rights in the country, and shamefully, some agencies have even acted as conduits for government propaganda, claiming that, for instance, the police force in Burma is proactive in efforts to address trafficking or child prostitution. Whether in making such absurd statements these agencies are victims of the confusion that the regime has sought to engender, whether they are cynical and willing participants in its charade or whether they have perhaps bought into their own propaganda is largely beside the point: the fact remains that through them not only is a dramatically false impression of what is actually going on inside the country being propagated, but the chances for more effective international intervention in the situation of human rights in Burma are being greatly diminished. The limitations and failings of the global human rights movement on Burma are the subject of the next, final section.

## Human rights defenders and the limitations of the global human rights movement

In April 2010 the Asian Human Rights Commission wrote to the High Commissioner for Human Rights on the topic of "A human rights defender targeted by medical doctors". The AHRC explained that it had received a copy of a letter from Burma, which had also been copied to the High Commissioner. The letter was dated 23 March 2010 and was from Ma Sandar, and her husband, Zaw Min Htun. It was addressed to Senior General Than Shwe, chairman of the State Peace and Development Council of Burma; U Aung Toe, chief justice of the Supreme Court; and, the minister for health, with copies to other senior officials.

Ma Sandar is a human rights defender who was imprisoned from August 2008 to September 2009 because she made a complaint of corruption against authorities in Twante Township, Rangoon, where she and her husband reside. She was released on completing her sentence. Less than two months later, she was subjected, together with her husband, to new fabricated criminal charges. It is that case which was the subject of the letter. The contents of the letter were, briefly, as follows:

*Ma Sandar and Zaw Min Htun*

1. On 12 November 2009 as a result of a vehicle accident a young woman named Ma La Yeit Choe (alias Ma Thida Win) went to the Twante Township Hospital to obtain a medical certificate for an injury. At that time there was no doctor present. She waited for two hours before Dr. Daw Hsint Hsint Thi attended to her. The doctor said that she had to do an x-ray. But because there was no electricity supply, they would have to use a generator. The cost of using the generator would be 10,000 Kyat and for medicine, 6000 Kyat; in total about USD16. The doctor said that if the accident victim and family would not pay, they could seek treatment elsewhere, and thereafter allegedly rudely ejected them from the premises.

2. As the township hospital is a public service, the family was unhappy with how they were treated and went to lodge a complaint at the local police station, which was recorded by Sub-inspector Hlaing Lin Htun, and in which they said that the doctor had failed to perform her duties. They went to the general hospital for treatment.

3. According to the doctor, when Ma Sandar and her husband went to see the accident victim at the hospital, they abused her and threatened her and her staff. Through the township health department head, Dr. U Kyu Khaing, she opened a criminal case against Ma Sandar and Zaw Min Htun (Penal Code, sections 353/506; obscenity and criminal intimidation, each punishable with up to two years' imprisonment).

4. Although the case is a minor one, it has since been investigated by high-ranked council officials, the Bureau of Special Investigation—which is supposed to be concerned with cases of corruption, not ordinary criminal inquiries—and the Criminal Investigation Department, which also is designated for serious crimes. Ma Sandar and her husband emphatically deny the charges. Despite a lack of prima facie evidence with which to open a case, Township Judge U Aye Ko Ko allowed the matter to go to trial. Regrettably but predictably, on 7 May 2010 both Ma Sandar and her husband were convicted and sentenced to one year and one-and-a-half years of imprisonment respectively. The AHRC has since set up a campaign page on their case, which points to a couple of serious difficulties for the global human rights movement in addressing the human rights situation in Burma, and in other countries with similar conditions, both in Asia and in other parts of the world.

The first serious difficulty is one of understanding. Often, cases concerning human rights defenders are treated as some sort of exceptional event, arising from dramatic moments like protest actions or high-profile political stands. But this case shows how the authorities in Burma can make something out of anything. Even the most trivial occurrence, an

argument over treatment for a small injury at a hospital, is an excuse and an opportunity for them to get back at a perceived troublemaker.

This same method was also evident in 2010 in the case of 25-year-old Ma Hla Hla Win, who in September 2009 went to Pakokku in upper Burma, where she stayed with a local resident. Her host's brother Maung Myint Naing helped her to visit some places and people, whom she interviewed on video, reportedly to send later to the Democratic Voice of Burma radio and television service based in Norway. However close to midnight on September 10 a group of police and local officials entered the house and arrested her and Myint Naing.

