

PETITION TO:

UNITED NATIONS WORKING GROUP ON ARBITRARY DETENTION

Mr Mads Andenas (Norway)

Mr José Guevara (Mexico)

Mr Seong-Phil Hong (Republic of Korea)

Mr Sètondji Adjovi (Benin)

Mr Vladimir Tochilovsky (Ukraine)

HUMAN RIGHTS COUNCIL UNITED NATIONS GENERAL ASSEMBLY

in the matter of

Tin San
(the “Petitioner”)

v.

Government of the Republic of the Union of Myanmar

Petition for Relief Pursuant to Commission on Human Rights Resolutions 1997/50, 2000/36, 2003/31, and Human Rights Council Resolutions 6/4 and 15/1

Submitted by:

Media Legal Defence Initiative

The Foundry

17-19 Oval Way

London SE11 5RR

United Kingdom

This Petition was prepared by students participating in the Freedom of Expression Law Clinic at the University of Zagreb, Faculty of Law, with Media Legal Defence Initiative, and Smita Shah, Garden Court Chambers. The project is in collaboration with Programme in Comparative Media Law and Policy (PCMLP), Oxford University.¹

¹ More information about the Law Clinic can be found at <http://pricemootcourt.socleg.ox.ac.uk/law-clinic/>. More information about Garden Court Chambers can be found at <http://www.gardencourtchambers.co.uk> and about PCMLP at <http://pcmlp.socleg.ox.ac.uk/>.

EXECUTIVE SUMMARY

The Petitioner requests that the United Nations Working Group on Arbitrary Detention (the “Working Group”) render an Opinion in his case. The Petitioner submits that his arrest and detention amount to arbitrary detention as defined by the Working Group.

The Petitioner is a citizen of the Republic of the Union of Myanmar (“Myanmar”) and is Chief Executive Officer of *Unity*, a current affairs journal. On 25 January 2014, *Unity* published a front-page article disclosing details of a military facility which had been built on more than 3,000 acres of land that had been confiscated from local farmers (see [Annex I](#) and [Annex II](#)). The article itself contained photographs of the location and alleged that the facility in question was in fact a chemical weapons factory.

The Petitioner was arrested and detained on 1 February 2014 and remains in prison to this date. The Petitioner was found guilty of knowing and permitting journalists to enter and take photographs of a military weapons factory contrary to the Burma Official Secrets Act 1923 (the “BOSA 1923,” [Annex III](#)), and is currently serving a seven year prison sentence. As demonstrated herein, the Petitioner has been arrested and detained whilst exercising his right to freedom of opinion and expression as guaranteed by Article 19 of the International Covenant for Civil and Political Rights (the “ICCPR”) and enshrined in Article 19 of the Universal Declaration of Human Rights (the “UDHR”). His arrest and detention, therefore, constitute Category II arbitrary detention as defined by the Working Group. Myanmar has also not complied with norms relating to the Petitioner’s right to a fair trial recognised by Articles 9 and 14 of the ICCPR and Articles 9 and 10 of the UDHR. As a result, his detention also constitutes Category III arbitrary detention as defined by the Working Group.

Therefore, the Petitioner respectfully requests that the Working Group render an Opinion requesting the Government of Myanmar to terminate his arbitrary detention and bring the situation in conformity with the principles set forth in the ICCPR and the UDHR.

BASIS FOR REQUEST

The Petitioner is a citizen of Myanmar, which is not a state party to the ICCPR. Nonetheless, Myanmar is a member of the United Nations² and voted in favour of the UDHR³ which has acquired the status of customary international law.⁴ By voting for the UDHR, Myanmar has demonstrated its commitment to promoting universal respect for and observance of human rights and fundamental freedoms.⁵

The Working Group fulfils its mandate by investigating cases of deprivation of liberty imposed arbitrarily whilst referring to the international standards set forth in the UDHR, as well as other relevant international instruments accepted by the state concerned.⁶ It has previously rendered numerous Opinions on cases of arbitrary detention in Myanmar.⁷ The Working Group, therefore, has competence to consider the Petitioner's request.

The Petitioner has been arbitrarily arrested and detained while he was exercising – or in situations connected to the exercise of – his right to freedom of opinion and expression (Art. 19 ICCPR and UDHR). Moreover, Myanmar has not complied with international norms relating to the Petitioner's right to a fair trial (Art. 9 and 10 UDHR and Art. 9 and 14 ICCPR).

For the reasons stated herein, the Petitioner's arrest and continuing detention violate fundamental rights enshrined in international law and constitute Category II and Category III arbitrary detention as defined by the Working Group. He should be immediately released from detention.

Therefore, the Petitioner hereby requests that the Working Group consider this Petition to be a formal request for an Opinion of the Working Group pursuant to Resolutions 1991/42 and 1997/50 of the Commission on Human Rights and Resolution 15/18 of the Committee on Human Rights.

² United Nations, *Member States of the United Nations* (2 December, 2014), available at <http://www.un.org/en/members/>.

³ Department of Public Information, United Nations, *Yearbook of the United Nations 1948-49* (November 1950), available at https://web.archive.org/web/20130927221000/http://unyearbook.un.org/1948-49YUN/1948-49_P1_CH5.pdf, p. 535.

⁴ United Nations, *The Foundation of International Human Rights Law* (3 December 2014), available at http://www.un.org/en/documents/udhr/hr_law.shtml.

⁵ UN General Assembly, *Universal Declaration of Human Rights*, UN Doc. No. 217 A(III) (10 December 1948), Preamble par. 5; United Nations, *Charter of the United Nations*, UN Doc. No. 1 UNTS XVI (24 October 1945), Article 1 par. 3.

⁶ UN Working Group on Arbitrary Detention (the "Working Group"), *Report of the Working Group on Arbitrary Detention*, UN Doc. No. A/HRC/16/47 (19 January 2011), par. 7.

⁷ Working Group, *Communications* No. 6/2014, 56/2013, 50/2013, 25/2011, 28/2010, 23/2010, 12/2010, 4/2010, 46/2008, 44/2008, 43/2008, 26/2008, 12/2008, 7/2008, 2/2007, 4/2006, 11/2005, 16/2004, 9/2004, 2/2002, 12/2001, 13/2001, 38/2000, 25/2000, 3/1999, 20/1997, 13/1994, 62/1993, 38/1993, 52/1992, 8/1992.

MODEL QUESTIONNAIRE

The Media Legal Defence Initiative has endeavoured to present all information requested in the Model Questionnaire. However, limited access to the Petitioner, and his own limited access to information about his arrest and ongoing detention, has made comprehensive completion of this questionnaire difficult. It is respectfully submitted that this should not affect the admissibility or final outcome of this Petition, consistent with the position of this Working Group in this regard.⁸ Unless otherwise indicated, information has been received via the Petitioner's defence team.

Petitioner: Mr Tin San

I. IDENTITY

Family name	- 9
First name	Tin San
Sex	Male
Birth date or age (at the time of detention)	52 years
Nationality	Burmese
Identity document (if any)	
(a) Issued by	(a) Unknown
(b) On (date)	(b) Unknown
(c) No.	(c) 12/Kha Ra Ka (N)097128
Profession and/or activity	Chief Executive Officer of <i>Unity</i> , a current affairs journal
Address of usual residence	No(8), Nay Kyar St, PaZunTaung Tsp, Rangoon, Myanmar

II. ARREST

Date of arrest	1 February 2014
Place of arrest	The Petitioner's arrest took place at <i>Unity's</i> premises in Rangoon.

⁸ This Working Group stated in its first report to the Commission on Human Rights, when establishing its methods of work, that 'failure to comply with all formalities [regarding the presentation of information about a petitioner and the use of the model questionnaire] shall not directly or indirectly result in the inadmissibility of the communication.' Working Group, *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment: Report of the Working Group on Arbitrary Detention*, Commission on Human Rights, 48th Sess., UN Doc. No. E/CN.4/1992/20 (21 January 1992), par. 8. Further, in Petition No. 29/2006, a petition was accepted (and detention was proven to be arbitrary) based almost entirely on newspaper articles. It was judged that the information was reliable as far as it was possible because it came from 'independent and reliable sources' including NGOs: Working Group, *Communication No. 29/2006 addressed to the Government concerning the case of Mr. Ibnal-Shaykh al-Libi and 25 other persons* (8 December 2005).

⁹ It is reported that citizens of Myanmar do not use family surnames, see Daw Mi Mi Khaing, *Burmese Names* (1 February 1958), available at <http://www.theatlantic.com/magazine/archive/1958/02/burmese-names/306818/> and *Keys to understanding Burmese Names/Titles* (7 March 2013), available at <http://www.myanmarburma.com/blog/469/keys-to-understanding-burmese-names-titles>.

Forces who carried out the arrest or are believed to have carried it out	The Special Branch of the Police
Did they show a warrant or other decision by a public authority?	No
Authority who issued the warrant or decision	Ministry of Defence, the Republic of the Union of Myanmar
Relevant legislation applied (if known)	Unknown

III. DETENTION

Date of detention	1 February 2014
Duration of detention (if not known, probable duration)	10 months and ongoing
Forces holding the detainee under custody	Ministry of Home Affairs, the Republic of the Union of Myanmar
Places of detention (indicate any transfer and present place of detention)	Pre-trial detention: Insein Prison, Rangoon, Myanmar Post-trial detention: Pokokku Prison, Magwe, Myanmar
Authorities that ordered the detention	Ministry of Home Affairs, the Republic of the Union of Myanmar
Reasons for the detention imputed by the authorities	Mr Tin San was convicted pursuant to Art. 3(1)(a) and 9 of the BOSA 1923 for knowing and permitting journalists to enter and take photographs of a military weapons factory.
Relevant legislation applied (if known)	Art. 3(1)(a) and 9 of the BOSA 1923

IV. DESCRIBE THE CIRCUMSTANCES OF THE ARREST AND/OR THE DETENTION AND INDICATE PRECISE REASONS WHY YOU CONSIDER THE ARREST OR DETENTION TO BE ARBITRARY

A. Circumstances of the arrest and detention

This section presents an overview of the context in which the arrest and detention of the Petitioner took place, introduces his background and summarises the most relevant facts of his arrest and subsequent detention. We respectfully refer the Working Group to the responses to sections I (Identity), II (Arrest), and III (Detention) of the Model Questionnaire on pages 4 and 5 of this Petition for additional information in this regard.

A.1 The Petitioner was arrested and detained amidst a climate of restrictions in Myanmar on the freedoms of participation in political affairs, expression, religion and association and the persecution of those who seek to exercise these freedoms

The Constitution of the Republic of the Union of Myanmar (the “Constitution”) was adopted following a referendum on 10 May 2008. The Constitution recognises the right to freedom of expression as a fundamental right under section 354, which provides that:

“[e]very 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, 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.”¹⁰

The Constitution also recognises a number of judicial principles that are synonymous with a fair trial. Section 19 of the Constitution states that:

“[t]he following are prescribed as judicial principles:

- (a) to administer justice independently according to law;
- (b) to dispense justice in open court unless otherwise prohibited by law;
- (c) to guarantee in all cases the right of defence and the right of appeal under law.”¹¹

The Government of Myanmar announced that the adoption of the Constitution, and the subsequent multi-party elections that were to be held in 2010, were two crucial steps towards democracy in Myanmar.¹² However, reports from a broad range of sources suggest that there has been routine and systematic repression of basic freedoms in Myanmar since the adoption of the Constitution. For example, between October and December 2008 some 400 prisoners of conscience were brought before prison courts and were given long sentences.¹³ A large number of these prisoners were kept in solitary confinement, and were subjected to ill-treatment.¹⁴

The multi-party elections that were held in 2010 further undermined the democratisation process that was to take place in Myanmar. Even though more than 25 parties were allowed to participate, five parties were deregistered from the election process by the electoral

¹⁰ *Constitution of the Republic of the Union of Myanmar* (9 April 2008) (“Constitution”), s 354.

¹¹ Constitution, s 19.

¹² UN Special Rapporteur on the situation of human rights in Myanmar (“Special Rapporteur”), *Report of the Special Rapporteur on the situation of human rights in Myanmar*, UN Doc. No. A/HRC/8/12 (3 June 2008), par. 16.

¹³ Special Rapporteur, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, UN Doc. No. A/HRC/10/19 (11 March 2009), par. 23.

