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Distr.
GENERAL

A/HRC/10/19
11 March 2009

Original: ENGLISH

HUMAN RIGHTS COUNCIL
Tenth session
Agenda item 4

HUMAN RIGHTS SITUATIONS THAT REQUIRE THE COUNCIL'S ATTENTION

Report of the Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana*

* For information purpose only.

* The present report was submitted after the deadline in order to include the information gathered during the Special Rapporteur's mission to Myanmar from 14 to 19 February 2009.

Summary

The present report, submitted pursuant to Human Rights Council resolution 8/14, mainly covers human rights developments in Myanmar since the Special Rapporteur's interim report submitted to the General Assembly (A/63/341).

The Special Rapporteur has travelled twice to Myanmar and has established constructive working relations with its Government. He would like to thank the Government for its hospitality and cooperation during the missions and also in discharging his mandate.

In the report, the Special Rapporteur elaborates on issues relating to the protection of human rights. In particular, he concentrates on the situation of prisoners of conscience, their right to a fair trial and due process of law and conditions of their detention; as well as freedom of expression, assembly and association in the context of the upcoming elections in 2010. He reviews internal conflicts with regard to international humanitarian law and protection of civilians and issues of discrimination and the need for humanitarian assistance.

The Special Rapporteur reiterates his recommendation of four core human rights elements: a review of national legislation in accordance with the new Constitution and international obligations; the progressive release of prisoners of conscience; training for the armed forces to ensure respect for international human rights and humanitarian law; and the establishment of an independent and impartial judiciary. Since Myanmar is party to the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women only, the Special Rapporteur strongly recommends that it accede to the other core international human rights instruments.

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I. INTRODUCTION

1. The present report is submitted pursuant to Human Rights Council resolution 8/14 and covers the human rights developments in Myanmar since the Special Rapporteur's reports submitted to the Human Rights Council (A/HRC/7/24) and the General Assembly (A/63/341).
2. On 23 September 2008, seven prisoners of conscience were released, one of whom was rearrested a day later. The Special Rapporteur welcomed the release, hoping that it would be the first in a series of releases of other prisoners of conscience. On 21 February 2009, 29 more prisoners of conscience were released.
3. From September to December 2008, some 300 prisoners of conscience were given harsh sentences, including a dozen detainees who were given 65-year prison sentences. The Special Rapporteur, together with the Special Rapporteurs on the independence of judges and lawyers, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on freedom of religion or belief condemned publicly the severe convictions and unfair trials. On 14 January 2009, a 20-year-old student was sentenced to 104 years of imprisonment.
4. The present report focuses on the Special Rapporteur's findings during his visit to Myanmar from 14 to 19 February 2009. The Special Rapporteur would like to thank the Government of Myanmar for its hospitality and the cooperation he received during his mission to the country. The objectives of the mission were to assess the development of the human rights situation since the Special Rapporteur's visit in August 2008 and to discuss with the relevant authorities the implementation of the four core human rights elements.
5. The Special Rapporteur met with the Secretary-General in October 2008 and is in constant contact with his Special Adviser on Myanmar, Professor Ibrahim Gambari. The Special Rapporteur would finally like to thank the Office of the United Nations High Commissioner for Human Rights (OHCHR), in particular at Geneva, Bangkok and New York for assisting him in discharging his mandate.

II. METHODOLOGY AND ACTIVITIES OF THE SPECIAL RAPPORTEUR

6. The Special Rapporteur was appointed in March 2008 and officially assumed his functions on 1 May 2008. He presented his first report to the Council in June 2008 (A/HRC/7/24), wherein he announced that his primary task was to cooperate with and assist the Government of Myanmar in its efforts in the field of promotion and protection of human rights. He reiterated his cooperation with the Government to assist in the realization of human rights of the people of Myanmar in his statements to the Council and in his report (A/63/341) and statement to the General Assembly. In the latter report, the Special Rapporteur mentioned that, if after some time, there was no sign of any result on in the horizon, he would consider changing his strategy.
7. The Special Rapporteur's two requests to visit Myanmar were met by the Government. He conducted missions to the country from 3 to 7 August 2008, and from 14 to 19 February 2009. He considers that both missions were constructive since the identified objectives were achieved, namely, the establishment of a cooperative relationship with the Government and other

stakeholders during his first mission, and the discussions with relevant authorities on the process of implementation of the four core human rights elements recommended by the Special Rapporteur, to be completed before the elections of 2010.

8. The Special Rapporteur had three constructive meetings with the Government human rights group. Initially, he presented the four core human rights elements to the group. In February, he requested the group to assist the Government in the implementation of the elements.

9. The Special Rapporteur had substantive and fruitful discussions with relevant authorities on the implementation of the four core human rights elements. With regard to the first core element, the Attorney General informed the Special Rapporteur that 380 domestic laws had been sent to the concerned ministries for review, to check compliance with the human rights provisions of the Constitution. On the second core element and the progressive release of prisoners of conscience, the Minister for Home Affairs assured the Special Rapporteur that he would consider his recommendation. Regarding the third core element, the Special Rapporteur discussed with the Head of Police and the Judge Advocate General at the Ministry of Defence the possibility of training sessions on international human rights law and humanitarian law for the armed forces and the police. Since sessions had already been conducted for both forces, it was agreed that they share their curricula with the Special Rapporteur to ensure compliance with international standards and cooperation in future sessions. On the fourth core element, even though the Chief Justice mentioned that the judiciary was independent in Myanmar, he accepted to engage and receive the Special Rapporteur on the independence of judges and lawyers.

10. The Special Rapporteur also met with the Minister for Labour, the Minister for Foreign Affairs, the Chairperson of the Tripartite Core Group, members of Bar Council, the Myanmar Woman Affairs Federation and Union Solidarity and Central Development Association. His request to meet with the leaders of various political parties was not met since all the leaders were held in detention, either under house arrest or in prisons in remote areas.

