

Joint Submission to the United Nations Universal Periodic Review

LAWYERS FOR LAWYERS & LAWYERS' RIGHTS WATCH CANADA

UPR submission

Myanmar

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A. Introduction

1. Lawyers for Lawyers (“L4L”) and Lawyers’ Rights Watch Canada (“LRWC”) submit this report on the situation of human rights regarding the legal profession in Myanmar, with recommendations for the 37th session of the Universal Periodic Review (“UPR”) of the Republic of the Union of Myanmar (“Myanmar”) by the UN Human Rights Council (“HRC”) in October/November 2020.
2. L4L is an independent and non-political Dutch foundation, which was established in 1986 and is funded by lawyers’ donations only. L4L promotes the proper functioning of the rule of law through the free and independent exercise of the legal profession around the world and has had special consultative status with the UN Economic and Social Council (“ECOSOC”) since 2013.
3. LRWC, founded in 2000, is an independent Canadian organization of lawyers and other human rights defenders who promote the implementation and enforcement of international human rights law and standards designed to protect the independence and security of lawyers and human rights defenders around the world. LRWC is volunteer-run and funded through individual donations. LRWC produces legal analyses of national and international laws and standards relevant to human rights violations against human rights defenders. LRWC has had special consultative status at the ECOSOC since 2005.

B. Executive Summary

4. This submission highlights key concerns regarding Myanmar’s compliance with its international human rights obligations to guarantee the right to independent counsel as set out in the UN Basic Principles on the Role of Lawyers (“Basic Principles”); and other international human rights instruments. The report has its focus on the lack of effective guarantees for the independence of the legal profession.

C. Normative and institutional framework of the State

5. The adequate protection of human rights and fundamental freedoms requires that every person within its territory has equal access to effective justice and legal assistance (UDHR Articles 7, 8, 10). Legal assistance can only be provided effectively in a judicial system where lawyers, along with judges and prosecutors, are free to carry out their professional duties independently of the government and free from political pressure. This follows from the Charter of the United Nations (“UN Charter”), the Universal Declaration of Human Rights (“UDHR”) and other instruments.
6. On 22 June 2017, the HRC passed a resolution condemning in general “the increasingly frequent attacks on the independence of [lawyers], in particular threats, intimidation and interference in the discharge of their professional functions”.ⁱⁱ The HRC expressed its deep concern “about the significant number of attacks against lawyers and instances of arbitrary or unlawful interference with or restrictions to the free practice of their profession” and called upon States “to ensure that any attacks or interference of any sort against lawyers are promptly, thoroughly and impartially investigated and that perpetrators are held accountable”.
7. In its task of promoting and ensuring the proper role of lawyers, the Government of Myanmar should respect and incorporate the Basic Principles in its national legislation and practice. The Basic Principles provide a concise description of international standards relating to key aspects of the right to independent counsel. Adherence to the Basic Principles is considered a fundamental precondition to fulfilling the requirement that all persons have effective access to independent legal assistance.
8. During the UPR 2nd cycle in December 2015, Myanmar receivedⁱⁱⁱ and accepted^{iv} recommendations concerning the need to ensure that human rights lawyers can perform their

professional functions without improper interference and the protection of and the creation of a safe and enabling environment for human right defenders.v

9. Despite these commitments by Myanmar, reliable reports and information received from Myanmar demonstrate that Myanmar has not consistently upheld the necessary guarantees for the proper functioning of the legal profession to fulfil the requirements set out in the Basic Principles. Consequently, lawyers encounter difficulties in carrying out their professional duties. This also undermines the proper functioning of the judicial system, including the right to fair trial and effective access to justice.

D. No Effective Guarantees for the Functioning of Lawyers

10. Fundamental to improving the protection of human rights and fundamental freedoms for all people in Myanmar in a justice system is an independent legal profession and guarantees that lawyers are able to work independently without fear of harassment or intimidation.
11. Article 16 of the Basic Principles states that governments must “ensure that lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference (...) and shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics”. Reliable information indicates that lawyers in Myanmar have been subjected to improper interference and harassment by members of the law enforcement agencies and investigative bodies and others. They have also been subjected to threats including death threats, surveillance, and physical attacks, on one occasion leading to the death of a lawyer. This is demonstrated by the following examples:
 - a. **U Ko Ni:** On 29 January 2017, U Ko Ni and U Nay Win were shot by a gunman at Yangon International Airport. U Ko Ni was a constitutional lawyer and senior legal adviser to the ruling National League for Democracy (NLD) party. He was assassinated at close range while holding his grandson after returning from a trip in Indonesia. U Nay Win, a taxi driver who was at the airport that day, attempted to stop the perpetrator’s escape by throwing a brick and chasing after him, and was shot and killed himself. Five men were charged for their alleged involvement in the murders. Four of them were convicted by a special bench of the Northern District Court in Yangon region on 15 February 2019, however concerns remain that the intellectual author of the murder remains at large, and that investigation into the murder has lacked impartiality and independence required by customary international law and UN standards for investigation of unlawful deaths.vi
 - b. **Mr. Robert Sann Aung,** a human rights lawyer, who has represented victims of human rights violations and human rights defenders facing arbitrary arrest and prosecution, has been repeatedly imprisoned, physically attacked, and regularly threatened. After the death of U Ko Ni on 29 January 2017, Robert Sann Aung reportedly received repeated death threats and other intimidating messages. It was also reported that Robert Sann Aung was monitored by Myanmar’s security forces. While travelling in Mandalay for work in December 2019, Robert Sann Aung was followed by a man wearing civilian clothes who allegedly claimed to be from Myanmar’s Military Intelligence. This has happened on four separate occasions since 19 December 2016.vii
12. Some lawyers working on sensitive cases have been subjected to, or threatened with prosecution. Their prosecution is believed to be connected to their legitimate professional activities. Article 18 of the Basic Principles states that lawyers “shall not be identified with their clients or their clients’ causes as a result of discharging their functions.” In her statement at the 73rd session of the General Assembly in October 2018, Ms. Yanghee Lee, Special Rapporteur on the situation of human rights in Myanmar, stated that: “On a regular basis, I receive reports of new charges lodged