¹⁴ *Id.*, at par. 32.

committee.¹⁵ 25% of the parliamentary seats were automatically accorded to the military, which made it even more difficult for the opposition parties to gain enough seats to form a government.¹⁶ There were also many other irregularities during the course of the elections; such as major internet disruptions two days before the elections, the prohibition of witnessing and reporting by international observers, ballot manipulation, and intimidation of voters. The United Nations Special Rapporteur on the situation of human rights in Myanmar (the “Special Rapporteur”) has characterised the election process as “deeply flawed”.¹⁷ 75% of the seats were won by the pro-military Union Solidarity and Development Party (the “USDP”), a successor to the Union Solidarity and Development Association (the “USDA”), a social organisation established by Senior General Than Shwe in 1993.¹⁸ In July 2010, the USDA dissolved and its memberships and funds were transferred to USDP. Its current President, Thein San, and 26 other generals with ministerial portfolios had resigned from the military and registered with the new party.¹⁹

In parliamentary by-elections in 2013, the National League for Democracy (the “NLD”) decided to re-join the political scene. It won 43 out of 44 contested seats.²⁰ However, the military representatives and former military officers maintain a majority in both houses.²¹ Many former military officers remain in important positions in the ruling military-backed USDP and have a number of senior ministerial portfolios.²²

Concerns over Myanmar’s supposed democratic transition were reported by Human Rights Watch, who recognised that “Burma’s human rights situation remains poor despite some noteworthy actions by the government towards reform.”²³

A continuing human rights concern in Myanmar is the practice of land grabbing, and the systematic suppression of protests against the practice. Human Rights Watch has reported on the human rights abuses related to land confiscations by the government of Myanmar on numerous occasions.²⁴ They also raise concerns over laws passed in 2012 which favour incoming private enterprises over local interests, and allow the government to seize land in the national interest.²⁵ As reported by the Asian Human Rights Commission to the United

¹⁵ Special Rapporteur, *Report of the Special Rapporteur on the human rights in Myanmar*, UN Doc. No. A/65/368 (15 September 2010) (“Report A/65/368”) par. 17; Denise Yanblood Coleman, Country Watch, *Burma (Myanmar) Country Review* (July 2014), p. 33.

¹⁶ Denise Yanblood Coleman, Country Watch, *Burma (Myanmar) Country Review* (July 2014), p. 33.

¹⁷ Report A/65/368, par. 17.

¹⁸ Human Rights Resource Centre, *Rule of Law for Human Rights in the ASEAN Region: A Base-line Study* (May 2011), p. 158.

¹⁹ *Id.* par. 32

²⁰ Amnesty International, *2013 Annual Report: Myanmar* (2013) (“Amnesty Report”), p. 187, available at http://files.amnesty.org/air13/AmnestyInternational_AnnualReport2013_complete_en.pdf.

²¹ Human Rights Watch, *World Report 2013: Myanmar* (2013), available at https://www.hrw.org/sites/default/files/wr2013_web.pdf, p. 284.

²² *Id.*

²³ *Id.*

²⁴ The Washington Post, *Land-grabbing endures in new Burma* (31 January 2013), available at http://www.washingtonpost.com/world/asia_pacific/land-grabbing-endures-in-new-burma/2013/01/31/429ace6e-6a3d-11e2-95b3-272d604a10a3_story.html.

²⁵ Human Rights Watch, *Submission on World Bank Group Systematic Country Diagnostic and Country Partnership Framework for Burma* (3 October 2014), available at <http://www.hrw.org/news/2014/10/03/submission-world-bank-group-systematic-country-diagnostic-and-country-partnership-fr>.

Nations, this puts Myanmar at risk of a “land-grabbing epidemic.”²⁶ The confiscated land is often used for the purpose of expanding army battalions and army units, as well as land allocation to private companies with links to the military.²⁷

Amnesty International has recognised that there were still a number of ongoing human rights issues in its 2013 Annual Report on Myanmar:

“[a]mid ongoing political, legal and economic reforms, the authorities released hundreds of prisoners of conscience; however, many remained behind bars. Security forces and other state agents continued to commit human rights violations, including unlawful killings, excessive use of force, arbitrary arrests, torture and other ill-treatment, and unlawful confiscation or destruction of property and livelihoods. Impunity for past crimes, including crimes against humanity, persisted.”²⁸

Despite the aspirations of the new Myanmar Constitution, the reality is that Myanmar continues to ignore basic human rights and fundamental freedoms in their domestic legal order. As an unfortunate consequence, the human rights situation in Myanmar remains extremely poor and is not in line with international norms.

(i) Freedom of expression

The Government of Myanmar often uses the restrictive apparatus of the former military state to curtail freedom of expression. This has led to a worrying situation in Myanmar, where journalists are often subjected to attacks, intimidation, arrest and prosecution by the state. Furthermore, many of the laws that are applied to journalists permit a significant amount of oversight and intervention from government authorities. This sustains an environment where the reporting of issues relating to the military or the Government is significantly restricted.

A particularly worrying trend in Myanmar is the increasing reliance on a number of draconian laws that have been inherited from when Myanmar was a British colony. These laws are clearly outdated and were drafted under circumstances that are no longer relevant to Myanmar. Out of an estimated 800 laws in the country, more than half were enacted prior to the country’s independence in 1948.²⁹

The BOSA 1923 is simply one example of a colonial law that poses a serious threat to freedom of expression in the country. The BOSA 1923 is largely modelled on the Official Secrets Act 1911 (the “OSA 1911”) of the United Kingdom. Section 3(1) BOSA 1923 makes it a criminal offence to approach, inspect, pass over or be in the vicinity of a “prohibited place” for any purpose prejudicial to the safety or interests of the State.³⁰ Section 2(8) gives a lengthy definition of what constitutes a “prohibited place”.³¹

²⁶Asian Legal Resource Centre, *Myanmar at risk of land-grabbing epidemic*, UN Doc. A/HRC/20/NGO/33 (11 June 2012), available at <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/20/NGO/33&Lang=E>.

²⁷The Irrawaddy, *Military involved in massive land grabs: Parliamentary Report* (5 March 2013), available at <http://www.irrawaddy.org/human-rights/military-involved-in-massive-land-grabs-parliamentary-report.html>

²⁸ Amnesty Report, p. 187.

²⁹ United Nations Development Programme, *Rule of Law and Access to Justice in Myanmar* (2013-2015), available at http://www.undp.org/content/dam/myanmar/docs/Documents/Fast_Facts_Rule_of_Law.pdf.

³⁰ *Burma Official Secrets Act* (2 April 1923) (“BOSA”), s (3)(1).

³¹ BOSA, s 2(8).

However, section 3(1) BOSA 1923 suffers from a number of flaws in its drafting which leave journalists exposed to arbitrary prosecution. For example, the provision does not define the “interests of the State”, nor does it require an actual harm to national security. Furthermore, section 3 BOSA 1923 does not provide a defence for responsible journalism or activity in the public interest. Section 3(2) BOSA 1923 places the onerous burden of proof on the defendant if they have not been acting under lawful authority. Section 3 BOSA 1923 also provides for the longest permissible jail sentence under the Act.

In the United Kingdom, the OSA 1911 had historically been reserved for prosecuting foreign spies.³² The equivalent OSA 1911 provision to Section 3 BOSA 1923 has been applied to a journalist on only one occasion. The application of the OSA 1911 in this manner has subsequently been “hailed as a farce and an ‘oppressive’ use of the OSA 1911, and an example of state pressure associated more with totalitarian regimes than liberal democracy.”³³

Nonetheless, the BOSA 1923 has been used against a large number of people in Myanmar, usually in retaliation to their peaceful expression of dissenting views.³⁴ Sometimes it has been used in conjunction with other laws, such as the Emergency Provisions Act which the Working Group has noted as being frequently cited in proceedings against journalists, writers, political leaders and members of Parliament.³⁵ The prosecution of Dr Aung Khin Sint is a pertinent example of Myanmar’s abuse of the BOSA 1923. Dr Sint was a NLD Central Committee Member who was sentenced to 20 years’ imprisonment for distributing leaflets which opposed the restrictions imposed by the State Law and Order Restoration Council (“SLORC”)³⁶ in the National Convention. In Opinions 13/1994³⁷ and 20/1997,³⁸ the Working Group deemed that the arrest and detention were linked to the exercise of the right to freedom of opinion and expression, finding the Government in contravention of Art. 9 and 19 of the UDHR.

The BOSA 1923 has also been used against Dr Khin Zaw Win, a dentist and pro-democracy activist, who was charged for possessing ‘secret official information’. Considered by Amnesty International to be a prisoner of conscience, and at the time one of only two political prisoners for whom UNESCO issued a public appeal, he was released in 2005 after having served ten years in prison for peacefully criticising the Government of Myanmar.³⁹

The Special Rapporteur has confirmed that the abuse of such laws is still prevalent in Myanmar. She has gone on to express her concern:

³² Mike Dodd and Mark Hanna, *McNae's Essential Law For Journalists* (22nd edn, Oxford University Press 2014), ch. 33.

³³ Paul Magrath, Official secrecy and the ABC Case [1980] 13 B.L.J. 88.

³⁴ Article 19, *Acts of Oppression: Censorship and the law in Burma* (March 1999), available at <http://www.article19.org/data/files/pdfs/publications/burma-acts-of-oppression.pdf>.

³⁵ Working Group, *Opinions 13/1994, 59/1992 and 38/1993*.

³⁶ The Economist, *Myanmar...formerly known as SLORC* (20 November 1997), available at <http://www.economist.com/node/106254>.

³⁷ Working Group, *Decision No. 13/1994* (22 April 1994).

³⁸ Working Group, *Opinion No. 20/1997* (11 July 1997)

³⁹ Committee on Human Rights, *Case Information: Khin Zaw Win* (3 November 2014), available at http://www7.nationalacademies.org/humanrights/Cases/CHR_043970.htm; see Article 19, *Acts of Oppression: Censorship and the law in Burma* (March 1999), available at <http://www.article19.org/data/files/pdfs/publications/burma-acts-of-oppression.pdf>.

“at reports of the continued application of the outdated legislation, such as the [BOSA 1923], to criminalize and impede the activities of civil society and the media. She noted that this has increased the number of political prisoners and that sentences imposed are disproportionately high.”⁴⁰

Moreover, she has publicly expressed concern regarding the sentencing of the Petitioner and four of his journalists.⁴¹ Reference to the *Unity* case was also made by her predecessor Mr Ojea Quintana who highlighted that “extreme care must be taken by States to ensure that laws relating to national security are applied in a manner that conforms to international human rights standards.”⁴² The Special Rapporteur stated that, to develop rule of law in Myanmar, the Government should:

“accelerate efforts to review and reform legislation and legal provisions that contravene international human rights standards [...] including the [BOSA 1923].”⁴³

While no action regarding the reform has been taken so far,⁴⁴ the overly broad nature of the offences created by the BOSA 1923 makes it clearly incompatible with international law guarantees on freedom of expression.⁴⁵

Another threat to freedom of expression in Myanmar is presented by the newly enacted Printing and Publishing Law 2014. According to the law, printers and publishers who currently wish to operate in the industry, as well as those organisations or companies that wish to establish a news agency, must apply for an “acknowledgement” certificate from the Ministry of Information.⁴⁶ Operating without a certificate or while the certificate is suspended is an offence punishable by a fine of up to five million Kyats (approximately USD 4,817).⁴⁷ The main problem with these provisions is that the registration system imposed on the print media is not overseen by a body that is independent of Government since the Ministry of Information clearly does not meet this requirement.⁴⁸ As a result, serious

⁴⁰ Special Rapporteur, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, UN Doc. No. A/69/398 (23 September 2014) (“Report No. A/69/398”), par. 18.

⁴¹ *Id.*, par. 20.

⁴² Special Rapporteur, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, UN Doc. No. A/HRC/25/64 (“Report No. A/HRC/25/64”) (2 April 2014), par. 14, 15.

⁴³ Special Rapporteur, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, UN Doc. No. A/67/383 (25 September 2012) (“Report No. A/67/383”), par. 95(c).

⁴⁴ Myanmar Times, *State Secrets Act reform rejected* (29 September 2014),

<http://www.mmtimes.com/index.php/national-news/11774-state-secrets-act-reform-rejected.html>; e.g. Human Rights Now, *Status of human rights and sanctions in Myanmar* (September 2014 Report),

<http://hrn.or.jp/eng/wp-content/uploads/2014/10/museptember2014report.pdf>.

⁴⁵ Article 19, *Acts of Oppression: Censorship and the law in Burma* (March 1999), available at <http://www.article19.org/data/files/pdfs/publications/burma-acts-of-oppression.pdf>.

⁴⁶ *Printing and Publishing Law* (2014), Art. 4.

⁴⁷ *Id.*, Art. 15, 16.

