



## **A Briefing Paper on the Shrinking Space for Civil Society in Burma/Myanmar**

### **1. Overview**

President Thein Sein announced the creation of the Committee for Scrutinizing the Remaining Political Prisoners (CSRPP) on 7 February 2013. On 15 July 2013, he then gave a verbal commitment to British Prime Minister David Cameron that, with the CSRPP's help, all political prisoners in Burma would be released by the end of 2013.<sup>1</sup> Political prisoners were freed throughout 2013, culminating in two "final" releases on 11 December (41 freed)<sup>2</sup> and 31 December (16 freed)<sup>3</sup>. Presidential Pardon Order Number 51/2013, issued on 30 December 2013, pardoned those imprisoned, charged or under investigation for a variety of controversial political offenses, which have been used to target human rights defenders (HRDs), activists and peaceful protestors.

The international community took these actions as a demonstration of President Thein Sein's commitment to ensuring political freedom, respecting human rights, and establishing the rule of law in Burma. Despite a positive start to this process, however, the CSRPP has failed to achieve the goals set for it on its inception. It was hampered at the outset by a failure to reach a uniform agreement or ratification as regards a definition of "political prisoner", which permits the Burma Government significant leeway in terms of detaining people whom it claims are not "political prisoners". Furthermore, dialogue between civil society and government representatives has broken down dramatically in 2014. The failure of this process can be traced back to a lack of government will to genuinely commit to the CSRPP's aims. In addition, the Burma Government's failure to attend regular meetings in 2014, during which only three meetings have taken place, and the constant difficulty in gaining access to prisons and information about prisoners, have only compounded the lack of trust and progress.

President Thein Sein's statement that no more political prisoners remained at the end of 2013 did little to improve government relationships with civil society or the public. Nor did it encourage the idea that the Burma Government was fully committed to political prisoner issues, or to people's enjoyment of the fundamental freedoms – especially civil and political rights – given that there was ample evidence to the contrary. At the time of President Thein Sein's statement, the Assistance Association for Political Prisoners (AAPP) held records of 33 political prisoners still imprisoned, a number that has steadily increased throughout 2014. In fact, according to AAPP's records, as of 1 October 2014, at least 71 political prisoners are now languishing in jail. Furthermore, this year alone, 69 have been arrested and 119 sentenced for conducting legitimate human rights and civil

<sup>1</sup> "Thein Sein pledges to free all political prisoners by end of year", DVB, 16 July 2013, <http://www.dvb.no/news/politics-news/thein-sein-pledges-to-free-all-political-prisoners-by-end-of-year/29926>.

<sup>2</sup> "Burma Releases 41 More Political Prisoners", The Irrawaddy, 11 December 2013, <https://www.dvb.no/news/burmese-president-pardons-all-remaining-political-prisoners-burma-myanmar/35635>.

<sup>3</sup> "Burmese president pardons all remaining political prisoners", DVB, 31 December 2013, <https://www.dvb.no/news/burmese-president-pardons-all-remaining-political-prisoners-burma-myanmar/35635>.

society activities, or for standing up against social and economic injustice, with around another 130 awaiting trial on various charges, many from a prison cell. Such prisoners include land rights activists, ethnic rights activists, journalists, and civil society organization (CSO) workers from across the country.<sup>4</sup> Despite the 2013 releases, the CSRPP has been further undermined throughout 2014 by the Burma Government's unwillingness to officially recognize the continuing existence of political prisoners, while the call from AAPP to agree on a definition of the term "political prisoners" has thus far been ignored.

Another criticism of the Burma Government's policy towards political prisoners is that it releases some, while arresting others. This "revolving door" policy ensures that Burma's jails are in no danger of being put out of business: a revolving door policy is not the same as opening the doors. Indeed, since the end-of-year amnesties, with the eyes of the world no longer so focused on the political prisoner issue, and with next year's landmark national elections now little more than a year away, the "revolving door" policy has been re-activated with a vengeance.