against lawyers (...) while exercising their legitimate rights and freedoms”^{viii} This is also demonstrated by the following examples:

- c. **Daw Khin Khin Kyaw**, human rights lawyer, was sentenced to six months in prison on September 28, 2018. The conviction and sentencing came after a lengthy trial that began in 2015. On 15 September 2015, she was charged with “contempt of court” under Section 228 of the Penal Code, for “intentionally insulting or interrupting a public sitting in a judicial proceeding”. It was reported that her prosecution was connected to her work representing a group of students in a case against high-ranking police officials responsible for the violent crackdown on these students during a peaceful protest against Myanmar’s National Education Law in Letpadan, Bago region, in March 2015.^{ix}
- d. **U Kyi Myint**, human rights lawyer, is being prosecuted for remarks he made in April 2019 at an assembly on the amendment of the Constitution. He is charged with defaming the military and military leadership under Section 505A of the Penal code. It is reported that the Police have not conducted proper investigation of the case, as is required under Section 202 in the Penal Code. U Kyi Myint is currently released on bail and his case continues at the Regional High Court, where he faces a prison sentence up to 2 years.
- e. **U Khin Maung Zaw** and **Daw Su Darli Aung** jointly represent a defendant in a trial called the “Victoria-case”, a child rape case that has generated unprecedented attention from the public in support of the defendant and against the justice system. Lawyer Daw Su Darli Aung has been charged with violating Section 96d of the new Child Rights Act ,^x and a lawsuit against her was opened on the 31st of August 2019. A complaint against U Khin Maung Zaw has also been filed with the police. Daw Su Darli Aung and U Khing Maung Zaw are defending the driver from the school where the child was allegedly raped and who is accused of the alleged rape. The lawyers have tried to prove the innocence of the driver and are accused of having mentioned the names of the alleged real perpetrators. The accusations against the lawyers are believed to be false and made for the purpose of silencing both lawyers. The lawyers now have filed a motion based on Section 561A of Myanmar Code of Criminal Procedure to transfer the case to the High Court in Mandalay, and the case against Daw Su Darli Aung is currently on hold. Both lawyers also receive threats on a regular basis.

E. Independent Bar Association

- 13. Independent bar associations have a vital role to play in protecting their members from persecution and improper restrictions and infringements on lawyers’ discharge of their legitimate functions.
- 14. The establishment in 2016 of the Independent Lawyers’ Association of Myanmar (ILAM) is welcome. The ILAM is supported by the International Bar Association Human Rights Institute (IBAHRI). Many lawyers in Myanmar have joined the ILAM, a voluntary bar association of lawyers that represents the interests of the affiliated lawyers. ILAM is conducts public information about the role of lawyers, is developing rules of conduct and training curricula, and provides liaison between the government, the legal profession, and the public.
- 15. However, the Myanmar Bar Council is not yet completely independent. In 2014 the Special Rapporteur on the situation of human rights in Myanmar urged parliament to “amend the Bar Council Act to transform the Bar Council into a self-governing professional association to defend the integrity and independence of the profession and maintain professional standards in accordance with the Basic Principles on the Role of Lawyers”.^{xi} The Bar Council Act has not yet been amended.

F. Recommendations to Myanmar

- **Immediately take measures to amend the Bar Council Act to ensure the independence of the legal profession and maintenance of professional standards in accordance with the provisions of the Basic Principles on the Role of Lawyers.**
- **Take immediate measures to ensure sufficient safeguards in law and in practice to guarantee the full independence and effective protection against any form of reprisals against lawyers for conducting their professional duties, in accordance with the UN Declaration on the Human Rights Defenders.^{xii} It is recommended that Myanmar adopt legislation and practices based on the Model National Law on the Recognition and Protection of Human Rights Defenders^{xiii}**
- **Immediately take effective measures to ensure that crimes, harassment, and other violations against lawyers are and publicly condemned at all levels and that all potentially unlawful deaths are promptly, impartially, independently, and effectively investigated, and that all the perpetrators of such acts are prosecuted, in accordance with the Minnesota Protocol on the Investigation of Potentially Unlawful Death,^{xiv}**
- **Refrain from any actions that may constitute harassment, persecution, or interference in the legitimate work of lawyers, including criminal prosecution on improper grounds such as the expression of critical views or the nature of cases in which lawyers are discharging their professional functions.**
- **Immediately sign and ratify the International Covenant on Civil and Political Rights and all other core UN human rights treaties.**