⁴⁸ “Imposing special registration requirements on the print media is unnecessary and may be abused and should be avoided. Registration systems which allow for discretion to refuse registration, which impose substantive conditions on the print media or which are overseen by bodies which are not independent of government are particularly problematical.”, The UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, *Joint Declaration on regulation of the media, restrictions on journalists and investigating corruption* (18 April 2003), available at <http://www.article19.org/resources.php/resource/3046/en/>.

concerns remain over the Government's authority to register and de-register media publications, which may possibly be exercised arbitrarily and with the possibility of continued control of the media through post-publication censorship.⁴⁹ This makes it increasingly difficult for the private media to publish reports considered controversial by the Government of Myanmar.

Widespread intimidation and abusive treatment of journalists is also a significant threat to freedom of expression in Myanmar. The country's police intelligence unit regularly interrogates editors of news publications to inquire about their business procedures and financial records.⁵⁰ According to local media reports, at least six private journals, including *Unity*, *Myanmar Post Weekly*, *The Voice*, *Myanmar Thandswint*, *Popular News* and *People's Age*, were instructed to visit the Special Branch of the Home Affairs Ministry.⁵¹ Human Rights Watch has noted that Myanmar's authorities are increasingly using public concerns over potential money laundering simply as an excuse to justify intimidation of the country's press.⁵²

The arrest, detention and unlawful killing of journalists are still prevalent in Myanmar. Despite the fact that Myanmar released more than 200 political prisoners in 2013, in January 2014 it still had an estimated 60 political detainees.⁵³ New arrests have been reported such as the arrest of Zaw Pe, a video journalist for the media organisation Democratic Voice of Burma, who was sentenced to one year in prison for his journalistic activities in April 2014; Yae Khe, a freelance journalist with the Mizzima news agency, who was arrested and charged after he had organised a peaceful protest calling for the release of detained journalists and media workers, and is facing up to one year in prison.⁵⁴ At the same time the Special Rapporteur has called for a review of these cases, and that the release of these journalists be a matter of priority.⁵⁵

What is more, Myanmar media recently reported on the death of a freelance journalist Ko Par Gyi, who was shot and killed while under the care of a government military unit.⁵⁶ Ko Par Gyi was arrested after finishing a photo assignment while reporting on clashes between government and ethnic rebel forces and accused of being a member of an ethnic rebel organisation.⁵⁷ Another example is the recent death of journalist Aung Naing, who was also

⁴⁹ Article 19, *Myanmar: Printing and Publishing Law* (11 November 2014), available at <http://www.article19.org/data/files/medialibrary/37765/14-11-11-LA-print-publishing.pdf>.

⁵⁰ Canadian Journalists for Free Expression, *Silencing "state secrets": "Security through censorship"* (24 August 2014), available at <http://cjfe.org/resources/features/silencing-state-secrets-security-through-censorship>.

⁵¹ Radio Free Asia, *Press Panel Questions Legality of Probe into Myanmar Journals* (1 July 2014), available at <http://www.rfa.org/english/news/myanmar/panel-07012014140427.html>.

⁵² Radio Free Asia, *Press Panel Questions Legality of Probe into Myanmar Journals* (1 July 2014), available at <http://www.rfa.org/english/news/myanmar/panel-07012014140427.html>.

⁵³ Human Rights Watch, *Country Summary: Burma* (January 2014).

⁵⁴ Amnesty International, *Myanmar: Jailing of new prisoners of conscience casts doubt on reform* (2 May 2014), available at <http://www.amnesty.org/en/library/asset/ASA16/007/2014/en/abac6d00-e0f9-415a-8f9a-0304b53fe4be/asa160072014en.pdf>.

⁵⁵ Report No. A/69/398, par. 70.

⁵⁶ Myanmar Times, *Reporter's Death Raises Questions About Army Reforms* (10 November 2014), available at <http://www.mmtimes.com/index.php/opinion/12186-reporter-s-death-raises-questions-about-army-reforms.html>.

⁵⁷ Reuters, *Rights Groups Urge Myanmar to Investigate Killing of Journalist* (21 October 2014), available at <http://www.reuters.com/article/2014/10/27/myanmar-journalist-idUSL4NoSM3Oo20141027>.

arrested after covering clashes near the border between Thailand and Myanmar and accused of working with an armed group in the area.⁵⁸

In a recent speech, Myanmar's President Thein Sein warned that in case "any media (...) exploits media freedom and causes harm to national security rather than reporting for the sake of the country, effective legal action will be taken against that media."⁵⁹

These examples demonstrate a pattern that has instilled a climate of intimidation and fear in Myanmar. This is true not only for journalists, but for society as a whole.⁶⁰ Bearing in mind the continuing human rights situation in Myanmar, it could be concluded that the old state still remains in the shadows and that "the generals have only changed their suits".⁶¹ The Special Rapporteur noted in her report from September 2014 that many journalists describe the current situation as a prevailing climate of uncertainty, intimidation and fear of arrest.⁶² This is particularly visible when they are reporting on issues too close to the interests of military or other powerful elites.⁶³

(ii) Fair trial

The provisions of Myanmar's Constitution that are most relevant to the right to a fair trial have not yet been reflected in actual practice. In his report from 2013, the Special Rapporteur expressed concerns over the executive branch's influence over the judiciary:

"[t]he Special Rapporteur sees no evidence that the judiciary is developing any independence from the executive branch of government."⁶⁴

According to the International Commission of Jurists, a number of aspects in organisation, regulation and administration of the judiciary in Myanmar are inconsistent with a truly independent judiciary:

"[i]n particular, the degree of control exercised by the Executive over the appointment process and the lack of transparency over criteria for selection and promotion, insufficient security of tenure, executive control over the budget and insufficient pay and training are inconsistent with international standards."⁶⁵

Myanmar does not have an independent body entrusted with the appointment, promotion and discipline of its judges, and the protection of judicial independence and efficiency of the judiciary. The judges are appointed by the executive branch, namely by the President

⁵⁸ BBC, *Detained Myanmar reporter Aung Naing shot dead* (24 October 2014), available at <http://www.bbc.co.uk/news/world-asia-29758329>.

⁵⁹ Report No. A/69/398, par. 21.

⁶⁰ Id., par. 26.

⁶¹ Index on Censorship, *Burma: Freedom of Expression in Transition* (19 July 2013), available at <http://www.indexoncensorship.org/wp-content/uploads/2013/07/Burma-Freedom-of-Expression-in-Transition.pdf>.

⁶² Report No. A/69/398, par. 19.

⁶³ Id.

⁶⁴ Special Rapporteur, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, UN Doc. No. A/HRC/22/58 (17 April 2013), par. 63.

⁶⁵ International Commission of Jurists, *Myanmar: Introduction* (17 April, 2014), available at <http://www.icj.org/cijlcountryprofiles/myanmar-introduction/general/>.

(Supreme Court and Chief Justices of the Regional High Courts) and Chief Ministers of the Region or State (other judges of the Regional High Courts).⁶⁶ The Parliament is required to approve the nominations. Yet, it cannot refuse to approve the appointment unless it can be proven that the person does not meet the required qualifications. These qualifications are set out in a vague manner and do not require the candidates to hold a law degree or have professional experience in a legal field. Instead, it is provided that being “a person who, in the opinion of the President, is an eminent jurist” can suffice.⁶⁷

It was estimated that in the Burmese criminal justice system more than 90% of the accused are convicted under laws apparently unrelated to their original arrest.⁶⁸ Furthermore, judges have repeatedly handed down decisions that are of an arbitrary nature. In 2014, the Special Rapporteur expressed his concern at a number of reports he had received on this basis, most notably that;

“some trials are still conducted behind closed doors, without legal representation or proof or with defective evidence, and pursuant to arbitrary decisions of judges. In addition, defence lawyers face difficulties ranging from not being informed of the dates and venues of the trials to not being allowed to meet the detainees in private in advance of the trials.”⁶⁹

The Special Rapporteur also reported that there had been numerous cases where authorities revoked the licences of lawyers who were defending political prisoners.⁷⁰ For example, Aung Thein’s licence was revoked when he attempted to represent NLD leader Aung San Suu Kyi.⁷¹ Another lawyer, Tin Tin Aung, who was also a member of NLD, had his licence revoked.⁷² Furthermore, defence lawyers are often subject to intimidation and monitoring by police, and are often prohibited from making oral arguments in court.⁷³

It has also been reported that corruption is prevalent in Myanmar’s legal system.⁷⁴ In 2014, a report of Myanmar’s Rule of Law, Stability and Peace Committee stated that such a corrupt judicial sphere undermined the rule of law and decreased citizens’ trust in legal protection.⁷⁵ This corruption can be demonstrated by the lack of action following complaints made to the Anti-Corruption Commission. Since its formation in February 2014, the Anti-Corruption

⁶⁶ Constitution, s 299, 300, 308.

⁶⁷ Constitution, s 301, 310.

⁶⁸ DVB, *DVB Debate: How corrupt is Burma’s legal system?* (8 February 2014), available at <https://www.dvb.no/dvb-video/dvb-debate-how-corrupt-is-burmas-legal-system-myanmar/36957>.

⁶⁹ Report No. A/69/398, par. 68.

⁷⁰ Report No. A/67/383, par. 76.

⁷¹ Burma Campaign UK, *Defence Lawyers Licence Revoked in Daw Aung San Suu Kyi Case* (16 May 2009), available at <http://burmacampaign.org.uk/defence-lawyers-licence-revoked-in-daw-aung-san-suu-kyi-case/>.

⁷² Burma News International, *Licence of lawyer known for representing farmers revoked* (24 August 2011), available at <http://www.bnionline.net/news/mizzima/11468-license-of-lawyer-known-for-representing-farmers-revoked.html>.

⁷³ *Id.*

⁷⁴ Report No. A/69/398, par. 67.

⁷⁵ Eleven Myanmar, *Rule of law feeble, courts corrupt, Suu Kyi Committee finds* (30 September 2014), available at http://www.elevenmyanmar.com/index.php?option=com_content&view=article&id=7715:rule-of-law-is-very-puny-corruption-influences-over-judicial-s%20ector-lower-house-mp-thura-aung-ko&catid=44:national&Itemid=384; e.g. Human Rights Now, *Status of human rights & sanctions in Myanmar* (September 2014), available at <http://hrn.or.jp/eng/wp-content/uploads/2014/10/museptember2014report.pdf>.

Commission received 533 complaints, 95 of which related to the judiciary. Only three of these complaints resulted in legal action.⁷⁶

The Special Rapporteur has stressed that there has been very little progress in reforming the judiciary. She continues to press Myanmar to guarantee due process of law, establish a judiciary that is impartial and independent, and refrain from charging individuals for alleged infringements of national laws that are in contravention of Myanmar's international human rights obligations.⁷⁷

A.2 The Petitioner is a journalist and chief executive officer of a weekly publication

The Petitioner is the founder and Chief Executive Officer of *Unity*, a current affairs journal which specialises in political issues. The Petitioner established the journal in 2011, and it is estimated that it has had a weekly circulation of 15,000 copies.⁷⁸ Prior to publication of the impugned article, there had been no lawsuits against the journal. Nonetheless, the Petitioner has been arrested five times since 1988 due to his political activities.

The arrest and detention of the Petitioner, alongside four other journalists from *Unity*, was met with criticism both nationally and internationally. In a joint statement from local media groups, it was submitted that “holding the Pauk Township-based journalist first, then charging him later, and holding the CEO for more than 24 hours without pressing any charges, is behaviour in the same vein of the former military regime.”⁷⁹ Similarly the U.S. State Department human rights official described the actions brought in this case as resorting to police state tactics.⁸⁰ As a result of the legal proceedings, *Unity* has had to cease operations.⁸¹

On 12 June 2014, the city of Sala Baganza in Italy awarded the Petitioner and his four co-defendants honorary citizenship for “exceptional and humanitarian reasons,” namely for ensuring the right to freedom of opinion and expression in Myanmar through their professional activities.⁸²

⁷⁶ Human Rights Now, *Status of human rights & sanctions in Myanmar* (September 2014), available at <http://hrn.or.jp/eng/wp-content/uploads/2014/10/museptember2014report.pdf>

⁷⁷ Report No. A/HRC/25/64, par. 54

⁷⁸ South China Morning Post, *Myanmar reporters in court over China chemical-arms-plant stories* (18 March 2014), available at <http://www.scmp.com/news/asia/article/1451868/myanmar-reporters-court-over-china-chemical-arms-plant-stories>.

