UPR as an exercise in the making of fiction: An analysis of the presentation by Burma and its implications

(This article is compiled from two submissions by the Asian Legal Resource Centre to the 16th session of the Human Rights Council in March 2011: ALRC-CWS-16-05-2011 and ALRC-CWS-16-12-2011.)

The Asian Legal Resource Centre (ALRC) has analyzed how the Burmese government recently treated the Universal Periodic Review process as an opportunity to present an almost entirely fictionalized account of human rights conditions in its country, rather than for dialogue of the sort that the process envisages. The reason for the government delegation's gross misrepresentations is the government's disconnection from any type of normative framework for the protection of human rights, international or domestic alike. While the UPR process is premised upon the existence of a domestic framework for the implementation of international human rights standards, no such normative basis for the protection of rights exists in Burma. On the contrary, the Burmese government's conceptualization of rights is that these are entitlements that can be extended or withdrawn according to circumstances.

Some of the more glaring fictions contained in the presentation of the government to the UPR Working Group, which are most directly related to the centre's work are documented below, followed by the corrections of the ALRC. Aspects of the government presentation not covered here include misrepresentations about the manner in which elections were held in 2010, the extent to which political parties are able to organize and operate, the status and treatment of people in Northern Rakhine State, the standing of the national human rights committee, sexual violence by the armed forces, confiscation of land, and the notion that the country is entering a new democratic era.

a. "[The] Myanmar Constitution of 2008 is committed to promote and protect human rights and the whole Chapter VIII deals with fundamental rights and principles, at par with the rights given by Constitutions in other countries. The legal remedies for the breach of human rights entrusted by this Chapter are given through five Writs which can be found in the same Chapter" (paragraph 6).

The statement is fiction. Chapter VIII of the 2008 Constitution contains no provisions to protect human rights in accordance with international standards. Most of the provisions are qualified through provisos that they be limited "in accordance with law" or similar. There are no institutional arrangements to ensure that even the rights as stipulated can be protected to a limited extent. Under section 182 all rights can at any time be restricted or revoked if contrary to the interests of the armed forces. From a human rights perspective the constitution is a norm-less document. The writ provisions are yet to be tested. Burma's courts have not received writs for half a century. There is no tradition or understanding of the usage of writs. There is no independent judiciary to receive them, which renders the basic principle of writ petitioning meaningless.

b. "Those referred to as 'political prisoners' and 'prisoners of conscience' are in prison because they had breached the prevailing laws and not because of their political belief" (paragraph 51).

The statement is a misrepresentation. One of the important distinctions between a system in which human rights norms are acknowledged but violated, and one in which they are not so much as acknowledged is that in the latter, even the grounds for imprisonment and punishment of persons deemed to be threats to the government must be denied. Therefore, many political detainees in Burma are charged and imprisoned under sections of law that are purportedly unrelated to their political activities. Even allowing for such cases however, the statement of the government could only be accepted if provisions such as sedition (section 124A, Penal Code) and having contact with political groups listed as unlawful associations (Unlawful Associations Act, 1908) could be classed as non-political. Furthermore, from study of literally hundreds of such cases in recent years, the ALRC can state that the records of these cases are throughout political in character, and political police, usually the Special Branch or special police units under divisional commands, also bring the cases to court. Therefore this statement, which the government has persisted in iterating over some years, is ridiculous and false from whichever angle it is examined.

c. "Torture is a grave crime and the Constitution prohibits torture or cruel, inhumane or degrading treatment" (paragraph 52).

The statement is fiction. There is nowhere in the 2008 Constitution a prohibition of torture or cruel, inhuman or degrading treatment or punishment of any sort. Nor is there a prohibition in the Penal Code or in any other section of domestic law. That the government delegation would make this patently false statement concerning a matter of such grave importance is indicative of its attitude towards the UPR process as a whole. The attitude that the delegation could say anything and expect that nobody would know better prevails throughout, and is an attitude not of a government contemplating dialogue but one of a government treating international processes with contempt.

d. "Myanmar is implementing the UN Standard Minimum Rules for the Treatment of Prisoners. Physicians and nurses are stationed in prisons and specialists from general hospitals are available. Family visits are also allowed" (paragraph 53).

The statement is a misrepresentation. The government is not implementing the Standard Minimum Rules. In particular, with regards to food, health and medicines the conditions in Burmese prisons are notoriously bad. Prisoners rely upon assistance of family and friends, who bring food, vitamins and medicines to supplement meager rations and help them to survive the poor conditions in prison. However, political detainees have in recent years been systematically sent to remote prisons, including some in the north of the country where the weather is extremely cold, making it impossible for family members to visit more than a few times in the year. Anecdotally, requests by gravely sick prisoners and their family members that they receive treatment from specialists outside of prisons are routinely denied. The use of prisoners as labour for the armed forces in areas of the country with persistent civil war or ceasefire conditions is documented and ongoing.

e. "Although there is no MOU between ICRC and the Government, from 1999 to 2005, [the International Committee of the Red Cross] made 406 visits to prisons and camps. Thereafter, it stopped prison visits of its own volition. However, after Cyclone

Nargis in 2008, ICRC made 16 visits" (paragraph 54).