ⁱ United Nations, *Basic Principles on the Role of Lawyers*, 7 September 1990, available at: <https://www.refworld.org/docid/3ddb9f034.html>. The UN Basic Principles on the Role of Lawyers provide a concise description of international norms relating to the key aspects of the right to independent counsel. The Basic Principles were unanimously adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in Havana, Cuba on September 7 1990. Subsequently, the UN General Assembly “welcomed” the Basic Principles in their ‘Human rights in the administration of justice’ resolution, which was adopted without a vote on December 18 1990 in both the session of the Third Committee and the plenary session of the General Assembly.

ⁱⁱ Human Rights Council, Mandate of the Special Rapporteur on the independence of judges and lawyers, Resolution adopted by the Human Rights Council on 22 June 2017, A/HRC/RES/35/11, 10 July 2017, available at: https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/RES/35/11.

ⁱⁱⁱ Report of the Working Group on the Universal Periodic Review of Myanmar, A/HRC/31/13, 23 December 2015, p. 12-29.

^{iv} Report of the Working Group on the Universal Periodic Review of Myanmar, Addendum 1: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, A/HRC/28/16/Add.1, 10 March 2016.

^v Recommendations:

144.73 Guarantee in law and in practice that lawyers and judges can perform their professional functions without improper interference and legally form and join self-governing professional associations (Austria); 144.74 Define professional legal standards and disciplinary procedures in conformity with the Basic Principles on the Role of Lawyers (Hungary);

144.82 Ensure the protection of human rights defenders (Chile);

144.83 Create and maintain a safe and enabling environment for civil society, human rights defenders and journalists (Norway);

Note that Article 9.3 of the UN Declaration on Human Rights Defenders reads: ‘[...] everyone has the right, individually and in association with others, inter alia: (c) To offer and provide professionally qualified legal assistance or other relevant advice and assistance in defending human rights and fundamental freedoms’. We therefore understand human rights defenders to include lawyers. The recommendations on human rights defenders are also applicable to lawyers.

^{vi} The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), Office of the United Nations High Commissioner for Human Rights, New York/Geneva, 2017. Also see UN Human Rights Council, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, A/HRC/26/36, 1 April 2014, para. 42, http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session26/Documents/A-HRC-26-36_en.doc.

^{vii} A statement by human rights group Amnesty International, published on Tuesday, said Robert Sann Aung first noticed he was being followed while transiting in Mandalay for work on December 19, 2016.

(<https://frontiermyanmar.net/mm/node/4584>). According to Robert Sann Aung, while having to transit in Mandalay for work, he has been followed by a man wearing civilian clothes who claims to be from the Military Intelligence. The man waits for him at the airport and follows him until he boards his connecting flight. This has now happened on four separate occasions since 19 December 2016.

(<https://www.amnesty.org/download/Documents/ASA1660032017ENGLISH.pdf>)

^{viii} Statement by Ms. Yanghee Lee, Special Rapporteur on the situation of human rights in Myanmar at the 73rd session of the General Assembly, 23 October 2018, available on: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23779&LangID=E>.

^{ix} See also the Statement by Ms. Yanghee Lee, Special Rapporteur on the situation of human rights in Myanmar at the 73rd session of the General Assembly, 23 October 2018, available on:

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23779&LangID=E>.

^x Section 96d of the new Child Rights Act, reads: *“No one shall be allowed for collecting, publishing or publicizing information on the identity of the child accused of committing an offence or a child involved in a case as a witness or photographing children for inclusion, distribution and use in periodicals and books and for dissemination on the radio, on television and through social media.”* Violation of this provision is made punishable in Section 101 of the Child Rights Law: *“Whoever commits any of the following acts shall, upon conviction, be punished with imprisonment for a term of minimum 4 months to maximum 1 year or with a fine of minimum Kyat 400,000 to maximum Kyat 600,000 or with both”*.

^{xi} Report of the Special Rapporteur on the situation of human rights in Myanmar, A/HRC/25/64, 1 April 2014, p. 15.

^{xii} UN General Assembly, Human rights defenders in the context of 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 : resolution / adopted by the General Assembly, 10 February 2016, A/RES/70/161, available at: <https://www.refworld.org/docid/56dd31954.html>.

^{xiii} International Service for Human Rights (ISHR) Model National Law on the Recognition and Protection of Human Rights Defenders, 2017, available at: https://www.ishr.ch/sites/default/files/documents/model_law_english_january2017_screenversion.pdf.

^{xiv} The Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016), Office of the United Nations High Commissioner for Human Rights, New York/Geneva, 2017.