11. The Special Rapporteur visited the areas affected by Cyclone Nargis in August 2008 and his findings were included in his report submitted to the General Assembly. He travelled to Kayin State in February 2009, where he met with two factions of the Karen National Union (KNU) that had concluded a ceasefire with the Government. He noted that the Karen National Union/Karen National Liberation Army (KNU/KNLA) Peace Council had maintained its own armed forces and had its own Constitution, laws, jail and judges; the Democratic Buddhist Karen Army informed the Special Rapporteur that it maintained an armed force of 5,000 fighters. Both factions denied recruiting minors as soldiers and agreed to allow the United Nations Monitoring and Reporting Mechanism task force verification of their troops, as required by the Security Council in its resolution 1612 (2005) on children in armed conflict.

12. The Special Rapporteur also met with the Phayagone Region Peace Group/Phado Aung San group, which has surrendered. He was unable to go to the KNU-controlled areas.

13. The Special Rapporteur intends to return to Myanmar before finalizing his report for the General Assembly.

III. HUMAN RIGHTS ISSUES

14. Myanmar is party to the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child only. However, as a State Member of the United Nations, it is bound by the Universal Declaration of Human Rights and subsequent declarations adopted by the General Assembly.

15. The Special Rapporteur commends the Government of Myanmar for submitting its report to the Committee on the Elimination of Discrimination against Women and its appearance before the Committee in November 2008. He encourages the Government's implementation of the Committee's concluding observations to ensure improvement of gender balance and the situation of women in Myanmar, including in North Rakhine State.

16. The third and fourth reports of Myanmar under the Convention on the Rights of the Child were due on 13 August 2008. The Special Rapporteur encourages the Government to abide by its reporting obligations and to submit its reports as soon as possible.

17. The human rights situation in Myanmar remains challenging and needs to be addressed quickly and effectively. These challenges include economic, social and cultural rights. For this reason, the Special Rapporteur has promoted the idea of the expansion of the Tripartite Core Group's mandate beyond the areas affected by Cyclone Nargis to address humanitarian needs in other States, such as Kachin, Rakhine and Chin.

18. As in any other least developed country, poverty is the main reason for a range of problems and a hindrance to the realization of human rights for everyone. While visiting Insein prison in Yangon, and speaking at random with the inmates, the Special Rapporteur spoke with a young girl who claimed to be 17 years old (prison authorities claimed that she was 19) who had been sentenced to two years of imprisonment for having stolen the equivalent of \$10. When she was asked to write her name, she responded that she was illiterate. To the Special Rapporteur's comment that he had heard from all relevant authorities that education was free and compulsory, the authorities' response was that she was an exception, since she had a poor financial background and had had to work from an early age to support her family. There are many others like her, who are exploited as children and do not receive any education to ensure a better future.

19. During his latest mission to Myanmar, the Special Rapporteur visited the Hpa-An and Insein prisons. These were announced visits. He took a tour of the kitchen and the medical facilities. In both prisons, he spoke at random with the inmates to check their ages, the reason for which they were detained, if they had been brought before a court, if they had had access to legal counsel, and so on. In both prisons, the Special Rapporteur interviewed inmates who had been porters, without remuneration, for the military in Kayin State and had tried to run away because of the harshness of the work. One was a porter of ammunition, the other of food. The probability that there are many other victims of forced labour in prison is high. Also, the probability of those who have not tried to run away is also high. The Special Rapporteur welcomes the one-year extension of the supplementary understanding between the Government of Myanmar and the International Labour Organization (ILO). He strongly recommends that the Government and ILO continue their close cooperation with a view to eradicating forced labour in Myanmar, and in particular to review the domestic policy and the jail manual regarding the use of prisoners by the military and prison labour. In Insein prison, the victim of forced labour was shackled. The

official explanation was that, since he had tried to run away from the military compound, he had been shackled in prison. The authorities also recognized that some 30 to 40 prisoners were shackled in Insein prison. According to article 33 of the Standard Minimum Rules for the Treatment of Prisoners,¹ instruments of restraint, such as handcuffs, chains, irons, and strait jackets, should never be applied as punishment, and chains and irons should not be used as restraints.

20. None of the prisoners with whom the Special Rapporteur spoke had been represented in the court by legal counsel. Many did not even know the definition of the word “lawyer”.

**A. Situation of prisoners of conscience, the right to fair trial
and due process of law: conditions of detention**

21. There are currently more than 2,100 prisoners of conscience in Myanmar. During the period under review, a range of events related to prisoners of conscience.

22. On 23 September 2008, U Win Tin (whom the Special Rapporteur had met in Insein prison in August 2008), Dr. May Win Myint, U Aung Soe Myint, U Khin Maung Swe, Win Htain, Dr. Than Nyein and U Thein Naing were released. The Special Rapporteur publicly welcomed this initiative by the Government of Myanmar and expressed hope that it would be the first in a series of releases of other prisoners of conscience. It was reported, however, that Win Htain was rearrested shortly after his release. The Special Rapporteur wrote to the Government on 26 September 2008 inquiring about the rearrest. The Government replied stating that Win Htain’s release from prison had been an error.

23. From October to December 2008, some 400 prisoners of conscience were brought before prison courts and given very harsh, long sentences. On 11 November 2008, 23 members of the 88 Generation Students, including five women, were given terms of imprisonments of 65 years by a court in Insein prison. The comedian Zarganar was sentenced to a total of 59 years, which was reduced in February 2009 to 35 years. More than 25 people, including 5 monks, were sentenced to 24 years of imprisonment. U Gambira, whom the Special Rapporteur had met in Insein prison in August 2008, was sentenced to 68 years in prison; in December 2008, he was transferred to Mandalay prison and, according to the latest information, transferred again in January 2009 to Hkamti prison in Sagaing Division. In August 2008, the Special Rapporteur also met with Su Su Nway, who was sentenced on 11 November 2008 to 12 years and 6 months. Subsequently, she was transferred to Mandalay prison; on 18 November 2008, she was transferred to Kale prison in Sagaing Division, some 680 miles north of Yangon. Owing to her heart condition, she relied on medication brought by her family. The Special Rapporteur has since learned that, on 20 February 2009, Yangon Division Court reduced Su Su Nway’s sentence by four years.