The statement is a misrepresentation. The ICRC stopped its visits because the Burmese government refused to comply with the terms of its globally recognized mandate. The obligation is upon the government to agree for the ICRC to make visits in accordance with the terms of its mandate, not according to whatever terms the government finds expedient.

f. "Since 2006, the Government issued a public notice in the newspaper to complain against human rights violations to the ministries concerned [sic]. From January to August 2010, the Ministry of Home Affairs received 503 submissions and action was taken on 199 complaints, 203 complaints were under investigation and 101 complaints were found to be false... Punitive actions are taken against military personnel who violate the military recruitment laws and regulations…" (paragraphs 88 & 92)

The statements are misrepresentations. The government does not explain the meaning of "action taken". There is no evidence of serious criminal action taken against state officials who have committed human rights abuses, in accordance with international standards. In most cases, action taken is presumed to mean departmental disciplinary action, such as transfer, demotion and sometimes dismissal. Complainants who attempt to pursue criminal actions are themselves subject to intimidation, coercion and harassment, sometimes resulting in criminal actions and imprisonment of the persons who brought complaints. Persons whose complaints are deemed false are sometimes also subject to counter-legal action, including for contempt of court. Such cases are documented not only by human rights groups but are also found in official published records. So far as punitive actions in cases of forced labour and recruitment of children to the army is concerned, the Committee on the Application of Standards of the International Labour Conference has observed that,

"None of the complaints under the [Supplementary Understanding] mechanism assessed and forwarded by the ILO Liaison Officer [to the government] resulted, in 2009, in a decision to prosecute perpetrators of forced labour… [The government] has routinely rejected recommendations made for more serious sanctions to be applied. Recent cases involving complaints of under-age military recruitment have resulted… [in] only administrative sanctions, if any, imposed on the perpetrators; there have been no prosecutions under criminal law" (C.App./D.5, June 2010, paragraph 21).

7. In concluding remarks to the UPR Working Group, the Government of Myanmar through the delegation leader stated bluntly that there is no impunity in the country and that the local remedies required by international law are available through the Ministry of Home Affairs. Thus, by the government's own assertion, it is not the judiciary at all but the executive, and specifically the ministry responsible for management of the police force and prisons, that is assigned the duty of providing remedies for rights abuses. This understanding of redress for rights violations is consistent with the government's non-normative conceptualization of human rights, whereby human rights are not universal principles but relative entitlements, which may be extended or withdrawn according to circumstances. It is this conceptualization of non-normative rights which is the basis for the government's denial of abuses, the

basis for the new constitution, and the basis for the decades of atrocious treatment that the Burmese population has suffered at the hands of the state.

Implications

It is important to consider the implications of this disconnect between the norms-based language and activities of the global human rights movement and the norm-less reality of a member state. This is not merely a disconnect between rhetorical aspirations and hard truth, but a much more significant problem of the gap between a norms-based system and a norm-less one. Unless this is properly understood and accounted for in the work of UN and other international agencies, the many proposals being put forward during the ongoing Human Rights Council review process will have little relevance to the situation of human rights in Burma, or other countries with similar conditions.

The problem of the gap between a norms-based international system and a norm-less domestic one is a difficult problem to approach and understand for people who have been trained in and are accustomed to norms-based systems. However, the problem is often implicit in questions and exchanges about human rights issues in member states, such as those raised in the lead up to the UPR Working Group's tenth session, this January 2011. Two of Japan's questions to Burma were particularly interesting because of their implicit acknowledgement that the problem of systemic rights abuse in Burma is less a problem of refusal to engage with the standards of the international community, less a problem of engagement with international law, than it is a problem of engagement with domestic law, or any standards of law for that matter. These questions ran:

"Although the Constitution of the Republic of the Union of Myanmar provides for the right of peaceful assembly and freedom of association, concerns over restrictions on such freedoms continue to be expressed in UN reports and resolutions. Likewise, the continued practice of arbitrary detention and torture, while prohibited by the Penal Code, has been raised as a matter of concern. We would like to request that the Myanmar Government explain how its understanding of the provisions laid out in its Constitution and Penal Code relates to the concerns and issues pointed out by the UN…

"What are the prospects for Myanmar becoming a signatory to the international conventions on human rights that it is currently examining, including the International Covenant on Economic, Social and Political Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and the Optional Protocol to the Convention on the rights of the Child on the sale of Children, Child Prostitution and Child Pornography? In this connection, we would also like to inquire as to why the Convention Against Torture and the Optional Protocol on the Convention on the rights of the Child on the involvement of children in armed conflict are not also under examination for signature by Myanmar."