If the CSRPP was supposed to demonstrate the commitment of the Burma Government to freeing political prisoners, then the process thus far has done little more than cement the belief that it represents a smokescreen and political tool to garner international favor without having to change policies within the country. The ongoing arrest, detention, charging and imprisoning of HRDs, activists and peaceful protestors further support this conclusion. Yet, the CSRPP process continues. However, as of 1 October 2014, there has been little progress in improving the systems and relationships relating to it. Without an improved attitude from the government side, and some substantive, systemic changes being made, the CSRPP will continue to stall and fail to achieve its aims. That will mean that there will be no mechanism to fight for the freedom of HRDs, activists and peaceful protestors in Burma, and to protect and preserve the wider democratic and civil society space in the country. Most importantly, the involvement of civil society is crucial to ensuring that human rights and the fundamental freedoms are respected. Moreover, the CSRPP requires much closer scrutiny by the international community, which is currently demonstrating a worrying degree of blind trust in the Burma Government's statement as regards the issue of political prisoners.

It is important to note that, as well as using overtly political charges under controversial and repressive legislation, such as Section 18 of the Law on the Right to Peaceful Assembly and Peaceful Procession 2011<sup>5</sup> (Assembly Law), and Article 505(b) of the Penal Code 1861 (Penal Code),<sup>6</sup> the Burma authorities have started employing a different tactic to silence political activists, peaceful protestors and HRDs and to stifle civil society space. Increasingly, they are using fabricated charges under standard criminal provisions in the Penal Code. This tactic relies on a compliant and corrupt judiciary – a gross violation of the fair trial rights of those concerned, particularly the right not to be subjected to arbitrary detention, as well as the right to be presumed innocent until proven guilty, and the right to a fair and public hearing by an independent and impartial tribunal.

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<sup>4</sup> "Burma: President Thein Sein fails to keep his promise to release all political prisoners by year-end", The International Federation for Human Rights (FIDH), 10 January 2014, <http://www.fidh.org/en/asia/burma/14452-burma-president-thein-sein-fails-to-keep-his-promise-to-release-all>.

<sup>5</sup> The Peaceful Assembly and Peaceful Procession Act 2011, available online at [http://www.burmalibrary.org/docs15/2011-Peaceful\\_Assembly\\_and\\_Procession\\_Act-en.pdf](http://www.burmalibrary.org/docs15/2011-Peaceful_Assembly_and_Procession_Act-en.pdf).

<sup>6</sup> Amended in 1948, <http://www.burmalibrary.org/show.php?cat=1860>.

As the Burma Parliament finds its feet, matures, and begins to enact legislation that is more consistent with international human rights standards, the use of the judiciary – rather than the legislature – as a tool of repression is likely to become more prevalent. This new tactic allows the Burma Government to claim that detainees are in fact not “political prisoners” but rather merely common criminals, while also allowing it to pursue its age-old strategy of stifling civil society space and silencing its critics. Moreover, other newly enacted laws, such as the Association Registration Law and the Printing and Publishing Enterprise Law (PPE Law), while not yet being used to arrest and sentence HRDs and other civil society actors, also pose a significant threat to the freedom of civil society with their potential to restrict fundamental freedoms, as do several repressive, colonial- or junta-era laws, which remain on the books and are yet to be repealed.

## **2. Repressive Legislation and Relevant Case Examples**

### **The Assembly Law**

On 14 March 2014, some members of the Burma Parliament and civil society believed that they had succeeded in their campaign to repeal the need for permission to protest required by the notorious Section 18 of the Assembly Law – an illegal restriction on the right to freedom of assembly under Article 20(1) of the Universal Declaration of Human Rights (UDHR) and Article 21 of the International Covenant on Civil and Political Rights (ICCPR) – in favor of merely notifying the authorities in advance.<sup>7</sup> However, when President Thein Sein signed the amendment on 24 June 2014, Section 18 remained, with only minor, almost cosmetic, amendments made to the repressive provision.<sup>8</sup> First, authorities are now required to provide “*valid reasons*” for the refusal of permission to hold a protest, although this means little in practice, since there are any number of vague and flimsy pretexts available to the authorities (disturbing public order, and so on). Second, Section 18 now imposes a maximum jail sentence of only six months rather than one year for conducting a peaceful assembly or procession without obtaining prior permission from the authorities, though this amendment is of little comfort to those whose rights have been violated.