24. The Special Rapporteur has been informed that the prosecutors during the above-mentioned trials were all police sergeants. Police officers were called by the court as witnesses. Prisoners of conscience were charged with unrelated offences, mainly under the

¹ Economic and Social Council resolutions 663 C (XXIV) and 2076 (LXII).

provisions of the Penal Code; the Emergency Provision Act (1950); the State Protection Act (1975); the Video Act and the State Law and Order Restoration Council Law No. 8/96 (29 July, 1996); the Law Protecting the Peaceful and Systematic Transfer of State Responsibility and the Successful Performance of the Functions of the National Convention against Disturbances and Oppositions; the State Law and Order Restoration Council Law No. 5/96 (7 June 1996); the Unlawful Association Act (1908); the Electronic Transactions Law; the Public Property Protection Act (1947); the Law Amending the Myanmar Immigration (Emergency Provisions); and the Official Secrets Act (1948).

25. The process leading to the above-mentioned sentences illustrates the serious flaws in the current administration of justice system and calls for serious reform efforts. The Special Rapporteur notes that the Constitution, in chapter 1, paragraph 19, establishes important judicial principles: (a) to administer justice independently according to the law; (b) to dispense justice in open court unless otherwise prohibited by the law; and (c) to guarantee in all cases the right to a defence and the right of appeal under the law. However, in reality, many prisoners of conscience have been sentenced in closed-door hearings within prison compounds, without legal representations, without the presence or knowledge of their family members, and without proof of evidence or with flawed evidence. In fact, defence lawyers face great difficulties ranging from not being informed of the dates and venues of trials to not having the possibility of meeting detainees in private before trial.

26. The Special Rapporteur has also received disturbing information from various reliable sources on the conviction of defence lawyers for contempt of court during the wave of sentencing of prisoners of conscience in November 2008. He discussed this matter with the Bar Council and was informed about the Contempt of Court Act (1926), which provides for a duration of imprisonment of up to six months, but does not specify what actually constitutes contempt of court, leaving it open to any interpretation or decision by higher instances. The senior lawyers Aung Thein and Khin Maung Shein representing U Gambira were sentenced to four months of imprisonment for contempt of court on 7 November 2008, charged under section 3 of the Contempt of Court Act.

27. The Special Rapporteur would like to point out that, according to the Basic Principles on the Role of Lawyers, Governments should ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) should not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics” (art. 16). Furthermore, lawyers should enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority (art. 20).

28. In Myanmar, the right to legal counsel is not fully respected and, if a suspect cannot afford a lawyer, the Government is not obliged to provide one.

29. Over 600 sentenced prisoners have been transferred to prisons far from their hometowns, in isolated areas around the country, making it difficult for their families to visit regularly. Visits

become more costly and time-consuming for families. The fact that family members are unable to see each other on a regular basis can have a psychological impact on both the prisoners and their families. Moreover, prisoners very often rely on food and medication provided by their families.

30. It has been reported that a number of prisoners have been regularly transferred to other prisons without notification of their families, who lose track of the prisoner's whereabouts.

31. On 3 January 2009, Bo Min Yu Ko, a member of the Mandalay branch of the All Burma Federation of Student Unions, in his early twenties, who was arrested on 16 September 2008, was sentenced to 104 years of imprisonment at Obo Prison Court in Mandalay Division. He was charged under 40 different sections of law and was not allowed a defence lawyer. He faced six charges under section 13/1 of the Immigration Act alone.

32. It is also reported that prisoners of conscience during the interrogation period carried out by the Special Security Force of Military Intelligence are subject to physical ill-treatment. Some are asked to remain in the same position for long hours every day. There are also reports of prisoners having been beaten during interrogation. The Special Rapporteur was informed that a large number of prisoners of conscience are kept in solitary confinement. He therefore reiterates the need for human rights training for the military and prison staff to raise their awareness of international standards and rules for the treatment of prisoners.

33. During his mission to Myanmar in February 2009, the Special Rapporteur met in private with five prisoners of his choice. He met with Dr. Tin Min Htut and Nyi Pu, both National League for Democracy candidates elected in 1990 to Parliament. They were co-signatories of a letter addressed to the Secretary-General to express concern about the new Constitution of Myanmar, after which they were arrested on 12 August 2008. On 13 February 2009, they were sentenced to 15 years of imprisonment. The Special Rapporteur is of the opinion that any citizen of a State Member of the United Nations should be able to write to and contact the Secretary-General without fear of reprisal.

34. The Special Rapporteur also met with Kyaw Ko Ko, leader of the All Burma Federation of Student Unions, arrested on 17 March 2008 and sentenced to three years of imprisonment in early February 2009. The Special Rapporteur was informed that Kyaw Ko Ko had been transferred to another prison, and his whereabouts have still not been disclosed to his family.

35. The Special Rapporteur met with Nyi Nyi Htwe, a lawyer defending prisoners of conscience, who has been charged under section 228 of the Penal Code and sentenced to six months of imprisonment; his release is due in April 2009. He also met with Daw Pone Na Mee (dae Mya Nyunt), 84 years old and a nun since the age of 45. She was arrested, together with a number of other nuns and elderly monks, in a monastery in October 2007, and did not know the reason for her arrest. She was frail and had difficulty in standing and walking.

36. The Special Rapporteur received reports about the dire health conditions of a large number of prisoners of conscience, some of whom do not even receive basic medication. In January 2009, he received reports regarding Kay Thi Aung's miscarriage owing to lack of adequate medical care in O Bo prison in Mandalay Division. He has unfortunately also received reports regarding the death of prisoners who died owing to lack of medical care. The most recent

case was on 28 December 2008 and concerned Htay Lwin Oo, 46, who was suffering from tuberculosis in Mandalay prison. A teacher and member of the National League for Democracy from Amarapura Township in Mandalay, he was arrested on 21 December 2003 and sentenced to seven years of imprisonment under section 5 (J) of the Emergency Provisions Act. He was due for release in December 2009.

37. The Special Rapporteur received reports regarding the situation of Zaw Naing Htwe, according to which his life is in danger at the Four-Mile Labour Camp near Taungoo Town in Pegu Division. It is said that he is shackled while being forced to perform hard labour by the authorities. He is not being given enough food and water.