⁷⁹ The Irrawaddy, *Sixth Unity journal staffer detained for questioning* (5 February 2014), available at <http://www.irrawaddy.org/burma/sixth-unity-journal-staffer-detained-questioning.html>; see also DVB, *Burma busy arresting journalists, not ratifying CW treaty* (7 February 2014), available at <https://www.dvb.no/analysis/burma-busy-arresting-journalists-not-ratifying-cw-treaty/36917>; Eleven Myanmar, *Media groups denounce reporters detention* (4 February 2014), available at <http://pdf.asianewsnet.net/pdf/2014/02/2014-02-04.pdf>.

⁸⁰ CPJ is quoted in an article about the *Unity* case in The Irrawaddy, *Burma resorting to 'Police state tactics' in Unity trial: US Official* (17 July 2014), available at <http://www.irrawaddy.org/burma/burma-resorting-police-state-tactics-unity-trial-us-official.html>.

⁸¹ DVB, *Unity five launch last appeal against harsh sentence* (29 August 2014), available at <https://www.dvb.no/news/unity-five-launch-last-appeal-against-harsh-sentence-burma-myanmar/43665>.

⁸² L'associazione per l'amicizia Italia Birmania, *Italian town awards honorary citizenship to Unity journalists (Sala Baganza – Parma)* (June 2014), available at <http://www.amiciziaitaliabirmania.it/wp/en/cinque-giornalisti-birmani-nuovi-cittadini-onorari-di-sala-baganza/>.

On 12 July 2014, two days after the judgment in the Petitioner's case was handed down, 50 journalists wearing t-shirts with the slogan "stop killing the press" staged a peaceful sit-down protest in front of the venue where President Thein Sein had been attending a cultural event. They were arrested and charged for violating the Peaceful Assembly and Procession Act, but the case was eventually dismissed. Nonetheless, police warned journalists that future demonstrations would be treated similarly.⁸³

A.3 The Petitioner was detained without legal justification and in a manner that violates international law

The Petitioner was arrested and detained on the basis of his publishing an article which sought to discuss an issue of significant public import. On 25 November 2014, *Unity* published a front-page article about a military facility that had been built in 2009 in Pauk Township. The facility had been built on more than 3,000 acres of land that had been confiscated from local farmers. The report was supported by details of the facility's location, and photographs of the site. The report itself alleged that the facility was a chemical weapons factory.⁸⁴ In most part, the story reproduced comments and complaints that had been made by local people about the land seizure, the lack of electricity in the area, and the inability to grow crops due to widely spread cement. The report called for greater civilian oversight over the military budget and secret projects.

The Government criticised the report, describing it as baseless accusations.⁸⁵ The Government remained silent as to the exact purpose of the defence facility, and especially about its signing of the Chemical Weapons Convention (the "CWC").⁸⁶ Since signing the CWC in 1993, Myanmar has not taken any steps to ratify it. Reports indicate that the country has been involved in chemical weapons production, but investigating bodies are not allowed to verify these reports since Myanmar has not yet ratified the CWC.⁸⁷ In any case, the Committee to Protect Journalists ("CPJ") considers weapons proliferation issues central to Myanmar's political narrative, stating that journalists should not be threatened or arrested for reporting on topics of national and international importance.⁸⁸

On 30 January 2014, Lieutenant Colonel Kyaw Kyaw Oo, who was in charge of the facility, filed a complaint with the Pauk Police Station against the Petitioner and his four journalists. This complaint was made at the request of the President's Office.

⁸³ Human Rights Now, *Status of human rights and sanctions in Myanmar* (August 2014 Report), available at <http://hrn.or.jp/eng/wp-content/uploads/2014/09/muaugust2014report.pdf>.

⁸⁴ Annex I.

⁸⁵ The Irrawaddy, *Burma govt rejects report of secret chemical weapons factory* (4 February 2014), available at <http://www.irrawaddy.org/burma/burma-govt-rejects-report-secret-chemical-weapons-factory.html>.

⁸⁶ DVB, *Burma busy arresting journalists, not ratifying CW treaty* (7 February 2014), available at <https://www.dvb.no/analysis/burma-busy-arresting-journalists-not-ratifying-cw-treaty/36917>.

⁸⁷ DVB, *Burma busy arresting journalists, not ratifying CW treaty* (7 February 2014), available at <https://www.dvb.no/analysis/burma-busy-arresting-journalists-not-ratifying-cw-treaty/36917>; see also Reuters, *Myanmar journalists on trial for reporting alleged chemical weapons factory* (16 February 2014), available at <http://www.reuters.com/article/2014/02/16/us-myanmar-journalists-idUSBREA1F03D20140216>.

⁸⁸ The Irrawaddy, *Burma govt rejects report of secret chemical weapons factory* (4 February 2014), available at <http://www.irrawaddy.org/burma/burma-govt-rejects-report-secret-chemical-weapons-factory.html>.

On 1 February 2014, the Petitioner and three other journalists, Mr Paing Thet Kyaw, Mr Yazar Oo and Mr Sithu Soe, were arrested by Special Branch police officers at *Unity's* premises in Rangoon. No warrants were produced, and the defendants were not aware of summons for their arrest.⁸⁹ According to the Petitioner's assistant, the four men were detained for more than 52 hours without providing any information to their families about their whereabouts. At the same time, family members were harassed by police officers who monitored their whereabouts.⁹⁰ The Constitution⁹¹ and Criminal Procedure Code⁹² provide that no person shall be held in custody for more than 24 hours except in exceptional circumstances. Following from his arrest, it was reported by journalist advocacy organisations that the Petitioner had been detained for more than 24 hours without appearing before a judge.⁹³ It was only after three days that the authorities told the families that the detainees were held in Insein prison, and that they were allowed to see them.⁹⁴ The police then seized from circulation all the remaining editions of the journal containing the impugned report.⁹⁵

Since his arrest, the Petitioner has been subject to undue pressure and coercion to admit his guilt. Police officers told him that if he admitted to the charges, he could be charged for criminal trespass under the Art. 447 of the Penal Code instead of the BOSA 1923. This would then have secured his release.

In the days following the arrest, the state media reported that the five detainees were charged under the BOSA 1923 for revealing state secrets by trespassing on the restricted area and taking photographs of the military's facility without permission. The Petitioner was only formally informed of the charges brought against him two weeks after his arrest, during the course of his first court hearing on 14 February 2014. This was the first time that the Petitioner appeared before a judge.

The Petitioner was charged under section 3(1)(a) and 9 BOSA 1923. Section 3(1)(a) BOSA 1923 provides that "if any person for any purpose prejudicial to the safety or interests of the State approaches, inspects, passes over or is in the vicinity of, or enters, any prohibited place", he shall be punishable with imprisonment for up to fourteen years.⁹⁶ Section 9 BOSA 1923 provides that "any person who attempts to commit or abets the commission of an offence under [the BOSA 1923] shall be punishable with the same punishment, and be liable

⁸⁹ DVB, *Journalists remain in prison* (4 February 2014), available at <https://www.dvb.no/news/journalists-remain-in-prison-burma-myanmar/36786>.

⁹⁰ Eleven Myanmar, *Unity Journal CEO, reporters detained at Insein* (4 February 2014), available at http://elevenmyanmar.com/index.php?option=com_content&view=article&id=4943:unity-journal-ceo-reporters-detained-at-insein&catid=44:national&Itemid=384; see also Eleven Myanmar, *Media groups denounce reporters detention* (4 February 2014), available at <http://pdf.asianewsnet.net/pdf/2014/02/2014-02-04.pdf>.

⁹¹ Constitution, s 21(b), s 376.

⁹² *Code of Criminal Procedure* (1 July 1898) ("Code"), s 61.

⁹³ The Myanmar Times, *Journalists detained over chemical weapon report* (5 February 2014), available at <http://www.mmtimes.com/index.php/home-page/143-editor-s-pick/9471-myanmar-press-council-urges-ministry-to-negotiate-with-unity-journal-2.html>.

⁹⁴ Some of the information contained in this section is based on private communications with sources in Myanmar. Their identities have been withheld due to concerns for their security or at their own request.

⁹⁵ The Wall Street Journal, *Myanmar journalist arrests raise concerns* (7 February 2014), available at <http://online.wsj.com/articles/SB10001424052702304450904579368574198395690>; see also DVB, *Journalists remain in prison* (4 February 2014), available at <https://www.dvb.no/news/journalists-remain-in-prison-burma-myanmar/36786>.

⁹⁶ BOSA s 3(1)(a); see also *Annex II*.

to be proceeded against in the same manner, as if he had committed such offence.”⁹⁷ As the Petitioner was charged of an offence that was qualified as “non-bailable” under section 12(a) BOSA 1923, the Petitioner was refused bail.⁹⁸

In addressing the court, all of the defendants pleaded not guilty. They stated that they were not spies but journalists whose only aim was publishing news in the public interest. Referring to the Art. 19 UDHR, the defence lawyers argued that their clients were innocent. In order to expose another incident of land grabbing for military purposes, they followed a local guide (Mr Lu Maw Naing’s source) who took them to the facility.⁹⁹ Apparently the source told them that the factory was accessible, which implies that it may not have been a “prohibited area”.

The court found that criticising the size of the defence budget and writing about the building of a weapons factory during a period of democratisation was prejudicial to the safety or interests of the State (see [Annex IV](#) and [Annex V](#)). As the most senior person at the journal, who knew that Mr Paing Thet Kyaw took the photographs, allowed Mr Yazar Oo and Mr Sithu Soe to enter the factory, and approved the draft article for publication, the Petitioner was convicted pursuant to Art. 3(1)(a) and 9 BOSA 1923 (see [Annex IV](#)).

During the trial, the prosecution submitted as evidence letters from Mr U Hla Tun, who is a minister of the President’s Office, and the Minister of Home Affairs.

The prosecution also referred to Art. 2(8)(a) BOSA 1923, stating that the factory subject to the article was a work of defence and as such a prohibited area within the meaning of the BOSA 1923. The lawyers for the defendants argued that there was only an English language sign saying “Power to the force”. This was confirmed by witnesses, who also testified that there had not been any “restricted area” signboards, walls or barbed wire. Warning signs against taking photos were put up only after the article was published.¹⁰⁰ Even Lieutenant Colonel Kyaw Kyaw Oo, who is the person responsible for the factory, said he did not know whether the Government officially designated the factory as a restricted area.¹⁰¹

The trial against the Petitioner was marred by irregularities.¹⁰² The main prosecution evidence was a letter sent from the President’s Office. Judges in the case met with the authorities beforehand. Some of the witnesses admitted that they had been instructed by the

⁹⁷ BOSA s 9, See also [Annex II](#).

⁹⁸ Section 12(a) BOSA 1923; See Eleven Myanmar, *Pakokku court refuses bail for Unity Journal’s CEO and reporters* (4 March 2014), available at http://www.elevenmyanmar.com/index.php?option=com_content&view=article&id=5262:pakokku-district-court-refuses-bail-for-unity-journal-s-ceo-and-reporters&catid=44:national&Itemid=384.

⁹⁹ Eleven Myanmar, *Unity Journal CEO convicted* (21 May 2014), available at http://www.elevenmyanmar.com/index.php?option=com_content&view=article&id=6202:unity-journal-ceo-convicted&catid=44:national&Itemid=384; e.g. Communications with sources in Myanmar.

¹⁰⁰ Myanmar Times, *‘Unity’ testimony throws trespassing allegations into question* (3 April 2014), available at <http://www.mmtimes.com/index.php/national-news/10065-unity-testimony-throws-trespassing-allegations-into-question.html>.

¹⁰¹ Myanmar Times, *Defence case mounts for Unity Journal staff* (21 March 2014), available at <http://www.mmtimes.com/index.php/national-news/9916-defence-case-mounts-for-unity-journal-staff.html>.

¹⁰² The Media Screen, *Burma/Myanmar: Journalists get ten years jail for writing on army* (14 July 2014), available at <http://themediascreen.blogspot.co.uk/2014/07/burmamyanmar-journalists-get-ten-years.html>.

police on how to testify before the court.¹⁰³ The courtroom was surrounded by plain-clothes military officers and, therefore, members of the public were dissuaded from attending the trial. Attempts were also made to obstruct the hearings, and the Petitioner was unable to speak freely to his lawyers during the trial. According to the Petitioner's defence team, the Government had excessive influence over the courts.¹⁰⁴

On 10 July 2014, the Pokokku District Court found the Petitioner guilty and sentenced him to ten years in prison with hard labour. On 28 August 2014, the Magway Regional High Court upheld the judgment on appeal while commuting the sentence to seven years in prison with labour.

The case was submitted to the Supreme Court of the Union, but was rejected without a hearing. The Petitioner will now file a "special appeal", which is a form of judicial review. Meanwhile, the Petitioner remains in Pokokku prison.