As a result, the Burma authorities have continued to use the Assembly Law throughout 2014 to silence political activists, peaceful protestors and HRDs, in violation of international law and norms on the rights to freedom of assembly and expression. One recent and prominent case is that of Michaungkan community leader Sein Than, who has now been charged five times under Section 18 since the start of 2014 for staging several protests, and each time sentenced to four months’ imprisonment with hard labor – a combined total of a-year-and-eight-months’ imprisonment.<sup>9</sup> His community alleges that the Burma Army confiscated their land in the 1990s, and that they have been protesting for its return since November 2013.<sup>10</sup> These Section 18 charges all stem from the fact that Sein Than held protests without receiving prior permission from the authorities.

Furthermore, in a recent and farcical new development, a lone protestor was arrested for protesting

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<sup>7</sup> “Myanmar: Need for Permission Dropped from Assembly Law”, ARTICLE 19, 14 March 2014, <http://www.burmapartnership.org/2014/03/myanmar-need-for-permission-dropped-from-assembly-law/>.

<sup>8</sup> “Myanmar: Disappointment surrounds amendment to assembly law”, ARTICLE 19, 27 June 2014, <http://www.article19.org/resources.php/resource/37606/en/myanmar-disappointment-surrounds-amendment-to-assembly-law>.

<sup>9</sup> “Michaungkan Protest Leader Receives 4-Month Jail Term”, Eleven Myanmar, 11 September 2014, [http://www.elevenmyanmar.com/index.php?option=com\\_content&view=article&id=7505:michaungkan-protest-leader-receives-4-month-jail-term&catid=32&Itemid=354](http://www.elevenmyanmar.com/index.php?option=com_content&view=article&id=7505:michaungkan-protest-leader-receives-4-month-jail-term&catid=32&Itemid=354).

<sup>10</sup> *Ibid.*

in favor of national unity in the capital Naypyidaw.<sup>11</sup> In no way can a lone protestor be described as an “assembly” or “procession”, which must by definition entail a group of people; even the Assembly Law itself defines both an “assembly” and a “procession” as involving “*more than one person*”.

The Burma Government’s reluctance to make necessary amendments to the Assembly Law in line with international human rights law and norms, such as the ICCPR, undermines the sincerity of President Thein Sein’s 30 December amnesty for all political prisoners held on Section 18 charges, as well as the integrity of government promises and the “political reforms” thus far. Furthermore, the fact that the Assembly Law is now in force will only serve to legitimize and increase restrictions on the fundamental rights of Burma people to freedom of assembly and expression, in violation of international human rights law and norms.

### **The Association Registration Law**

The new Association Registration Law was enacted by the Union Parliament on 25 June 2014; reviewed and amended by President Thein Sein on 9 July 2014; reviewed and endorsed by the Union Parliament on 16 July 2014; and signed by President Thein Sein and officially “gazetted” (*i.e.*, published in an official newspaper) on 20 July 2014. With the enactment of the Association Registration Law, the draconian Law Relating to Formation of Organizations 1988 has been repealed.<sup>12</sup> The final version of the Association Registration Law was agreed between civil society representatives and the Burma Parliament. It represents a vast improvement on previous drafts, and now allows for voluntary rather than mandatory registration for domestic and international associations and CSOs, as well as containing no criminal sanctions or significant restrictions.<sup>13</sup> However, the legislation contains clauses that are still disconcertingly ambiguous, specifically a reference to organizations which threaten “*national security*” being subject to charges under “*existing law*”; in addition, there are others which have the potential to restrict the freedom of associations or CSOs to operate, for example, by imposing limitations on the geographical scope of their activities.<sup>14</sup>

With the Association Registration Law so recently enacted, it remains to be seen whether associations and CSOs will in fact be able to operate freely, and whether individuals will be penalized and criminalized for breaches of the legislation. Most importantly though, all attention is now focused on the nature of the implementing by-laws, which are currently being developed by the Ministry of Home Affairs. As is often the case, the devil is in the detail.