38. The Special Rapporteur reiterates his call for the termination of Daw Aung Sa Suu Kyi's detention under house arrest, which is in contravention of articles 9, 10 and 19 of the Universal Declaration of Human Rights, according to which no one should be subjected to arbitrary arrest or detention, everyone is entitled to a fair and public hearing by an independent and impartial tribunal, and everyone has the right to freedom of opinion and expression. Moreover, according to the 1975 State Protection Act, used to justify her detention, a person judged to be "a threat to the sovereignty and security of the State and the peace of the people" can only be detained for up to five years. The five-year limit has now passed. In his meeting with the Chief Justice, the Special Rapporteur inquired about Aung Sa Suu Kyi's legal case against her house arrest and conditions of detention, which was submitted to the authorities on 8 October. The response to the inquiry was that, since the detention was an administrative order, the legal case had not been sent to the Supreme Court. Furthermore, the Deputy Attorney General asserted that she was under "quasi-judicial" detention. Subsequently, the Special Rapporteur raised the issue with the Minister for Home Affairs, who explained that the case had been received by the Prime Minister, who had instructed both the Chief Justice and Ministry of Home Affairs to look into the matter. The Special Rapporteur calls for an urgent, impartial and independent review of this case.

39. The Special Rapporteur regrets that, despite his request, he could not meet with any of the leaders of political parties (including Daw Aung Sa Suu Kyi, Min Ko Naing, leader of the 88 Generation Students; Hkun Htun Oo, leader of the Shan Nationalities League for Democracy; and U Myint Aye, leader of Human Rights Defenders and Promoters Group) because they were all either under house arrest or in remote prisons. Hkun Htun Oo was sentenced to 93 years of imprisonment in November 2005. He is in Puta-O prison in Kachin State, where conditions are said to be very harsh, especially for him since he suffers from diabetes, high blood pressure and prostate problems. Min Ko Naing was sentenced to 65 years of imprisonment in November 2008 and, according to the latest information, is in Keng Tung prison in Shan State, where he is reported to be in solitary confinement and suffering from severe eye problems. U Myint Aye was transferred from Insein prison to Loikaw prison in Kayah State on 16 December 2008. On 28 November 2008, he was convicted under the Explosives Act, the Immigration Act and the Unlawful Association Act, and received a life sentence and eight years.

40. In order for the seven-step road map to democracy to comply with international standards and the requirements of a democratic society, the leaders of these political parties and other prisoners of conscience should be released to participate freely in the completion of the road map.

41. On 21 February 2009, the Government released some 6,313 prisoners, including 29 prisoners of conscience. The release, although welcome, lacks proportionality when compared with the total number of prisoners of conscience, of whom there are more than 2,100.

42. The Special Rapporteur draws the attention of the Myanmar authorities to the existence of a body of internationally accepted standards and principles in the area of human rights in the administration of justice, including the treatment of prisoners, the role of lawyers, the role of prosecutors, the independence of the judiciary and the conduct of law enforcement officials, which must guide the authorities to ensure free trials and due process of law. He underlines the necessity of legal reform to review legislation and procedures to ensure conformity with human rights standards and respect for the basic principles of the presumption of innocence, due process of the law and the independence of the judiciary.

43. The State has the responsibility of ensuring the protection and proper treatment of persons in detention, including by providing adequate food and medical care in accordance with universally accepted standards and the principles contained in international human rights instruments, such as the Universal Declaration of Human Rights, the Standard Minimum Rules for the Treatment of Prisoners, the Basic Principles for the Treatment of Prisoners, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

44. The Special Rapporteur notes the importance of financial support provided by the International Committee of the Red Cross (ICRC) to families to visit their detained relatives. He invites the authorities to re-engage with ICRC and allow it to conduct prison visits, which have been suspended since December 2005, in accordance with its established mandate.

45. The Special Rapporteur commends the Government for the moratorium on the use of death penalty, in place since 1998.

B. Freedom of expression, assembly and association and the road towards the elections of 2010

46. Freedom of opinion and expression, as well as of assembly and association, are essential elements for the achievement of the road map to 2010 and are enshrined in the new Constitution of Myanmar. Paragraph 8 of the preamble provides for justice, liberty and equality. Paragraph (d) of article 6 declares that the basic principles of the State are the flourishing of a genuine, disciplined multiparty democratic system. Paragraphs (a) and (b) of article 406 state that a political party should have the right to organize freely and to participate and compete in elections. Lastly, article 354 states that every citizen should be at liberty to express and publish their convictions and opinions freely, to assemble peacefully without arms and to form associations and organizations. Nonetheless, some 16 journalists and bloggers are currently in prison.

47. In its resolution 63/245, the General Assembly expressed its grave concern about the continuing imposition of severe restrictions on the exercise of fundamental freedoms, notably the

freedom of expression, association and assembly. In his report submitted to the General Assembly (A/63/341), the Special Rapporteur indicated several domestic laws that restrict the principles of freedom of association and assembly, most importantly the Unlawful Association Act, the State Protection Act, and sections 143, 145, 152, 505, 505 (b) and 295 (A) of the Penal Code. These laws continue to be used to restrict freedom of expression and association, most notably during the sentencing of hundreds of political activists since August 2008, for their participation in the peaceful demonstrations of 2007. With regard to freedom of opinion and expression, the Television and Video Law (1985), the Motion Picture Law (1996), the Computer Science Development Law (1996), the Electronic Communication Law and the Printers and Publishers Registration Act (1962) are invoked to censor the media.

48. Furthermore, the Special Rapporteur received information that restrictions continue to be imposed on the right to form trade unions. Several individuals who were associated with trade unions, including the banned Federation of Trade Unions of Burma, have been detained, convicted and sentenced to long terms in prison.

49. The Special Rapporteur has also received information that several journalists have been convicted on the basis of the Electronic Act and the Video Act. He moreover remains concerned about restrictions on the media, including censorship of newspapers, the Internet and other sources of information, and the threatening of journalists with heavy prison sentences under the above-mentioned laws.