B. Reasons why the arrest and detention are arbitrary

The arrest and detention of the Petitioner are arbitrary as they fall within Categories II and III arbitrary detention as articulated by the Working Group. The following section details the reasons that render the arrest and detention arbitrary by category, addressing each category in turn.

Myanmar is a signatory of the UDHR, which holds the status of customary international law. This Petition sets out the various articles of the UDHR that Myanmar has violated as a result of its treatment of the Petitioner. Although Myanmar is not a signatory to the ICCPR, articles of the ICCPR are mentioned where they elaborate on the principles enshrined in the UDHR.

B.1 The detention of the Petitioner constitutes Category II arbitrary detention because his deprivation of liberty results from the exercise of his right to freedom of opinion and expression (Article 19 UDHR)

Although the charges against the Petitioner related to the protection of state secrets and the safeguarding of national security, the Petitioner submits that his arrest and detention resulted from the exercise of his right to freedom of expression.

Article 19 UDHR guarantees the right to freedom of expression:

"[e]veryone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

¹⁰³ Myanmar Times, *'Unity' testimony throws trespassing allegations into question* (3 April 2014), available at <http://www.mmtimes.com/index.php/national-news/10065-unity-testimony-throws-trespassing-allegations-into-question.html>.

¹⁰⁴ Burma Net News, *Democratic Voice of Burma: Unity journalists' sentences reduced on appeal – Shwe Aung* (2 October 2014), available at <http://www.burmanet.org/news/2014/10/02/democratic-voice-of-burma-unity-journalists%E2%80%99-sentences-reduced-on-appeal-%E2%80%93-shwe-aung/>.

The UN Human Rights Committee (“UNHRC”) has recognised that Art. 19(2) ICCPR specifically protects the work of journalists and editors and “includes the right of individuals to criticise or openly and publicly evaluate their Government without fear of interference or punishment.”¹⁰⁵ The UNHRC has further stated that “the right to freedom of expression is of paramount importance in any democratic society.”¹⁰⁶

As set out above under A.3, the Petitioner is the Chief Executive Officer of current affairs journal *Unity*. He was arrested and detained following the publication of a front-page article on a military facility built on more than 3,000 acres of land confiscated from local farmers (see Annex II). The Petitioner was prosecuted on the basis of the colonial BOSA 1923, which is known to have been used to stifle free expression.¹⁰⁷ Therefore, the Petitioner’s arrest and detention are a clear restriction of his right to freedom of expression.

This restriction is not in line with Art. 29(2) UDHR, which requires that “[i]n the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”

The restriction of the Petitioner’s right to freedom of expression cannot be considered as “determined by law”. In order to be “provided by law” within the meaning of Art. 19(3) ICCPR, a law must be adequately accessible to everyone and formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly.¹⁰⁸ The BOSA 1923 has never been translated into Burmese and exists only in English. According to some members of Parliament, it is difficult to understand even for experts.¹⁰⁹ Moreover, the provisions of the BOSA 1923 are vague and do not enable individuals to regulate their conduct accordingly.¹¹⁰

The restriction of the Petitioner’s right to freedom of expression did not pursue any of the purposes set out in Art. 29(2) UDHR. It follows from the purpose of the BOSA 1923 that the Petitioner was prosecuted in order to protect national security. However, as set out in the guidance provided by the UNHRC General Comment No. 34 in relation to the question as to whether a restriction pursues a legitimate aim, in order to invoke national security as a legitimate aim the government must “specify the precise nature of the threat”.¹¹¹ Laws should

¹⁰⁵ UN Human Rights Committee (“UNHRC”), *De Morais v. Angola*, Communication No. 1128/2002, UN Doc. CCPR/C/83/D/1128/2002 (2005), par. 6.7.

¹⁰⁶ UNHRC, *Tae-Hoon Park v. Republic of Korea*, Communication No. 628/1995 (1998), par. 10.3.

¹⁰⁷ Human Rights Documentation Unit, *Human Rights Yearbook 1998-99: Burma* (1999) p. 198, available at <http://www.ibiblio.org/obl/docs/98-99-19OPINION.PDF>.

¹⁰⁸ UNHRC, *General Comment No. 34, Article 19: Freedoms of opinion and expression* (“General Comment No. 34”), UN Doc. No. CCPR/C/GC/34 (12 September 2011), par. 25.

¹⁰⁹ Myanmar Times, *State Secrets Act reform rejected* (29 September 2014), available at <http://www.mmtimes.com/index.php/national-news/11774-state-secrets-act-reform-rejected.html>; e.g. Human Rights Now, *Status of human rights and sanctions in Myanmar* (September 2014), available at <http://hrn.or.jp/eng/wp-content/uploads/2014/10/museptember2014report.pdf>.

¹¹⁰ For instance, Article 19 described almost identical wording of the Malaysian 1972 OSA to be vague and imprecise to the extent that does not reach the standard of foreseeability. See Article 19, *Memorandum on the Malaysian Official Secrets Act 1972* (September 2004), available at <http://www.article19.org/data/files/pdfs/analysis/malaysia-official-secrets-act-sept-2004.pdf>.

¹¹¹ UNHRC, *Park v. Republic of Korea*, Communication No. 628/1995 UN Doc. No. CCPR/C/64/D/628/1995 (1998), par.10.3.

not be invoked to suppress or withhold information of legitimate public interest that does not harm national security, or be used to prosecute journalists or others for disseminating such information.¹¹² The prosecution had not demonstrated that the article posed a threat to national security. None of the other legitimate aims were put forward by Myanmar, and none of those are applicable in this case either. Instead, the purpose of Tin San's arrest and detention appears to be to restrict his right to freedom of expression rather than safeguard national security.

Even if a legitimate purpose would be served with the restriction of the Petitioner's right to freedom of expression, the arrest and detention are not necessary to achieve the aim of national security. General Comment No. 34 provides in relation to Art. 19(3) ICCPR that restrictive measures must not be overly broad and must conform to the principle of proportionality:

“they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their protective function; they must be proportionate to the interest to be protected [...]. The principle of proportionality has to be respected not only in the law that frames the restrictions but also by the administrative and judicial authorities in applying the law.”¹¹³

General Comment No. 34 further provides that:

“[t]he penalization of a media outlet, publishers or journalist solely for being critical of the government or the political social system espoused by the government can never be considered to be a necessary restriction of freedom of expression.”¹¹⁴

The article did not pose a real or potential threat to national security. Therefore, the sentencing of the Petitioner to seven years in prison with labour for his involvement in publishing an article on a matter of significant public interest cannot properly be considered necessary or proportionate to the protection of national security.

Although the charges against the Petitioner relate to the alleged leaking of state secrets, it is submitted that, given the history of Myanmar in detaining political prisoners and those who speak out against the political regime (see above under A.1), the real purpose of the detention and prosecution is to punish the Petitioner for exercising his rights under Art. 19 UDHR and deter others from doing so.

¹¹² General Comment No. 34 par. 30.

¹¹³ General Comment No. 34, par. 27; UNHCR, *General comment No. 27: Article 12: Freedom of Movement*, UN Doc. No. CCPR/C/21/Rev.1/Add.9 (2 November 1999), par. 14; UNHCR, *De Morais v. Angola*, Communications No. 1128/2002, UN Doc. No. CCPR/C/83/D/1128/2002 (2005); UNHCR, *Coleman v. Australia*, Communications No. 1157/2003, UN Doc. No. CCPR/C/87/D/1157/2003 (2006).

¹¹⁴ General Comment No. 34, par. 42.

B.2 The detention of the Petitioner constitutes Category III arbitrary detention because it violates his right to a fair and public hearing by an independent and impartial tribunal (Article 10 UDHR)

The UNHRC General Comment No. 32 provides guidance on the terms ‘independent’ and ‘impartial’.¹¹⁵ Independence requires, among other things, the actual independence of the judiciary from political interference by the executive branch and legislature.¹¹⁶ According to the UNHRC “a situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control the former is incompatible with the notion of an independent tribunal.”¹¹⁷

The requirement of impartiality has two aspects: a subjective element and an objective element. First, the judge must not be influenced by harboured preconceptions about the particular case he is dealing with, nor promote the interests of one of the parties over those of the other.¹¹⁸ Second, the tribunal must be seen to be impartial by a reasonable observer as well.¹¹⁹

The right to a fair trial by an independent and impartial tribunal established by law is an absolute right that cannot be subject to any exception. It is a general principle of customary international law, binding on all states at all times including those that have not ratified international treaties. Furthermore, it cannot be derogated from during states of emergency and armed conflict.¹²⁰

Myanmar’s judiciary is characterised by its institutionalised corruption and remains under the de facto control of the military and the Government.¹²¹ The Special Rapporteur in her latest report from 23 September 2014 stated that:

“there are [...] persistent allegations of interference in judicial decision-making by the Executive or senior judicial authorities, as well as a high level of corruption in the judiciary.”¹²²

This is confirmed by the US Department of State, which found that “the military regime frequently directs verdicts in politically sensitive trials of civilians.”¹²³ The Special Rapporteur

¹¹⁵ UNHCR, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial* (“General Comment No. 32”), UN Doc. No. CCPR/C/GC/32 (23 August 2007).

¹¹⁶ Id., par 19.

¹¹⁷ Id. See also UNHCR, Communication No. 468/1991, *Oló Bahamonde v. Equatorial Guinea* (10 November 1993), par. 9.4.

¹¹⁸ General Comment No. 32, par. 21. See also: UNHCR, Communication No. 387/1989, *Karttunen v. Finland*, (5 November 1992), par. 7.2.

¹¹⁹ General Comment No. 32, par. 21.

¹²⁰ Amnesty International, *Fair trial manual* (London 2014 2nd ed.) p. 108, available at <http://www.amnesty.org/en/library/asset/POL30/002/2014/en/7aa5c5d1-921b-422e-8ca4-944db1024150/pol300022014en.pdf>; General Comment No. 29 States of Emergency (Article 4) CCPR/C/21/Rev.1/Add.11 (31 August 2001), par. 11.

¹²¹ United States Department of State, *2011 Country Reports on Human Rights Practices – Burma* (24 May 2012) available at: <http://www.refworld.org/docid/4fc75ab3c.html>.

¹²² Report No. A/69/398, par.67.

¹²³ United States Department of State, *2008 Country Reports on Human Rights Practices – Burma* (25 February 2009), available at <http://www.state.gov/j/drl/rls/hrrpt/2008/eap/119035.htm>

has repeatedly called for reforms of the judiciary, but there was no significant progress as he mentioned in his report from April 2014:

“there has been little progress in introducing fundamental reforms to the judiciary, and the gist of the Special Rapporteur’s recommended measures under the fourth core element remain pertinent: establish a judiciary that is impartial and independent, including from the direct control of the Government and the military; guarantee due process of law.”¹²⁴

This lack of judicial independence and impartiality was visible in the Petitioner’s case as well. The charges against the Petitioner were based on the letter of accusation from the President’s Office. A manager at the factory who testified during the trial told the court that the management had received an order from the President’s Office to initiate a lawsuit against the journalists a few days after their story was published.¹²⁵ The letter is likely to have influenced the judge. It is also reported that prior to the trial, the judge attended a meeting with the authorities. According to the Petitioner’s defence team, the sentencing of the Petitioner was excessively influenced by the Government. These facts provided by the Petitioner’s defence team indicate that the Court was neither independent nor impartial.

Furthermore, although the trial was open to the public in theory, it is reported that members of the public did not dare to attend the trial as police officers occupied the court facilities.

These irregularities conform to the Working Group’s findings in Ms Suu Kyi’s case,¹²⁶ where it was found that Myanmar did not conform with the international human rights norms regarding fair, independent and impartial trials.¹²⁷

For the reasons set out above, the arrest and detention of the Petitioner constitute a Category III form of arbitrary detention as it violates his right to a fair and public hearing by an independent and impartial tribunal as enshrined in Art. 10 UDHR.

B.3 The detention of the Petitioner constitutes Category III arbitrary detention because it violates his right to a public trial in which he has had all the guarantees necessary for his defence (Article 11(1) UDHR)

Art. 11(1) UDHR provides that “[e]veryone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.”

Art. 14(3) ICCPR elaborates on a number of procedural minimum guarantees that are

¹²⁴ Report No. A/HRC/25/64, par. 54.