Any legislation that regulates civil society space must ensure that registration is genuinely voluntary rather than imposing mandatory registration (as per the first draft of the Association Registration Law) or *de facto* mandatory registration by making it difficult or impossible for associations and CSOs to function viably due to logistical and administrative restrictions (as per the second draft)<sup>15</sup>. Any

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<sup>11</sup> “Man Arrested for Calling for National Unity on International Peace Day”, Eleven Myanmar, 22 September 2014, [http://elevenmyanmar.com/index.php?option=com\\_content&view=article&id=7637:man-arrested-for-calling-for-national-unity-on-international-peace-day&catid=44:national&Itemid=384](http://elevenmyanmar.com/index.php?option=com_content&view=article&id=7637:man-arrested-for-calling-for-national-unity-on-international-peace-day&catid=44:national&Itemid=384).

<sup>12</sup> NGO Law Monitor: Myanmar (Burma), International Journal of Not-for-Profit Law, <http://www.icnl.org/research/monitor/Myanmar.html>.

<sup>13</sup> “Union Parliament Passed NGO Law”, The Irrawaddy, 1 July 2014, <http://www.irrawaddy.org/burma/union-parliament-passed-ngo-law.html>.

<sup>14</sup> “Activists relay worries of draft association law to parliament”, DVB, 5 June 2014, <https://www.dvb.no/news/activists-relay-worries-of-draft-association-law-to-parliament-burma-myanmar/41268>.

<sup>15</sup> Under the second draft, all CSOs were required to register to avail themselves of “benefits” to which any legal person is

such legislation must respect international law and norms on the right to freedom of association, in particular as stipulated by Article 20 of the UDHR and Article 22 of the ICCPR, as well as accepted international guidelines on the right to freedom of association.<sup>16</sup>

### **The Unlawful Associations Act 1908 (UAA)**

Despite the enactment of the Association Registration Law, Section 17(1) of the colonial-era and repressive UAA has continued to be used throughout 2014 to subjugate political opposition, most often in the case of ethnic minority groups. In May of this year, a village chairman of the Shan Nationalities League for Democracy Party (SNLD) was illegally detained for almost a month on charges under Section 17(1) of the UAA. On 5 May 2014, Ai Kyein (otherwise known as Sai Jan or Sai Ai Keng), a resident of Nant Linn Mai Village in Kengtung Township, was beaten and arrested by the Burma Army without a warrant. He was accused of being in possession of a gun given to him by the Restoration Council of Shan State/Shan State Army (RCSS/SSA). He was subsequently beaten, tortured and threatened, in an effort to solicit information regarding the alleged weapon. According to SNLD representative Sat Soe Mai, after searching Ai Kyein's home unsuccessfully, the Burma Army raided the communications office of the RCSS/SSA in Kengtung, Shan State, on 6 May 2014.<sup>17</sup> Such actions only serve to fuel tension between the Burma Army and ethnic armed groups. Despite finding no incriminatory evidence in their illegal searches, the authorities charged Ai Kyein under Section 17(1) of the UAA on 9 May 2014. An official statement released by the SNLD at the time states that he was forced to sign a prepared document which led to his indictment.<sup>18</sup> On 30 May 2014, nearly a month after his original arrest, and with no evidence against him, Ai Kyein was released and all charges against him dropped.

This case exemplifies the way in which the UAA continues to be applied with impunity by the military and police in Burma, in violation of international law and norms on the fundamental right to freedom of association. The UAA should therefore be immediately repealed.