50. It is important to note that these laws are in contravention of international law, inter alia, articles 19 and 20 of the Universal Declaration of Human Rights, articles 13 and 15 of the Convention on the Rights of the Child as well as the ILO Convention concerning Freedom of Association and Protection of the Right to Organise (Convention No. 87) to which Myanmar is a party, and which explicitly calls upon Governments to ensure the full enjoyment of freedom of expression and association. As a State party to these conventions and a State Member of the United Nations, the Government of Myanmar should ensure compliance of domestic laws with its international obligations.

51. On the basis of a discussion held with the Attorney General regarding the implementation of the first core human rights element, the Special Rapporteur strongly encourages the Government to complete the process of reviewing and amending the domestic laws that do not comply with international standards and provisions relative to human rights of the new Constitution, in order to allow for the full enjoyment of the freedom of opinion and expression, as well as of association and assembly, including assuring a free and independent media.

52. In the context of the elections in 2010, fundamental rights also include freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media, regardless of frontiers. Genuine multiparty elections imply informed and educated voters, the forming and proper registration of political parties, the ability of political parties to carry out campaign activities, including through all available means of media and the opening of offices in localities across the country, and the existence of independent media and non-governmental groups. None of this would be possible without the fundamental rights of freedom of opinion and expression, assembly and association.

53. In this regard, it is of utmost importance that the election law be introduced publicly as soon as possible.

54. In order for the seven-step road map to democracy to comply with democratic values, the right to assembly (such as public demonstrations and political meetings) should be fully respected. Following the crackdown on the peaceful demonstrations of September 2007, 31 deaths, of which 15 were confirmed by the Government, and 74 cases of disappearance were reported. Crackdowns on peaceful demonstrations and assemblies demonstrate the vulnerability of the freedom of assembly and the democratic process.

C. International humanitarian law protection of civilian discrimination

55. In its resolution 63/245, the General Assembly strongly called upon the Government of Myanmar to inter alia, intensify measures to ensure the protection of children from armed conflict. Children continue to be recruited and used in large numbers as soldiers despite the existing laws and policies prohibiting the recruitment of persons below the age of 18. In this regard, the Special Rapporteur encourages the Government to intensify efforts to address the problem of the recruitment of child soldiers in its armed forces. He welcomes the efforts of the Government committee for the prevention of military recruitment of under-age children in November 2008 to raise awareness among military officers and other ranks in the Northern Command. He also notes the cooperation of the Government with the Working Group on Children in Armed Conflict. The Special Rapporteur calls upon the Government to continue implementing the plan of action of the committee, urges that those who continue to recruit child soldiers be brought to justice. The Special Rapporteur recommends that the Government adhere to the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict.

56. The Special Rapporteur is seriously concerned about the unfolding armed conflict in Kayin State between the Union of Myanmar Army and the KNU, which severely affects the civilian population. It is said that both parties are responsible for extrajudicial killings, torture, enforced disappearances and arbitrary arrests, forcible displacement, the use of anti-personnel mines and the destruction of villages.

57. In August 2008, villagers were allegedly shot dead by soldiers in their paddy fields west of Papuan township. Incidents of forced labour are also reported, including in the construction and maintenance of eight roads and the portering of supplies to new military outposts. The Special Rapporteur, during his latest visit, met in prison with two victims of forced labour for the military in Kayin State. According to the information received, in Central Kayin State military patrols continue to restrict the free movement of villagers.

58. In the townships of Laikha, Nam Zarng and Mong Kung in Southern Shan State, human rights abuses have allegedly been committed by a splinter group, of the Shan State Army South Battalion 758. Forced labour, land confiscations, the forced construction of agricultural plantations and sharp rises in commodity prices have also been reported.

59. In Kaya State, despite a decrease in the number of troops, fighting between the military and the Karenni National Progressive Party continued. The confiscation of land and work without remuneration in the agriculture sector have been reported.

60. In Mon State, fighting between the Monland Resistance Party and the military continued. During a three-month offensive by the army from June to August 2008 in southern Ye Township, civilians were allegedly tortured and forcibly conscripted into local militia forces. It is reported that, in Thanbyuzayat township, land was confiscated for the construction of rubber and castor oil plantations and farmers were arbitrarily taxed. Furthermore, civilians were allegedly forced to guard the Kanbawk-Myaingkalay gas pipeline in Mudon. In Thanbyuzayat and Kyaikmayaw townships, it is said that civilians were forced to construct security outposts every 500 metres.

61. In November 2008, the Committee on the Elimination of Discrimination against Women expressed deep concern at the high prevalence of sexual and other forms of violence, including rape, perpetrated against rural women from the Shan, Mon, Karen, Palaung and Chin ethnic groups by members of the armed forces. The Committee also expressed concern at the apparent impunity of the perpetrators of such violence (although a few cases have been prosecuted) and at reports of threats against and intimidation and punishment of the victims. On 27 December 2008, the body of a 7-year-old girl was found raped and shot dead, near her house in Ma Oo Bin village, Kyauk Township, Nyaunglebin District, in northern Kayin State. No action has yet been taken against the perpetrator of the crime, allegedly from the Light Infantry 350, which has since moved away from the area. As in all other such previous cases, justice must be done. The family of the victim and other community members must be protected from any retaliation for seeking justice. Some 450,000 people are said to be internally displaced in Myanmar because of armed conflicts around the country.

62. The Special Rapporteur urges the Government and all armed groups to ensure the protection of civilians, in particular children and women, during armed conflict. He calls upon the Government to abide by international humanitarian law, especially the four Geneva Conventions, to which Myanmar is a party. In particular, article 3 of the Geneva Conventions provides for the protection of civilians from inhumane treatment and violence to life and person.

63. The use of anti-personnel mines along the border areas of Myanmar, particularly near the eastern border, poses a serious threat to the lives of villagers. Both the military and non-State armed groups use anti-personnel mines. It is reported that landmines are commonly used for purposes such as restricting the movement of people, hindering the movement of troops, or for marking concession parameters. Particularly worrying is the reported practice of human minesweepers, whereby civilians are forced by the military to clear brush in suspected mined areas or to serve as porters for the military in areas where there is a mine hazard. According to reports, civilians have been requested to remove mines without training or protective equipment, or to repair fences in mined areas; serious casualties have been reported. The Special Rapporteur calls for the implementation of a moratorium on the use of landmines and for accession to the Mine Ban Treaty. He encourages the authorities to seek effective international cooperation and support in order to begin efforts for mine clearance and to provide support to victims of landmines.