¹²⁵ The Irrawaddy, *Court Hears Witnesses in Case Against Unity Journalists* (19 March 2014), available at <http://www.irrawaddy.org/burma/court-hears-witnesses-case-unity-journalists.html>

¹²⁶ Working Group, *No.28/2010, Communication addressed to the Government concerning Ko Mya Aye*, UN Doc. A/HRC/WGAD/2010/28 (2010)., par.30; Working Group, *No. 23/2010, Communication addressed to the Government concerning Mr Kyaw Zaw Lwin a.k.a. Nyi Nyi Aung*, UN Doc. No. A/HRC/16/47/Add.1 (2010), par.20; Working Group, *No. 12/2010, Communication addressed to the Government concerning Ms Aung San Suu Kyi*, UN Doc. No. A/HRC/16/47/Add.1 (2010), par.31.

¹²⁷ Working Group, *No. 12/2010*, par.31.

required in order for a trial to be fair. This includes the right of the accused to be promptly informed of the reasons for the arrest and the charges brought against him (Art. 14(3)(a) ICCPR).

According to the UNHRC “[t]he reasons must include not only the general basis of the arrest, but enough factual specifics to indicate the substance of the complaint, such as the wrongful act.”¹²⁸ Indicating to an accused person that he or she is being arrested for breach of state security, without any indication of the substance of the complaint against him, is not sufficient.¹²⁹ Failure to state the reasons for an arrest have been found by the Working Group to render detentions arbitrary.¹³⁰

The accused should also be informed promptly. Although this does not necessarily have to take place at the time of the arrest, the UNHRC found that there had been a violation where an arrested person was held for 50 hours without being informed of the reasons for his arrest.¹³¹ According to the Special Rapporteur “there is no good reason for failing to inform a person of the reasons for their detention at the time of arrest.”¹³²

The Petitioner was arrested without a warrant following a Presidential request. Although it was speculated that he might be accused under the BOSA 1923, it was only during the first trial on 14 February 2014 that he found out about the nature of the charges brought against him. The Petitioner was, therefore, not informed promptly of the reasons for his arrest.

One of the other procedural minimum guarantees set out in Art. 14(3) ICCPR is that everyone shall be entitled in the understanding of equality of arms, not to be compelled to testify against himself or to confess guilt.¹³³

The right not to be compelled to incriminate oneself or confess guilt places the burden of proof on the prosecution and prohibits any form of coercion, whether direct or indirect, physical or psychological. This is reflected in the General Comment No.32:

“[t]his safeguard must be understood in terms of the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt.”¹³⁴

¹²⁸ UNHCR, *General Comment No. 35, Article 9: Liberty and security of person*, CCPR/C/GC/35 (28 October 2014) [hereinafter “General Comment No. 35”], par. 25. See also UNHCR, Communication No. 1177/2003, *Wenga and Shandwe v. Democratic Republic of the Congo*, par. 6.2.

¹²⁹ UNHCR, *Wenga and Shandwe v. Democratic Republic of Congo*, Communication No. 1177/2003, (2006), par.6.2.; see also UNHCR, *Drescher Caldas v. Uruguay*, Communication No. 43/1979 (1983)

¹³⁰ UN Working Group on Arbitrary Detention, No. 25/2000, *Communication addressed to the Government concerning James Mawdsley*, U.N. Doc. E/CN.4/2001/14/Add.1 at 124 (2000); UN Working Group on Arbitrary Detention, No. 11/2005, *Communication addressed to the Government concerning U Tin Oo*, U.N. Doc. E/CN.4/2006/7/Add.1 at 40 (2005).

¹³¹ UNHCR, *Portorreal v Dominican Republic*, Application No. 188/1984 (1987), par. 9.2, 11; see also UNHCR, *Paul Kelly v. Jamaica*, Application No. 253/1987, U.N. Doc. CCPR/C/41/D/253/1987 at 60 (1991), par. 5.8. in which the Committee concluded that requirements of the Article 9(2) ICCPR were not met when, for several weeks following the apprehension, the State failed to inform in any detail of the reasons for arrest and about the facts of the crime in connection with which the accused was detained

¹³² Special Rapporteur, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, Martin Scheinin (28 June 2007), par.22., available at <http://www2.ohchr.org/english/issues/terrorism/docs/A.HRC.6.17.Add.3.pdf>

¹³³ ICCPR, Art. 14(3)(g).

According to the Petitioner’s defence team, he had been subject to undue pressure by the Special Branch police forces after his arrest to admit his guilt. Officers reportedly told him that if he admitted the crime, he could be charged under Art. 447 of the Penal Code for criminal trespass instead of the BOSA 1923 and consequently released.¹³⁵

For the reasons set out above, the arrest and detention of the Petitioner constitute a Category III form of arbitrary detention as it violates his right to a public trial in which he has had all the guarantees necessary for his defence as enshrined in Art. 11(1) UDHR.

B.4 The detention of the Petitioner constitutes Category III arbitrary detention because it violates his right to be brought promptly before a judge or other judicial officer or to release (Art. 9 UDHR, Art. 9(3) ICCPR)

The Working Group has recognised in its previous Opinions that the right enshrined in Art. 9(3) ICCPR constitutes customary international law.¹³⁶ This means that this norm also applies to Myanmar, despite the fact that Myanmar has not signed the ICCPR. Article 9(3) ICCPR provides that:

“[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of judicial proceedings and, should occasion arise, for execution of the judgement.”¹³⁷

While the exact meaning of being “brought promptly before a judge” may vary depending on the circumstances of a case, the UNHRC has stated that delays should not exceed a few days from the time of arrest. In the view of the UNHRC:

“forty-eight hours is ordinarily sufficient to transport the individual and to prepare for the judicial hearing; any longer delay must remain absolutely exceptional and be justified under the circumstances. Longer detention in the custody of law enforcement officials without judicial control unnecessarily increases the risk of ill-treatment.”¹³⁸

State compliance with this right is particularly important in situations where military forces are in control of security. The Inter-American Court held that:

“in areas with a significant military presence, where members of the military forces take control of internal security, bringing a person without delay before the judicial

¹³⁴ General Comment No. 32, par.41.

¹³⁵ *The Penal Code* (1 May 1861), Section 447.

¹³⁶ Working Group, *No. 4/2010, Communication addressed to the Government concerning Dr Tin Min Htut and Mr. U Nyi Pu*, U.N. Doc. A/HRC/16/47/Add.1 (2010.), par. 18.

¹³⁷ ICCPR, art. 9(3).

¹³⁸ General Comment No.35, par.33.

authorities is even more important in order to minimize any risk of violating a person's rights."¹³⁹

In its General Comment No. 35, the UNHRC has recognised that unauthorised extension of any form of detention is both arbitrary as well as unlawful.¹⁴⁰

Prior to his trial, the Petitioner was kept in detention for two weeks from his arrest on 1 February 2014 to the first day of his trial on 14 February 2014. He was not brought before a judge until his trial. This clearly violates international customary law.

This state of affairs is in line with earlier Opinions from the Working Group, who have observed Myanmar's violation of the international human rights law requiring that a court review the lawfulness of the detention and that the hearing occur promptly.¹⁴¹

Moreover, the principle encompassed in Art. 9(3) ICCPR is violated by laws that remove judicial control by prohibiting bail for particular offences, or by laws that make pre-trial detention obligatory for certain offences. The UNHRC has expressed concern when bail is not allowed, stating that such provisions are at variance with the provisions of the ICCPR.¹⁴²

Section 12 BOSA 1923 states that "notwithstanding anything in the Code of Criminal Procedure [...] an offence punishable under section 3 or under section 3 read with section 9 with imprisonment for a term which may extend to fourteen years shall be a cognizable and non-bailable offence."¹⁴³ As the Petitioner was prosecuted on the basis of these provisions, he was not eligible for bail, which is in violation of Art. 9(3) ICCPR.

The detention of the Petitioner therefore constitutes a Category III form of arbitrary detention as he was denied bail and has been detained in custody for two weeks before trial without being brought before a judge, which is a clear violation of his rights under Art. 9 UDHR and Art. 9(3) ICCPR, which has acquired the status of customary international law.

For the reasons mentioned above, the arrest and detention of the Petitioner constitute a Category III arbitrary detention as it violates the principles recognised in Art. 9, 10 and 11 UDHR.

V. INDICATE INTERNAL STEPS, INCLUDING DOMESTIC REMEDIES, TAKEN ESPECIALLY WITH THE LEGAL AND ADMINISTRATIVE AUTHORITIES, PARTICULARLY FOR THE PURPOSE OF ESTABLISHING THE DETENTION AND, AS APPROPRIATE, THEIR RESULTS OR THE REASONS WHY SUCH STEPS OR REMEDIES WERE INEFFECTIVE OR WHY THEY WERE NOT TAKEN

On 20 May 2014, the Pokokku District Court found the Petitioner guilty under the BOSA 1923. He was sentenced to ten years in prison with labour on 10 July 2014.

¹³⁹ Inter.-Am. C.H.R., *Teodora Cabrera Garcia and Rodolfo Montiel Flores v. Mexico*, Report No. 11/04 (2004), par.102.

¹⁴⁰ General Comment No. 35, par.11.

¹⁴¹ Working Group, UN Doc. No. A/HRC/16/47/Add.1, par. 18.

¹⁴² General Comment No. 32, par. 35.

¹⁴³ BOSA, s 12.

On 2 October 2014, the Magway Regional High Court found the Petitioner guilty on appeal as well, but reduced his sentence to seven years in prison with labour.

The Petitioner applied to the Nay Pyi Taw Supreme Court of the Union, but his request for a review was not accepted. The Petitioner will file a “special appeal” in order to exhaust the last remaining domestic remedy.

VI. REQUESTED ACTION FROM THE WORKING GROUP

For the Working Group to:

- (a) render an opinion that the detention of the Petitioner is arbitrary for being in contravention to Article 19 of the UDHR and Article 19 of the ICCPR and therefore falls within Category II of the categories of arbitrary detention defined by the Working Group;
- (b) render an opinion that the detention of the Petitioner is arbitrary due to the failure by the Government of Myanmar to ensure the Petitioner’s rights to a fair trial guaranteed by Article 11 of the UDHR and by Article 14 of the ICCPR and therefore falls within the Category III of the categories of arbitrary detention defined by the Working Group;
- (c) recommend that the Government of Myanmar release the Petitioner and withdraw the charges based on national security, or ensure the charges are determined by an independent and impartial tribunal in proceedings conducted in strict compliance with the provisions of the UDHR and the ICCPR, and provide just compensation to him for the arbitrary detention that he suffered;
- (d) request that the Government of Myanmar take such other steps as are necessary to prevent further violations of the Petitioner’s right to freedom of expression as recognised and guaranteed by the UDHR and the ICCPR; and
- (e) recommend that the Government of Myanmar becomes a state party to the ICCPR.

VII. FULL NAME AND ADDRESS OF THE PERSON(S) SUBMITTING THE INFORMATION (TELEPHONE AND FAX NUMBER, IF POSSIBLE):

Media Legal Defence Initiative
17-19 Oval Way
London SE11 5RR
United Kingdom

T. +442037525550
E. nani.jansen@mediadefence.org

Table of Annexes

Annex I: Original <i>Unity</i> article (25 January 2014)	29
Annex II: Unofficial translation of <i>Unity</i> article (25 January 2014)	30
Annex III: Sections 2(8), 3 and 9 of the Burma Official Secrets Act 1923	32
Annex IV: Translation of the charge sheet and key lines from the first instance judgment	34
Annex V: Translation of the Appeal Judgement	37

Annex I: Original *Unity* article (25 January 2014)



Annex II: Unofficial translation of *Unity* article (25 January 2014)

“Secret chemical weapon factory of the former Chief of Staff, present Chief of Staff, and Chinese technician from the Pauk Township”

In the Pauk Township, Myar Paing village, it is alleged that a Chemical Weapon Factory is being built at Military Equipment Factory No (24).

A worker said he saw a fifteen-foot long missile, which is the biggest in South East Asia. The worker, who works inside the factory, said that there was also a ten square feet white fission oven which had been buried underground. The factory was built on either side of mountains, and a red signboard at the entrance of the factory reads “Power to the force”. According to the workers and *Unity* journalists investigating the factory, there are two main buildings (A1 and A2) and four other buildings (S1, S2, S3, S4). A thousand feet long steel tunnel runs through the mountain separating the two buildings.

The local people estimated that among the six factories buildings, the two main buildings (A1 and A2) are the biggest and can store hundreds of 22-wheel trucks. The *Unity* journalist who entered the factory noticed that the two main factory buildings (A1 and A2) are connected to the others (S1, S2, S3, S4).

Local people and workers confirmed that the factory is the biggest chemical weapon factory in Myanmar. However, the *Unity* journalists who entered the factors and the workers employed at the factory do not wish to comment on such allegations. A villager from Myar Paing said a white oven and 22-wheel trucks were seen carrying cement bags.