### **The PPE Law and the draft Public Service Media Law**

In March of this year, two media laws were enacted: the PPE Law, which was drafted by the Ministry of Information, and the Media Law, which was drafted by the somewhat-independent Interim Press Council.<sup>19</sup> Implementing by-laws are now being discussed and finalized. Before its enactment, some welcome amendments were made to the PPE Law, such as abolishing prison sentences, reducing financial penalties for infringements, and removing the prohibitions on criticisms of the military-drafted 2008 Constitution and personal attacks intended to discredit an individual.<sup>20</sup> Furthermore, the general consensus among journalists, and political and legal experts, is that the PPE Law represents a huge improvement on the draconian, junta-era 1962 Printers and Publishers Registration Act. In particular, the new legislation is now considered to be relatively well-drafted,

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entitled, such as initiating judicial proceedings, seeking funding, opening a bank account, or even having a logo. It is near impossible for CSOs to function viably with such restrictions imposed.

<sup>16</sup> "Guidelines for Laws Affecting Civic Organizations," Open Society Institute and the International Center for Not-for-Profit Law, 2004, <http://www.icnl.org/search/index.html?x=0&y=0&q=association+law+guidelines>.

<sup>17</sup> "Arrest of Party Member Could Affect Peace Process, SNLD Says", The Irrawaddy, 16 May 2014,

<http://www.irrawaddy.org/burma/arrest-party-member-affect-peace-process-snld-says.html?PageSpeed=noscript>.

<sup>18</sup> SNLD Statement, 15 May 2014, <http://blog.irrawaddy.org/2014/05/snld.html#more>.

<sup>19</sup> "Burma's Parliament Approves 'Parallel' Media Laws", The Irrawaddy, 5 March 2014,

<http://www.irrawaddy.org/burma/burmas-parliament-approves-parallel-media-laws.html>.

<sup>20</sup> "Burma amends controversial publishing law", DVB, 13 November 2013, <http://www.dvb.no/news/burma-amends-controversial-publishing-law/34369>.

more representative of democratic principles, and, most importantly of all, the notorious censorship board has been disbanded.

However, there is still a long way to go, with the Burma Government still maintaining executive control over the press: under the PPE Law, the Ministry of Information will still retain total discretion over the issuance of licenses, as well as the revocation of the license of any publication that it finds has taken any of a number of broadly-defined actions, such as insulting religion, disturbing the rule of law, or harming ethnic unity.<sup>21</sup> Given that any individual or media outlet printing or publishing without registering will be subject to sanctions, the vague law could intimidate editors to curtail investigative journalism and reporting on sensitive topics such as corruption and abuses of power.<sup>22</sup> This has prompted journalists to criticize the legislation for ushering in a new, more subtle form of censorship.<sup>23</sup> Coupled with the requirement for submission of publications to the newly-instituted Copyright and Registration Division for post-publication review, there is real potential for abuse by authorities to curb media independence and freedom,<sup>24</sup> in violation of international law and norms regarding the right to freedom of expression, in particular as protected by Articles 19 of the UDHR and the ICCPR.

In addition, a draft Public Service Media Law was drafted by the Ministry of Information and submitted to the Burma Parliament in March of this year.<sup>25</sup> While its original intent was to ensure that independent news organizations receive public funding, the definition of “*public service media*” is far too narrowly defined, so that it covers only state broadcasters and publications, such as the *Mirror* and the *New Light of Myanmar* – widely acknowledged as government mouthpieces.<sup>26</sup>

First praised as one of the most significant areas of progress in reformist Burma, media freedom is now slowing down and backtracking on reforms made since 2012. Beyond the immediate threat that the adoption of the PPE Law represents, media freedom is facing many challenges and concerns,<sup>27</sup> many of which were mentioned in interviews recently conducted by Burma Partnership with media outlets in Burma.

They include: (1) questioning and harassment of journalists by the security agencies in order to intimidate them from publishing reports or articles on certain issues; (2) arrests of journalists under other laws, such as the Penal Code and the Official Secrets Act 1923 (please see below for more detail), or lawsuits against publications, intended to set an example and sow fear throughout the industry; (3) increased visa restrictions on foreign journalists, thereby limiting foreign reporting on the country; (4) professional ethics, competence and responsible journalism; (5) the co-option of the previously journalist-comprised Interim Press Council by the Office of President Thein Sein, by means

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<sup>21</sup> “Burma: Repression Marks Press Freedom Day”, Human Rights Watch, 3 May 2014, <http://www.hrw.org/news/2014/05/03/burma-repression-marks-press-freedom-day>.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> The Copyright and Registration Division was instituted after the dissolution of the press censorship board previously known as the Press Scrutiny and Registration Division.