64. The Special Rapporteur remains concerned over the practice of forced labour without compensation or payment and various forms of extortion and arbitrary taxations.

65. The Special Rapporteur reminds the Government of its obligations to fully implement Legislative Order No. 1/1999 on the Eradication of Forced Labour. There have been numerous

and frequent reports on civilians being forced to serve as porters and guides for the military, to build and maintain roads, to construct military camps and to work on infrastructure projects. The Special Rapporteur has received reports on human rights abuses in relation to extractive projects, which bring in an increased military presence to oversee preparations, such as the building of roads and for setting up infrastructures, relying on forced labour and land confiscation. He calls upon all those involved in such extractive projects to carry out human rights impact assessments in order to avoid this kind of human rights abuse.

66. The Special Rapporteur remains concerned over the continued discrimination against the Muslim population of Rakhine State. Ongoing human rights violations, such as restrictions on the exercise of religion, forced relocation, land seizures and restrictions on freedom of movement have been reported. In November 2008, the Committee on the Elimination of Discrimination against Women urged the Government of Myanmar to review the 1982 citizenship law that places unreasonable restrictions on the Muslim population of Rakhine State in the enjoyment of their fundamental rights, and denies them citizenship. They are subject to multiple restrictions and forms of discrimination, require official permission to marry and have children, and are criminalized for non-compliance. They have an illiteracy rate of 80 per cent, and their movements are restricted. Since 1994, the authorities have stopped issuing birth certificates, leaving thousands of children unregistered. As non-citizens, women are barred from serving as schoolteachers or as nurses. They are vulnerable to sexual violence. The presence of the Office of the United Nations High Commissioner for Refugees (UNHCR) in the region, established after the 1992 refugee influx into Bangladesh, has had a stabilizing effect. The continued presence of UNHCR and other humanitarian organizations is most important.

67. The Special Rapporteur calls upon the Government to ensure that ethnic minorities are granted fundamental rights, as enshrined in the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities and article 30 of the Convention on the Rights of the Child. In the light of the seven-step road map to democracy and the new Constitution, especially articles 34 (freedom of religion), 347 (equal rights of all persons before the law) and 348 (prohibition of discrimination based on race, birth, religion, official position, status, culture, sex and wealth), he urges the Government to continue and complete the amendment of domestic laws to ensure the full enjoyment of human rights without discrimination for all people in Myanmar.

D. Living conditions, sustenance and humanitarian assistance

68. In August 2008, the Special Rapporteur travelled to the cyclone-affected areas, including Labutta in Ayeyawady Division, and Kyaukkalatt, Khongyi, Pyinsalu and Kyatshar villages (A/63/341, para. 67).

69. The Special Rapporteur welcomes the achievements of the Tripartite Core Group, established in May 2008 by the Government of Myanmar, the Association of Southeast Asian Nations and the United Nations, in its relief efforts in the aftermath of Cyclone Nargis. Its post-Nargis periodic review of 19 December 2008 indicated that progress had been made, notwithstanding initial problems, and that most of the affected population had received some form of support and assistance. It has been reported, however, that living conditions for a large proportion of the population remain difficult. Some 15 per cent of children still suffer from malnutrition, and many households remain in inadequate shelters.

70. The Special Rapporteur reiterates his call for the respect of the fundamental rights of the victims and survivors of the cyclone, in particular children who have lost their parents, women and the elderly. Titles should be returned to owners of land, and identity certificates, such as birth certificates and citizenship cards, should be reissued if they have been lost. Communities should not be relocated without their consent.

71. With regard to the health sector, the Special Rapporteur notes that the right to health is at risk for many in the cyclone-affected areas. Vulnerable groups, including widows and orphans, need special attention and protection as laid down by the Convention on the Rights of the Child and the Convention against All Forms of Discrimination against Women. It has been estimated that 1 million people in the Irrawaddy Delta are in need of food aid.

72. It is commonly acknowledged that Myanmar receives one of the lowest levels of international aid. The social development indicators of the country call for concerted action and support. Urgent measures are required to ensure the most basic human rights of the most vulnerable people, especially of ethnic communities residing in remote border areas. According to the Human Development Report 2007, Myanmar is one of the least developed countries, ranking 132nd of 177 States on the human development index. Under-5 mortality ranks number 36, meaning that the probability of a child dying before the age of 5 years is roughly 1 in 10. Maternal mortality is among the highest in South-east Asia. Only 43 per cent of children enrolled at school complete five years of primary education. Inside the country, the poorest of the poor live in border areas populated by ethnic minorities; for example, according to the Integrated Household Living Conditions Survey for 2007 of the United Nations Development Programme, while the figure for people below the official food poverty line is 10 per cent countrywide, it is 40 per cent in Chin, 21 per cent in northern Shan State and 20 per cent in eastern Shan State.

73. Serious investment in the public service sector is urgently needed in order to make affordable and accessible health care, education and social security coverage available.

74. In Chin State, the evolving food crisis remains of great concern. According to information received, up to 100,000 people in more than 200 villages are in need of food aid, most urgently in the southern townships of Matupi and Paletwa.

75. Scarcity of food is also reported in Northern Rakhine State, Kayin State, North and East Shan State and the cyclone-affected areas. According to reliable sources, nearly 5 million people are in need of food aid.

76. In Rakhine State, it is said that only 13 per cent of households are able to meet their food needs for the entire year, and 26 per cent of the population suffers from malnutrition. In a study of 760 children in December 2007, 26 per cent suffered from acute malnutrition and 1.8 per cent from severe malnutrition. Food prices increased by over 30 per cent over the past year. Between 70 and 90 per cent of household income is allocated to food purchase. The price of rice, the main food for the people of Myanmar, increased by 75 per cent over the past year.

77. The Special Rapporteur is concerned about reports of restrictions by the authorities on farmers to plant and harvest in different areas. The food crisis has been exacerbated by arbitrary

land confiscation for the purpose of growing cash crops, such as tea and biofuels. Moreover, peasants have been forced to purchase tea and jathroba seeds under the threat of having their land confiscated. In addition, food aid has been redirected by members of the military.