*Ma Hla Hla Win*

The police originally charged the two of them and Myint Naing's sister with not having declared Hla Hla Win on the local visitors' register, which is officially required by law in Burma but is typically ignored in practice. The police were able keep the two in custody with that charge, and they then made another charge against the two, regarding the use of an unregistered and illegally imported motorcycle. Since Hla Hla Win was not the owner or driver of the motorbike and this second charge should not have been applied to her at all. However in October she and Myint Naing were both given seven years' imprisonment for that offence, and both they and Myint Naing's sister were given 15 days for the failure to register as a visitor. Thus, in the same manner as the case of Ma Sandar, Hla Hla Win and her associate were imprisoned for alleged crimes that were altogether unrelated to the actual reason for their incarceration.

The difficulty of understanding the methods that the state in Burma uses to deal with human rights defenders is also apparent when looking at the persons involved in the case of Ma Sandar. Usually when we think about cases where human rights defenders are targeted, the perpetrators who come to mind are soldiers, police, mafia figures or others acting on behalf of people like these. But in Burma where five decades of military dictatorship have completely poisoned institutions and social life, they are just as likely to be medical doctors or other professionals acting as proxies for government authorities. In fact, with the emergence of a new parliament under military control in the next year or so, this aspect of human rights abuse, and attacks on human rights defenders in Burma, is likely to become more pronounced, making understanding of the real actors and issues even more difficult for people outside the country than it already is.

The second difficulty is what to do. Of course, as much pressure as possible can be brought to bear on the authorities in Burma from outside. Experience has shown that concerted efforts from United Nations agencies, governments abroad, human rights groups, the media and others can have an effect in some instances, for which everyone is grateful. Indeed, in this case it was obviously the hope of Ma Sandar and her husband, in sending a copy of their letter to the High Commissioner, that she personally or the staff of her office would take up the case with the government of Burma: although by the end of the year any such interventions had not yielded results, as she was still being held, and was reportedly in ill-health.

But no matter the amount of pressure, the systemic obstacles to effective intervention into human rights cases in Burma remain, and will remain for the time being, irrespective of superficial political changes following the November 2010 elections. Among these obstacles, the single most pronounced is the absence of an independent judiciary, as discussed above. In the absence of an independent judiciary, it is then pointless to make statements calling for a trial to be fair or for an independent inquiry into some violation of rights, because no institutions exist for these things to happen. The sad fact is that in the 21st century, conditions for victims of rights abuse in Burma are little different than they were three or four hundred years ago. The availability of computers and email notwithstanding, profound inequality between rulers and ruled underpins all relations and transactions between state and society. This same notion of inequality, and all its anti-human rights and anti-democratic implications, has been woven into the fabric of the 2008 Constitution and the measures being introduced for a proxy semi-civilian parliament.

On top of that sad fact is the added fact that the global human rights movement has been unable to do anything much about it. Burma is an example, together with Sri Lanka, Cambodia, and some other countries in the Asian region, of how a country that is a relatively small player in global affairs is able to make it difficult, even nigh impossible, for the global human rights community to contribute to meaningful change of any sort in its domestic conditions. This fact is now increasingly recognized by people in Myanmar themselves, who up to 2007 had still held strong hopes that a combination of domestic activism and international intervention could bring about change, but who saw with the failed nationwide monk-led uprising of that year and during the massive cyclone that hit them in the next that the United Nations and its apparatus was unable to have any discernible lasting influence on their lives or the future direction of their country.

Where does that leave the global human rights movement? What further role can United Nations human rights agencies play? There are no easy answers to these questions, but clearly there is also a tremendous amount of room for more in-depth studies of developments in Burma over time, approaching the notion of state control there in terms of the basic principle of government by confusion, rather than in terms of generic normative frames—like abstracted concepts of the rule of law and human rights as found in western academic debate—that are completely unrelated to the true situation in the country, and where there are practically no points on which such concepts can be anchored, at least not without extensive study and careful consideration of the real conditions. Failure to undertake such studies and approach the situation there in terms of what is actually going on rather than what ought to be will only result in more commentators and analysts expressing perplexity from afar at events and behaviour that do not correspond with their birds' eye views of government and statecraft. Undertaking such studies and starting with the lessons learned through work on the country—including that government by confusion is deliberate, not coincidental, and therefore for people to be perplexed is precisely the point—may not lead to any easily identified and obtained answers of the sort that think tanks and international agencies need for lists of recommendations, but may lead to a better understanding of what is going on in Burma and why, through which some starting points for further work can be found, and without which any work on human rights and the rule of law will be pointless.