<sup>25</sup> “Journalists slam Public Service Media Law”, DVB, 3 June 2014, <https://www.dvb.no/news/journalists-slam-public-service-media-law-burma-myanmar/41193>.

<sup>26</sup> *Ibid.*

<sup>27</sup> “Journalists and Freedom of Speech Under Threat in Burma”, Burma Partnership, 11 February 2014, <http://www.burmapartnership.org/2014/02/3-9-february-journalists-and-freedom-of-speech-under-threat-in-burma/>.



of government appointments, quotas and donations;<sup>28</sup> and (6) self-censorship by some publications, including a tendency to shy away from sensitive topics – for example religious violence, the plight of the Rohingya, human rights abuses committed by the Burma Army, illegal land evictions and confiscation, and corrupt business interests – and to focus more on uncontroversial issues, such as business or lifestyle.

However, the main threats to media independence and freedom in Burma are said to be unfair competition, corruption and the challenging commercial environment, about which the PPE Law and other media laws remain completely silent. According to some publications that Burma Partnership spoke to, the Burma Government is using underhand commercial tactics, monopolizing and exploiting the industry, by using tax revenues or allowing its corporate cronies to subsidize publications which are sympathetic to it and which promote its views and interests. This means that such publications can afford to charge lower prices, a game-changer in a poor country like Burma, thus enabling them to expand their distribution and publishing frequency, while at the same time squeezing out more independent publications. Furthermore, advertising – the main source of funding for print media – is also unfairly skewed, with the print media industry as yet very small, and businesses reluctant to spend money on publications with narrow distributions. The result is that government-aligned publications gain a double advantage, while many independent, critical ones have to rely on donor funding and overseas grants to survive.

Current government strategy is not very different to how it has always been: stifle independent voices, restrict the right to freedom of expression, and shrink the space for civil society activity and legitimate criticism of power. Only the tactics have changed, with blunt and passé tools of repression such as the censorship board and flagrantly repressive legislation shelved, in favor of a more sophisticated, strategic and subtle arsenal of weaponry. The bottom line is that, in spite of the media reforms and the explosion of print media in Rangoon and elsewhere, there are still many challenges to the media landscape, and many threats to the right to freedom of expression.

The Burma Government should undertake to enact a comprehensive media law, which: (1) fully respects, protects and promotes the right to freedom of expression and a free press in line with international human rights law and norms; (2) ensures independent oversight of the industry and complete operational independence from the Burma Government; (3) ensures transparent regulation of the industry to prohibit any unfair competition; (4) issues and revokes licenses on the basis of professionalism, competence and responsible journalism rather than issues covered; and (5) criminalizes the harassment, intimidation and detention of journalists for conducting their legitimate work. Finally, foreign journalists should not be unfairly targeted with visa restrictions for doing their job and reporting transparently on relevant issues affecting Burma.

### **The Official Secrets Act 1923**

This law, which makes it unlawful for any person to possess classified information belonging to the state, has been used to judicially harass, sentence and imprison political activists, journalists and HRDs.<sup>29</sup> Indeed, four journalists from *Unity Weekly* journal and the Chief Executive Officer were

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<sup>28</sup> “Press Council (Interim) and Me”, Eleven Myanmar, 19 August 2014, [http://www.elevenmyanmar.com/index.php?option=com\\_content&view=article&id=7253:press-council-interim-and-me&catid=38&Itemid=361](http://www.elevenmyanmar.com/index.php?option=com_content&view=article&id=7253:press-council-interim-and-me&catid=38&Itemid=361).