While it is not correct to say that Burma's constitution and Penal Code protect its citizens from abuses of the sort mentioned by Japan, the first question is essentially correct in that it raises the basic problem of the government's routine failure to

comply with its own domestic law. This is not merely a practical problem of the gap between what is on paper and what goes on in real life, but rather, a consequence of the imperative for all institutions in Myanmar to follow instructions on the implementation of policy, irrespective of law. It is a consequence of the disengagement of the Burmese state with any firm concept of law, properly understood as the product of a legislature, for over two decades. The gap between domestic law and reality in Burma is not a simple consequence of practices that engender rights abuses; it is a matter of policy. This is a primary cause of chronic rights abuse in the country, yet it is one that has not yet been properly or fully acknowledged by the Human Rights Council.

Where a state is as a matter of policy disengaged from any meaningful concept of law nationally, it can hardly be expected to engage with international law. Thus, as Japan indicates in the second paragraph, there is a vast gap between the development of human rights standards internationally and the recognition of these by the Burmese government. Decades after the rest of the world passed core covenants of the international bill of rights, Burma still has not joined them. However, even where a state pretends to engage with law internationally, if it is not doing the same domestically then any such apparent engagement will have few or no practical consequences.

This incapacity to engage with basic norms for the protection of human rights at either an international or domestic level is manifest in the 70 recommendations "that do not enjoy the support" of Burma listed in the UPR Working Group's draft report on the country (A/HRC/WG.6/10/L.7, 2 February 2011, paragraph 107). While rather awkwardly insisting that it is in compliance with international standards, the government rejected recommendations that included, among many others, the following:

a. "Amend the Constitution… [to be] in compliance with international human rights treaties and humanitarian laws (Denmark)";

b. "Begin a transparent and inclusive dialogue with all national stakeholders… aimed at reviewing and reforming all relevant national legislation to ensure that it is consistent with international human rights law (Maldives)";

c. "Repeal laws that are not in compliance with international human rights law and review its legal system to ensure compliance with the rights to… a fair trial and respect for the rule of law (New Zealand)";

d. "Cooperate with the international human rights mechanisms and humanitarian agencies, specifically by issuing a standing invitation to the Special Procedures of the Human Rights Council and allowing full and unhindered access to all persons in need of humanitarian assistance (Republic of Korea)";

e. "Take appropriate measures to end de-facto and de-jure discrimination with all minority groups (Pakistan)";

f. "Investigate and punish all cases of intimidation, harassment, persecution, torture and forced disappearances, especially against political dissidents, journalists, ethnic

and religious minorities and human rights defenders (Uruguay)"; and,

g. "Seek technical assistance from United Nations to reform judiciary, to establish accessible judicial remedies as well as to alleviate poverty (Turkey)".

It is difficult to understand why any government with a commitment to international standards would not in principle at least agree with any of the above non-specific recommendations. However, when a government has disengaged from human rights norms both in international and domestic law, not only is it understandable that such recommendations would be rejected, but it is imperative that they be rejected. For a government divorced from any normative framework for human rights, arbitrary, inconsistent and contradictory positions on human rights standards are both necessary and unavoidable. In the absence of adherence to any consistent set of standards, whether at home or abroad, there is no body of principles against which decisions can be made and policies applied. Decision-making is relativized and situation-specific; recommendations are accepted or rejected according to expediency.

The problem of what the UN can do with a member state that is disconnected from any normative framework for the protection of human rights urgently needs to be taken up in the ongoing Human Rights Council review process (in accordance with General Assembly resolution 60/251, 15 March 2006).

There have been some initiatives in the lead up to the review; however, many of the issues raised, such as at the Algiers retreat in February 2010, are technical in nature or concerned mainly with the inevitable politicization of the Council processes, rather than the more difficult problem of a member state operating according to an entirely different conceptualization of human rights than that on which the work of the international human rights system is premised, and one disconnected from any standards for the application of human rights not only at the international but also at the domestic level. Consequently, challenges facing the Council, such as the apparent ineffectiveness of special sessions, are discussed mainly in superficial terms, with reference to specific difficulties associated with specific identifiable outcomes, and without critical examination of possible underlying reasons for failure.

The problem that a norm-less state in a normative framework presents is also in part due to the confusion caused by apparently common language that disguises fundamental differences in conceptions, which are revealed only through careful study of circumstances and rhetoric. Although the discussions around the review acknowledge the importance of dialogue, they implicitly take any exchange of views to be a form of dialogue. They also presuppose that member states will in fact engage in frank discussion of their human rights problems and challenges. They fail to recognize and grapple with the problem of what happens when a member state, while apparently talking in the same language as the international community, in fact holds or expresses views that are profoundly contradictory to global values and human rights goals.

The most important problem for the Human Rights Council regarding Burma is not a functional problem, but a problem of understanding. The Council review process presents an opportunity for the Council to go into more significant conceptual and epistemological questions about how to engage with a member state that is

disengaged from human rights standards both internationally and domestically. If the Council can couple its examination of procedural and technical issues with genuinely substantive questions of this nature, then the review process will yield fruit. If not, the Council will continue to offer little to people in countries like Burma, who lack avenues to address violations of their human rights not for want of the language of rights, but for want of a normative framework in which rights can be realized.