In 2009, the former Chief of Staff Senior General Than Shwe visited the factory, as did Chief of Staff Senior General Min Aung Hlaing in 2011, and Vice-President U Nyan Tun and ex-Vice-President U Tin Aung Myint Oo in 2013.

A local construction company based outside the factory produces bricks and steel structures. The main parts, such as ovens, were constructed by technicians in China.

The No. (24) and No. (23) Military Equipment Factories take electrical power from the No. 3 main electrical support. This electricity support building was built on 50 acres of farmland that had been grabbed from 17 peasants. “They do not provide electricity to our villages but to the factories,” noted a Chaung Ku villager. Villagers around the factory and migrant workers worked on the infrastructure of the factory. “Since 2009, this factory was built and 33,387 acres of farmland has been grabbed” said local people. It is built near Myar Paing, Ohn Min, Htan Pin Chaung and Lay Pin Eai villages. In 2008, the military moved Lay Pin Eai village nearer to Chaung Ku because it was located on a factory project site. The rest of the villagers were given compensation for their houses, from 300000 ks to 2000000 ks depending on location, but only 5000 ks for one acre of farmland. A villager who was given compensation for moving said: “They allowed us to farm on some farmland not near the factory. These factories caused trouble. Even trying to go to my farm avoiding the factories is too difficult. It is also difficult to farm due to the cement from the factories.”

The above facts were collected from interviews of local people and *Unity* journalists that visited the factory but do not represent the opinions of *Unity*. *Unity* Journal has found that millions of Kyats were used to finance the budget for the building of military weapons factories, which could reduce international trust in the democratic nation. There has been international pressure to reduce this military budget. The military budget is still higher than those of previous regimes, like the former military government and even the civilian government led by president Thein Sein over a term of 3 years. The fact that the defence budget is currently higher than usual is incredible considering U Thein

Sein's drive to reduce poverty. The ethnic arms group cannot believe the size of the defence budget and the extent to which weapons factories have been built. Under the 2008 Constitution, it is not the President but the Chief of Staff who manages the military sector. The Unity Journal urges the military under the civilian government to reduce the lack of transparency regarding military budgets and the secret projects of the military.

Annex III: Sections 2(8), 3 and 9 of the Burma Official Secrets Act 1923

Section 2(8) "prohibited place" means —

- (a) any work of defense, arsenal, naval, military or air force establishment or station, mine, minefield, camp, ship or aircraft belonging to, or occupied by or on behalf of, [the State]¹⁴⁴, any military telegraph or telephone so belonging or occupied, any wireless or signal station or office so belonging or occupied, and any factory, dockyard or other place so belonging or occupied and used for the purpose of building, repairing, making or storing any munitions of war, or any sketches, plans, models or documents relating thereto, or for the purpose of getting any metals, oil or minerals of use in time of war;
- (b) any place not belonging to [the State] where any munitions of war or any sketches, models, plans or documents relating thereto, are being made, repaired, gotten or stored under contract with, or with any person on behalf of, [the Government];
- (c) any place belonging to or used for the purpose of [the State] which is for the time being declared by the President of the Union, by notification in the Gazette, to be a prohibited place for the purposes of this Act on the ground that information with respect thereto, or damage thereto, would be useful to an enemy, and to which a copy of the notification in respect thereof has been affixed in [Burmese] and in the [language of the locality, if any];
- (d) any railway, road, way or channel, or other means of communication by land or water (including any works or structures being part thereof or connected therewith) or any place used for gas, water or electricity works or other works for purposes of a public character, or any place where any munitions of war or any sketches, models, plans or documents relating thereto, are being made, repaired or stored otherwise than on behalf of [the State], which is for the time being declared by the President of the Union, by notification in the Gazette, to be a prohibited place for the purposes of this Act on the ground that information with respect thereto, or the destruction or obstruction thereof, or interference therewith, would be useful to an enemy, and to which a copy of the notification in respect thereof has been affixed in [Burmese]¹ and in the [language of the locality, if any];

Section 3(1) If any person for any purpose prejudicial to the safety or interests of the State—

- (a) approaches, inspects, passes over or is in the vicinity of, or enters, any prohibited place; or
- (b) makes any sketch, plan, model, or note which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy; or
- (c) obtains, collects, records or publishes or communicates to any other person any secret official code or password, or any sketch, plan, model, article or note or other document or information which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy;

he shall be punishable with imprisonment for a term which may extend, where the offence is committed in relation to any work of defense, arsenal, naval, military or air force establishment or station, mine, minefield, factory, dockyard, camp, ship or aircraft or otherwise in relation to the naval, military or air force affairs of [the State] or in relation to any secret official code, to fourteen years and in other cases to three years.

3(2) On a prosecution for an offence punishable under this section with imprisonment for a term which may extend to fourteen years, it shall not be necessary to show that the accused person was guilty of any particular act tending to show a purpose prejudicial to the safety or interests of the State, and, notwithstanding that no such act is proved against him, he may be convicted if, from the circumstances of the case or his conduct or his known character as proved, it appears that his purpose was a purpose prejudicial to the safety or interests of the

¹⁴⁴ Those parts that are in square brackets have been substituted by the Union of Burma (Adaptation of Laws) Order, 1948.

State; and if any sketch, plan, model, article, note, document, or information relating to or used in any prohibited place, or relating to anything in such a place, or any secret official code or password is made, obtained, collected, recorded, published or communicated by any person other than a person acting under lawful authority, and from the circumstances of the case or his conduct or his known character as proved it appears that his purpose was a purpose prejudicial to the safety or interests of the State, such sketch, plan, model, article, note, document or information shall be presumed to have been made, obtained, collected, recorded, published or communicated for a purpose prejudicial to the safety or interests of the State.

Section 9 Any person who attempts to commit or abets the commission of an offence under this Act shall be punishable with the same punishment, and be liable to be proceeded against in the same manner, as if he had committed such offence.

Annex IV: Translation of the charge sheet and key lines from the first instance judgment

[Stamp 200ks]

Criminal Charge

Pokokku District Court

2014 Criminal Case No. 4

Tin San, son of U Thein Tun, was charged on or around January 25 2014 in Pauk Township, Myar Paing village, together with Yar Zar Oo and Situh Soe who were returning from military defence factory No (24) whom Tin San knew had visited the factory, as a most responsible CEO of journal publishing, for acting in a manner prejudicial to the safety or interest of the State.

So this Court charges you under, Burma's Official Secrets Act 1923, section 3(1)(a). It is for you to satisfy the court that you are not guilty.

Seal of Court Maung

Maung Htay

District Judge

2014 May 20 Pokokku District Court

In back page,

Read and explain the charge to the accused. He pleads not guilty. He has no desire to call a prosecution witness.

He explains, "We are not spies, only journalists. We publish the *Unity* journal for the interest of the public and the state."

He will submit a separate witness list.

2014 May 20 Maung Maung Htay

District Judge, Pokokku

District

[State emblem] Classified

Union of Myanmar

Ministry of Home Affairs

Minister's Office

Order

The case from Pauk police station, Pauk Township, Magway Division (FIR) 8/2014 Burma Official Secrets Act as the following defendants are charged under 1923, Burma Official Secrets Act 3/9 –

1. Tin San (52 Years) (Father) U Thein Tun
2. The' Yar Zar Oo (a) Yar Zar Oo (a) KoThe' (18 yrs) (F) U Thein Maung Gyi
3. Aung Thu Ya (a) Paing Thet Kyaw (25 yrs) (F) U Aung Ko Lwin
4. Si Thu Soe (22 yrs) (F) U Win Hlaing
5. Lin Kyaw Oo (a) Lu Maw Naing (a) Lu Maw (18 yrs) (F) U Maung Maung Gyi

Sign

General Ko Ko

Union Minister

Letter No. Pa Hta Ra/2-6 /Oo 4
Date 2014, February 13

Judgment Main Lines

(10.7.2014)

(29) Prosecution Witnesses and (12) Defence witnesses were examined.

Lft Col Kyaw Kyaw Oo was requested by a letter (Ex –A) from the President Office’s Director General U Hla Tun to raise a complaint with the police after the Chief Officer of the factory had received reports about the (25.1.14) issue of *Unity* Journal. Paing Thet Kyaw admits he took (20) Photos over the hill. It is submitted that Ma Khin Myint , Ma Sandar Win, Ma Ei Su Win and Ko Min Oo said Yar Zar Oo and Si Thu Soe entered the No (24) Defence Equipment Factory. Tin San and Lu Maw Naing admitted to giving permission for Yar Zar Oo and Si Thu Soe to enter the No. (24)Defence Equipment Factory. The (Ex-C) (25.1.14) issue of *Unity* Journal entitled “Secret chemical weapon factory of the former Chief of Staff, present Chief of Staff, and Chinese technician from the Pauk Township” was drafted by Si Thu Soe, Yar Zar Oo and Pai Thet Kyaw, and they reported to U Tin San who then sent the article to the editors. The article was sent by e –mail from Lu Maw Naing’s laptop.

Regarding the prohibited place mentioned in Section 2(8)(a) of Official Secrets Act, the No (24), the Defence Equipment Factory is a work of defence.

Section 3(2) of Burma’s Official Secrets Act 1923 states that under this Section, which can result in a sentence of fourteen years imprisonment, it is not necessary to show that the accused person was guilty of any particular act tending to show a purpose prejudicial to the safety or interest of the state. The *Unity* Journal (Ex–C) wrote, “*Unity* Journal has found that millions of Kyats were used to finance the budget for the building of military weapons factories, which could reduce international trust in the democratic nation. There has been international pressure to reduce this military budget. The military budget is still higher than those of previous regimes, like the former military government and even the civilian government led by President Thein Sein over a term of 3 years. The fact that the defence budget is currently higher than usual is incredible considering Thein Sein’s drive to reduce poverty.”

By stating that the ethnic arms group cannot believe the size of the defence budget and the extent to which weapons factories have been built the accused are deemed to be acting prejudicially to the safety or interest of the state.

The defence lawyers argued for punishment under Media law because the article is not contrary to the Official Secrets Act, as it only mentioned the land grabbing, which was hearsay from local people. But the media law was enacted on (14.3.14) and the offence was committed on (25.1.14). The accused discussed the Land grabbing briefly but mentioned the No (24) Defence Equipment Factory, took photos of, approached, and entered the factory as well as wrote about and criticised it, contrary to Section 3(1)(a)/9 of 1923 ,Burma Official Secret Act.

The Union Minister of the Ministry of Home Affairs gave sanction to the accused under Section 3(1)(a)/9 of Burma’s Official Secrets Act 1923.

A review of the case shows that U Tin San knew that Paing Thet Kyaw took photos and allowed The’ Yar Zar Oo and Si Thu Soe to enter the factory, and published the news having signed off on the draft article and sent it to the editors contrary to Section 3(1)(a)/9 of Burma’s Official Secrets Act 1923.

Aung Thu Ya (a) Paing Thet Kyaw committed an offence under Section 3(1)(a) of Burma’s Official Secrets Act 1923 by taking photos and writing an article.

The' Yar Zar Oo and Si thu Soe committed an offence under Section 3(1)(a) of Burma's Official Secrets Act 1923 by entering the No. (24) Defence Equipment Factory and writing an article.

Lu Maw Naing (a) Lu Maw committed an offence under Section 3(1)(a)/9 of Burma's Official Secrets Act 1923 as he knew that Paing Thet Kyaw took photos and allowed The' Yar Zar Oo and Si thu Soe to enter the factory, and sent the article to the *Unity* Journal office from his computer.

Notice of Appeal

1. The journalists were only writing an article for *Unity* Journal. The Journal mentioned the land grabbing and interviewed the villagers about their land.
2. The Journalists could enter the factory because of lack of security. The journalists got through the check point and so nobody prohibited them from entering the premises.
3. When the journalists entered the factory, they were dressed differently from workers.
4. U Tin San permission to The' Yar Zar Oo and Si Thu Soe was not unusual as they had requested to visit the factory; they were not granted permission to enter the factory.
5. U Tin San did not approach the factory. He only stayed at Ma Ei Su Win's house which is far from factory.
6. The fact that U Tin San had signed off on the draft article was not submitted as evidence before the Court.
7. The most liable for the article are the Editors of the journal.
8. The more relevant provision of the legislation was section 5 on wrongful communication.
9. The article is in the public interest and the factory is under construction. The article has not threatened the safety or interest of the State. Many international organizations are inquiring about that factory.