78. In Rakhine State, only 30 per cent of the population is said to receive public health care; a third has no access to clean water. The main causes of mortality are malaria, diarrhoea, respiratory and skin infections, intestinal parasites and cholera. The maternal mortality rate is much higher than in the rest of Myanmar (380 women per 100,000 births). In the State, there are three doctors per 430,000 people in Maungdaw, two for every 280,000 in Buthidaunga, and an average of one nurse for 60,000 people.

79. The Special Rapporteur welcomes the recently announced new grants to grass-roots non-governmental organizations by the Three Diseases Fund, established by a consortium of international donors to address tuberculosis, malaria and HIV/AIDS in close cooperation with all key actors in the country. The Special Rapporteur welcomes in particular the Fund's approach in supporting activities targeting vulnerable and underserved population groups, especially those living in remote and inaccessible areas and most at risk of the three diseases.

80. The Special Rapporteur continues to receive reliable information according to which members of the military in Kayin State and Chin State arbitrarily tax villagers, confiscate crops and livestock and force villagers to construct roads, work as porters and fulfil other duties.

E. Developing cooperation in the context of human rights

81. The Special Rapporteur welcomes the recent meeting between the United Nations country team and the Government human rights group. He encourages both parties to meet on a regular basis to establish working cooperation to improve the human rights of the people of Myanmar. In this context, the Special Rapporteur encourages the States Members of the United Nations and the donor community to provide adequate resources and the necessary environment to the United Nations and financial institutions to assist the Government of Myanmar to achieve the Millennium Development Goals. Children, women and all people of Myanmar should be given the same opportunity as those in any other Member State to achieve their economic, social and cultural rights.

82. The Special Rapporteur welcomes the one-year extension of the supplementary understanding between the Government and ILO signed on 26 February 2009. In agreement with the Government of Myanmar, ILO operates a forced labour complaints mechanism, which includes complaints of underage recruitment into the military and the inappropriate use of prison labour. The Special Rapporteur encourages the Government of Myanmar and ILO to strengthen its application, particularly with regard to ensuring that all citizens are aware of the law, the existence of the complaints mechanism and their associated rights. It is critical that people exercising their right to complain can do so without fear of recrimination or reprisal. He also recommends that the Government review its policy on forced labour used by the military and on prison labour. He requests ILO to provide all technical assistance needed in this regard.

83. The Special Rapporteur once again commends the achievements of the Tripartite Core Group and calls for the expansion of its mandate beyond the Delta, to cover all regions in Myanmar where the need for humanitarian aid is acute. The Special Rapporteur touched upon

this proposal in his address to the General Assembly in October 2008, mentioned it to the chairperson of the Tripartite Core Group and the Secretary-General of ASEAN, as well as to the diplomatic community in Myanmar.

84. The Special Rapporteur hopes that the future ASEAN human rights mechanism will have an oversight mandate that ensures respect for human rights in Member States, including in Myanmar.

IV. CONCLUSIONS

85. **In less than one year, the new Special Rapporteur has already travelled twice to Myanmar. A very small number of prisoners of conscience were released during that period, which the Special Rapporteur hopes is the beginning of the progressive release of more than 2,100 others. The Special Rapporteur engaged in constructive dialogue with the authorities in Myanmar with a view to achieving the minimum requirements to ensure that the elections in 2010 and its aftermath will comply with the international standards of a democratic society and the expectations of the international community.**

86. **The situation of human rights in Myanmar remains challenging. In his report to the General Assembly (A/63/341), the Special Rapporteur recommended four core human rights elements to be completed before the elections in 2010. Until they are completely implemented, the Special Rapporteur will continue to recommend their full implementation. In the meantime, he will follow closely the Government's implementation process for each core element, and will constantly check with the Government for updates on the progress of the implementation process. He stands ready to provide any assistance and expertise in this process. He also calls on the donor community to provide any assistance required to build a society based on respect for fundamental human rights and democratic institutions for the people of Myanmar.**

V. RECOMMENDATIONS

87. **In his report submitted to the General Assembly (A/63/341), the Special Rapporteur recommended that the Government implement the four core human rights elements before the elections in 2010. During his mission to Myanmar in February 2009, the Government expressed its readiness to implement the four case elements, but their effective implementation and completion has yet to be seen. Therefore, the four core human rights elements are again included as recommendations, taking into account the developments witnessed during the mission.**

88. **The Special Rapporteur recommends that the Government of Myanmar:**

- (a) Sign and ratify the remaining core international human rights instruments;**
- (b) Expand the mandate of the Tripartite Core Group to include all other regions in Myanmar in need of humanitarian aid;**
- (c) Complete the four core human rights elements indicated below before the elections in 2010.**

(i) First core human rights element: review of national legislation in accordance with the new Constitution and international obligations

89. The Special Rapporteur has recommended that the Government of Myanmar start reviewing and amending domestic laws that limit fundamental rights and contravene the new Constitution and international human rights standards. Myanmar, as a State Member of the United Nations that signed the Charter of the United Nations soon after the country gained independence in 1948, must honour its international human rights obligations, and cannot invoke provisions of its domestic law as justification for its failure to comply with them (article 27 of the Vienna Convention).

90. Any domestic law that limits the enjoyment of human rights should (a) be defined by law; (b) be imposed for one or more specific legitimate purposes; and (c) be necessary for one or more of these purposes in a democratic society, including proportionality. Any limitation that does not follow these requirements and jeopardizes the essence of the right with vague, broad and/or sweeping formulae would contravene the principle of legality and international human rights law.

91. In his report submitted to the General Assembly (A/63/341), the Special Rapporteur identified a number of legal provisions that do not fulfil the above-mentioned requirements, and recommended that the Government start a process of review and, at the same time, stop arrests and convictions under those legal provisions, namely, the State Protection Act (1975); the Emergency Provision Act (1950); the Printers and Publishers Act (1962); the Law Protecting the Peaceful and Systematic Transfer of State Responsibility and the Successful Performance of the Functions of the National Convention against Disturbance and Oppositions (No. 5) (1996); the Law Relating to the Forming of Organizations (1988); the Television and Video Law (1985); the Motion Pictures Law (1996); the Computer Science and development Law (1996); the Unlawful Association Law; the Electronic Communication Law; and sections 143, 145, 152, 505, 505 (b) and 295 (A) of the Penal Code.