Reference Citation

- 1.Col Tin Aye Kyaw and Union—1979 MC.(Pg.64)
- 2.Maung Ba Pyae and Union_ 1979 MC (Pg.99)

Annex V: Translation of the Appeal Judgement

Magway Regional High court

2014 Criminal Appeal Case No (59)

The appeal of the judgment of the Pokokku district court dated on (10.7.14)

U Tin San (Appellant)

and

Republic of the Union of Myanmar (Defendant)

For the Appellant - U Kyaw Lin

For the Defendant - U Than Win, Deputy Divisional Law Officer, Magway Division

Judgment

Date: 2nd October 2014

The criminal case no (4) of the Pokokku District court concerned the judgment of Si Thu Soe, Yar Zar Oo (a) Ko The', Aung Thu Ya (a) PaingThet Kyaw, who were sentenced to 10 years imprisonment under Section 3(1)(a) of Burma's Official Secrets Act 1923, and Tin San, Lin Kyaw Oo (a) Lu Maw Naing, who were sentenced to 10 years imprisonment under Section 3(1) of Burma's Official Secrets Act. Si Thu Soe, Yar Zar Oo (a) Ko The', Aung Thu Ya (a) Paing Thet Kyaw, Lin Kyaw Oo (a) Lu Maw Naing appealed under case No 58, and Tin San appealed under case No(59) due to the unsatisfactory judgment of the Pokokku District court.

Page (2)

The summary of the case is that Lt Col Kyaw Kyaw Oo complained to the Pauk Police Station while he was on duty as the head of department at the No. (24) military equipment factory. He knew the *Unity* Journal issue dated on (25.1.14) Vol. (3) No. (4) mentioned in the title secret chemical weapons and leaked state secrets by entering and taking photos of the prohibited area of No (24) military equipment factory.

Page (3)

The appellants' lawyer, using exhibits of the original court, argued that the case concerned a military equipment factory and yet the case was brought under the instruction of the office for the President (Ex (b)). No one had been instructed by the Chief of Staff and Minister of Defence. Even the prosecutor and other witnesses made no statement reference to the leaking of state secrets. The Act has been in force for about 100 years but there is no secret of the state leaked in this case.

Page (4)

The statements from the prosecution witnesses Tun Aung Kyaw, Khin Myint, San Dar Win, Kyi Kyi Win, Min Aung and Kyi Kyi Htay and Myint Naing, revealed that the factory was not a prohibited area by the 1923 Official Secrets Act. The prosecutor lieutenant colonel Kyaw Kyaw Oo's statement in court was that the factory did not produce chemical weapons and the factory had no official secrets, thus there had been no leak. Therefore there had been no proper application of the law.

Page (5)

Under Art. 19 of the Universal Declaration of Human Rights, the right to freedom of expression is a fundamental right. The journalists had only written and published a news report in the exercise of this right.

U Tin San's Lawyer argued on Appeal case 59/2014 that No(24) military equipment factory's land was not a state secret as the factory was not a prohibited area according to Section 2(8)(a) of the Official Secrets Act and the land grabbing was illegal. By the statement of villagers there was only a signboard reading "**Power to the force**". The client should have the benefit of doubt. The original court judgment was wrong. Moreover, the area was not yet announced as a prohibited area by the President of the Union of Myanmar. The punishment was not relevant to the Section 3(2) provisions. The burden of proof was on the prosecutor. The sentence was very heavy for the appellant, who was a first time offender. Instead of Section 3(1)(a)/9, the appellant should be charged under Section 6(3) of the Act. Moreover, the police special branch impounded the evidence with search warrants.

Page (6)

In accordance with Section 12 of the relevant Act, the search required the permission of a magistrate. Therefore the police special branch's activities were illegal, and void because the permission was granted after the prosecution. And the factory is not a work of defence because construction is still on-going and no weapons were produced. President Thein Sein said he will help the journalists who were sentenced. In accordance with the speech of Mr President, the defendants should be acquitted.

On behalf of the government, the law officer argued that on the (25.1.14) Vol (3) No (4) *Unity Journal* ran an article entitled "**Secret chemical weapon factory of the former Chief of Staff, present Chief of Staff, and Chinese technician from the Pauk Township**", and published accompanying photos. Intention to leak state secrets and damage the state's security and interest can be imputed. On section 3(1)(a) of the Official Secret Act 1923 provides, "If any person for any purpose prejudicial to the safety or interest of the State - (a) approaches, inspects, passed over or is in the vicinity of, or enters, any prohibited place; or' by this act even approaches the prohibited place has committed a crime. To enter the areas is also a crime."

Page(7)

On this appeal, the appellant Tin San, Lin Kyaw Oo, Lu Maw Naing allowed Yar Zar Oo and Si Thu Soe entered the factory. The writer selected the title of the article and reported it to Tin San. After that, Tin San signed off on the draft and sent it to the editorial team. Section 9 of the Act states that 'any person who attempts to commit or abets the commission of an offence under this act shall be punishable with the same punishment, and is liable to be proceeded against in the same manner as 'if he had committed such offence'. Concerning the prohibited area, section 2(8)(a) of this act, states that any area "occupied by or on behalf of (the state) for any work of defence is prohibited area". This factory was a work of defence by government. At the entrance of the factory as well as within the factory a signs stating 'Power to the Force' in English, 'prohibited area', and 'restricted area' were visible.

Page(8)

Whether villagers were compensated for the factory area was not relevant. The sentence was right and the appeal should be dismissed.

It must be analysed if the sentence of the journalists in Pokokku District court criminal case No. (59) was relevant or not. When studying the original court case No. (4) of the Pokokku District Court, U Tin San is the CEO of Unity Journal based on Yangon (Rangoon). In the case, U Tin San and the three journalists left Yangon (Rangoon) and stayed at Lu Maw Naing's house on 2014 January.

Page(11)

Yar Zar Oo, Paing Thet Kyaw and Si Thu Soe wrote the draft article and reported to U Tin San, who then sent it to the editorial team. U Tin San signed off on the article, and later confirmed it and

publicly published it in (25th Jan 2014) Issue Vol(3) No(4) of *Unity* Journal. After publication, Lt Col Kyaw Kyaw Oo read the article and complained to Pauk Township police station having received a letter to do so from the President's office (Ex-B). The case was held by sanction of the Ministry of Home Affairs (Ex-T). The appellant lawyers argued that the location of No. (24) Military Equipment Factory was not a prohibited place as it was not declared to be so by the president of the union. So there was no leak of state secrets. The words "Power to the force" do not describe a prohibited area. Article (19) of UDHR mentions the right to freedom of expression. Those journalists were merely publishing news in the journal. So the journalists were innocent. The land shall not be considered relevant because the land for factory was illegally grabbed under existing laws. By the section 3(2) of the Official Secrets Act,

Page (12)

placing the burden of proof on the clients was not a correct reading of the laws. The sentence was very heavy for first time offenders. The sentence should have been made pursuant to section 6(3) of the Official Secrets Act.

Section 3(1) of the Official Secrets Act provides ;

3(1) If any person of any purpose prejudicial to the safety of interest of

- (a) Approaches, inspects, passes over or is in the vicinity of, or enters any prohibited places or
- (b) [...]
- (c) [...]

He shall be punishable with imprisonment for a term which may extend, where the offence is committed in relation in any work of defence, arsenal, naval, military or air force establishment or station, mine, minefield, factory, dockyard, camps, ships or aircraft or otherwise in relation to the naval, military or air force affairs of (the State) in relation to any secret official code, to fourteen years and in other cases to three years.

In section 2(8) of this act prohibited place means

"Any works of defence, arsenal, naval, military or air force establishment or station, mine, minefield, camp, ship or aircraft belonging to, or occupied by or on behalf of the (state), any military telegraph or telephone so belonging or occupied, any wireless or signal station or office so belonging or occupied and any factory, dockyard or other place so belonging or occupied and used for the purpose of building, repairing, making or storing any munitions of war, or any sketches, plans, models or documents relating thereto, or for the purpose of getting any metals, oil or minerals of use in time of war;"

Page (13)

The prosecutor, Lt Col Kyaw Kyaw Oo and the witness Lt Htet Wai Aung's statements and exhibits (R-9) to (R-27) demonstrate that the photos which were sent by E-mail from Lu Maw Naing's computer to the *Unity* Journal office were of prohibited places by section 2(8)(a). By the statement of Yar Zar Oo and Si Thu Soe, there was a red sign board that read "Power to the force" which showed that the area was a prohibited place where work of defence took place. Moreover, (Ex-S) the search form and (Ex-S 1 – 12) photos showed there was a restricted area, "do not trespass" signboards, and by the (Ex-S13) and (Ex-S14) the defendants were not allowed to take photos and cameras on the premises.

Page(14)

Section 2(8)(c) of Official Secret of State provided;

“Any place belonging to or being used for the purpose to the (state) which is for the time being declared by the President of the Union by notification in the Gazette, to be a prohibited place for the purpose of this act on the ground that information with respect there to, or damage thereto, would be useful to an enemy, and to which a copy of the notification in respect thereof has been affixed in (Burmese) and in the (language of the locality, if any).”

Page (15)

So the location of No. (24) Military Equipment Factory was not relevant to the section 2(8)(c) description of “prohibited place” but rather fell within section 2(8)(a) of work of defence. And (Ex_C1) of the *Unity Journal* page (22) vol (3) issue (4) dated on (25th, Jan, 2014) an article written by Yar Zar Oo, Paing Thet Kyaw, Si Thu Soe and Lu Maw Naing and titled “**Secret chemical weapon factory of the former Chief of Staff, present Chief of Staff, and Chinese technician from the Pauk Township**” read;

“[A] red signboard at the entrance of the factory reads “Power to the force” [...] According to the workers and *Unity* journalists investigating the factory [...] *Unity Journal* has found that millions of Kyats were used to finance the budget for the building of military weapons factories, which could reduce international trust in the democratic nation. There has been international pressure to reduce this military budget. The military budget is still higher than those of previous regimes, like the former military government and even the civilian government led by President Thein Sein over a term of 3 years. The fact that the defence budget is currently higher than usual is incredible considering U Thein Sein’s drive to reduce poverty.”

Those written statements were intended to leak state secrets. The CEO U Tin San and journalists mentioned above were based in Lu Maw Naing’s house and

Page (16)

entered the factory, took photos and collected facts. Paing Thet Kyaw shot photos over a 500 foot hill and sent them to *Unity Journal*’s office. U Tin San, knowing about this as well as Yar Zar Oo and Si Thu Soe entering the factory, was committed an offence under section 3(1)(a)/9 of the act. The argument of U Tin San’s lawyer that the factory was under construction and does not fall under the ambit of the Act was not relevant.

Page (17)

Concerning burden of proof, in section 3(2) of the Act, regarding the prosecution for an offence punishable under this section with imprisonment for a term which may extend to fourteen years, it shall not be necessary to show that the accused person was guilty of a particular act leading to show a purpose prejudicial to the safety of interest of the state, and notwithstanding that no such act is proven against him, he may be convicted if, from the circumstances of the case or his conduct or his known character was for this purpose. Thus, the argument of U Tin San will not be considered and the sentence will not be changed under section 6(3). Moreover, the lawyer for Yar Zar Oo, Si Thu Soe, Paing Thet Kyaw and Lu Maw Naing mentioned Article (19) of UDHR. But No. (24) Military equipment factory was built for the purpose of secret service work in defending state security. State security is inclusive not only of government but citizens of the state. In other words, the work of defence was a secret place for securing citizens and the defence of the government.

Page(18)

The limitation to freedom of expression is justified, the photographs and facts were taken secretly and published not just to the public but also to international anti-government organisations, and thus constituted a leak of State and defence secrets.

Taking all these circumstances into account, the appellant's sentence was not wrong on the part of Pokokku District court. The original punishment the appellant was sentenced with was (10) years imprisonment. According to statements of the original court, U Tin San was a CEO and Yar Zar Oo, Si Thu Soe and Paing Thet Kyaw were young reporters. Lu Maw Naing was also a reporter who sent news from his computer to the Unity journal. They were all members of the media. They committed the crime due to lack of knowledge as to the proper conduct of the media. The sentence has been commuted because they have shown regret for their actions.

Page(19)

The Court has decided to partially allow the appeal case No (59). Re-confirm the sentence of Pokokku court to Yar Zar Oo, Paing Thet Kyaw and Si Thu Soe under section 3(1)(a) of Official Secrets Act 1923 and Tin San and Lu Maw Naing under section 3(1)(a)/9. Regarding punishments, Yar Zar Oo, Si Thu Soe and Paing Thet Kyaw are sentenced to 7 years of labour each instead of 10 years. Tin San and Lu Maw Naing are sentenced to 7 years of labour instead of 10 years under section 3(1)(a)/9 of the Act.

Myint Thein
High Court Magistrate
Magway Regional High Court