92. During the Special Rapporteur's mission to Myanmar in February 2009, the Attorney General informed him that 380 domestic laws had been sent to the concerned ministries for review, to check compliance with international human rights standards and the provisions of the new Constitution. In the meantime, many people are still detained in Myanmar and many harsh sentences against prisoners of conscience have been issued under the above-mentioned domestic laws. The Special Rapporteur urges the Government to give priority to the legal provisions listed above (see paragraph 91) when reviewing the 380 domestic laws to check compliance with the human rights provisions of the Constitution.

(ii) Second core human rights element: progressive release of prisoners of conscience

93. At present, there are more than 2,100 prisoners of conscience detained in different prisons around Myanmar. A prisoner of conscience is a person who (a) is charged with or has been convicted for the infringement of national legislation, which impedes enjoyment of freedom of expression, opinion, peaceful assembly, association or any other human right; and (b) does not have access to a court, or is being tried by courts that lack independence

and impartiality, and/or due process of law is denied. These two circumstances are against the basic human rights recognized in the new Constitution and the Universal Declaration of Human Rights. Therefore, prisoners of conscience are basically individuals whose human rights are systematically denied.

94. Given the fact that fundamental rights such as liberty and personal integrity are being affected in detention, the release of prisoners of conscience, even progressive, should start as soon as possible. Release must be without any conditions, that may result in new ways of diminishing the enjoyment of human rights, such as written statements renouncing the right to political participation or campaign. On the other hand, parallel to release, immediate measures should be taken to avoid any cruel treatment, improve conditions of detention and ensure urgent medical treatment.

95. In his report (A/63/341), the Special Rapporteur recommended that the prisoners be released in the following order of priority:

- (a) Elderly prisoners;
- (b) Prisoners with health problems;
- (c) Prominent members of political organizations and ethnic leaders;
- (d) Long-standing prisoners;
- (e) Members of religious orders;
- (f) Women who have children;
- (g) Prisoners transferred to forced labour camps;
- (h) Unconvicted prisoners;
- (i) Prisoners without a criminal record;
- (j) Prisoners held in jails remote from their homes.

96. In September 2008, the Government released 9,000 prisoners, although only 7 were prisoners of conscience, of whom one was rearrested a day later. In February 2009, the Government released 6,313 prisoners, but only 29 were prisoners of conscience. These releases, although encouraging, lack any proportionality with the total number of prisoners of conscience. Therefore, these measures cannot be seen as progressive.

(iii) Third core human rights element: armed forces

97. In his report (A/63/341), the Special Rapporteur recommended that a number of measures be adopted by the military and the police in order to improve the human rights situation in the country. These recommendations relate to very serious issues that should be stressed again. In this regard, the military should:

(a) Repeal discriminatory legislation and avoid discriminatory practices, particularly in Northern Rakhine State, where a large part of the Muslim community has been deprived of citizenship, movement and other fundamental rights for many years;

(b) Refrain from the recruitment of child soldiers, and continue its policy to avoid such a practice;

(c) Forbid the use of anti-personnel landmines. In this respect, the Special Rapporteur recommends again that the Government ratify the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction. The Government has reportedly justified its failure to ratify the Convention by stating that rebels still use anti-personnel landmines. However, violations of international humanitarian law by one party to a conflict is no justification for non-compliance by other parties.

(d) Respect international human rights and humanitarian law in areas affected by armed conflict, particularly in Kayin State. It is prohibited to direct attacks against civilians not directly participating in the hostilities or to launch indiscriminate attacks against military objectives and civilians or civilian objects. Every precaution must be taken to spare civilians and their property of the effects of the hostilities. Medical and humanitarian staff, hospitals and clinics must be respected. This includes ensuring efficient working of health providers in the conflict areas.

(e) Refrain from the use of forced labour of civilians (portering), particularly in Kayin State. In this regard, the Special Rapporteur recommends that the Government engage with ILO representatives to ensure compliance of prison labour policy with the obligations of the Convention concerning Forced or Compulsory Labour (Convention No. 29);

(f) Refrain from detaining individuals for alleged infringement of national laws that are under review according to the first core human rights element, and refrain from ill-treatment of detainees;

(g) Establish a permanent and meaningful training programme on human rights for members of the armed forces, police and prison forces, with international cooperation. In this regard, the Special Rapporteur recommends that technical assistance be requested from OHCHR.

(iv) Fourth core human rights element: the judiciary

98. In his report submitted to the General Assembly (A/63/341), the Special Rapporteur stressed the lack of independency and impartiality of the judiciary in Myanmar, and recommended that a series of measures be taken. Subsequently, the judiciary delivered hundreds of harsh sentences against prisoners of conscience, applying national legislation that might be contradictory to human rights standards, with disregard for judicial guarantees.

99. Independency and impartiality of the judiciary remains an outstanding issue in Myanmar. Members of the Supreme Court are appointed by the Head of State, due process of law is not fully respected, and the right to appeal, if granted, is handled by judges with similar constraints and lack of independence. Consequently, the Special Rapporteur reiterates his recommendations that the judiciary:

(a) Exercise full independence and impartiality, particularly in cases of prisoners of conscience;

(b) Guarantee due process of law, including public hearings, in trials against prisoners of conscience;

(c) Refrain from charging and convicting individuals for alleged infringement of national laws that are under review, in compliance with the first core human rights element. The Special Rapporteur urges the judiciary to refrain from conducting trials against prisoners of conscience, if independency is not assured, due process of law is not guaranteed and national law is not properly reviewed;

(d) Establish effective judicial mechanisms to investigate human rights abuses in order to fight impunity;

(e) Seek international technical assistance with a view to establishing an independent and impartial judiciary that is consistent with international standards and principles. In this respect, the Chief Justice accepted the recommendation to engage with the Special Rapporteur on the independence of judges and lawyers, a decision that was welcomed.