<sup>29</sup> “Burma: identifying and freeing remaining political prisoners”, The Asian Human Rights Commission, 19 July 2013,

arrested on 30-31 January 2014 for publishing an article alleging that the Burma Government was using a military facility to secretly produce chemical weapons.<sup>30</sup> They were then charged with trespass and releasing state secrets under the Official Secrets Act 1923,<sup>31</sup> and sentenced to ten years' imprisonment with hard labor on 10 July 2014.<sup>32</sup> Following the defense counsel's appeal on 28 August 2014, it is hoped that the *Unity Weekly* journalists will be acquitted, or, at the very least, have their disproportionate and draconian sentences drastically reduced on grounds of mitigation.<sup>33</sup> Such abuses are in violation of international human rights law and norms, specifically the right to freedom of expression as protected by Articles 19 of the UDHR and the ICCPR. Based on this case, and the severity of the sentences, it seems that the Burma Government may be using the enactment of the new media laws to garner favor with the international community, while still repressing and severely punishing civil society under other, repressive, colonial-era legislation. Such legislation should be repealed or amended immediately, though a recent proposal to amend it has been rejected and dismissed out of hand, betraying the lack of political will to bring legislation in line with international human rights law and norms.<sup>34</sup>

### **The Penal Code**

Section 505(b), which prohibits the inducement of crimes against the state or against public order by means of any statement, rumor or report, is often used in conjunction with Section 18 of the Assembly Law to target peaceful protestors who are legitimately exercising their fundamental rights to freedom of assembly and expression as protected by the UDHR and the ICCPR.

The "relentless persecution"<sup>35</sup> of Ko Htin Kyaw under Section 505(b) through 2014 illustrates the urgent need for legislative reform. Ko Htin Kyaw – a beneficiary of the presidential amnesty in December 2013 – is the leader of the Movement for Democracy Current Force (MDCF), a community-based organization that has focused on land confiscation and democratization. Between April and May of this year, he delivered speeches, distributed leaflets, and held a candlelight vigil in Rangoon, canvassing a total of 11 townships around the city. The demonstrations denounced the Burma Government, called for its resignation, and protested against ongoing land grabbing. On 5 May 2014, he was arrested by South Okkalapa's Police Station Commander and Township Director while delivering a speech at Nanduan Market in South Okkalapa Township. According to Zeya Lin of the MDCF, he was detained in Insein Prison without bail.<sup>36</sup> Since May, Ko Htin Kyaw has been sentenced to a total of ten-and-a-half-years' imprisonment with hard labor under Section 505(b) of

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<http://www.humanrights.asia/news/ahrc-news/AHRC-STM-135-2013>.

<sup>30</sup> "Unity Weekly journalists in court for 'disclosing state secrets'", DVB, 17 February 2014, <http://www.dvb.no/news/unity-weekly-journalists-in-court-for-disclosing-state-secrets-burma-myanmar/37331>.

<sup>31</sup> *Ibid.*

<sup>32</sup> "Unity Journalists Sentenced to 10 Years Imprisonment with Hard Labor", The Irrawaddy, 10 July 2014, <http://www.irrawaddy.org/burma/unity-journalists-sentenced-10-years-imprisonment-hard-labor.html>.

<sup>33</sup> "Draconian Sentences of Unity Weekly Journalists Must at the Very Least be Drastically Reduced", Burma Partnership, 2 September 2014, <http://www.burmapartnership.org/2014/09/25-august-31-august-draconian-sentences-of-unity-weekly-journalists-must-at-the-very-least-be-drastically-reduced/>.

<sup>34</sup> "Proposal to reform State Secrets Act rejected", Myanmar Times, 29 September 2014, <http://www.mmtimes.com/index.php/national-news/11798-proposal-to-reform-state-secrets-act-rejected.html>.

<sup>35</sup> "Myanmar: Authorities must end 'relentless persecution' of activist", Amnesty International, 10 September 2014, <http://www.amnesty.org/en/for-media/press-releases/myanmar-authorities-must-end-relentless-persecution-activist-2014-09-10>.

<sup>36</sup> "MDCF Activist Detained for Government Protest", Eleven Myanmar, 6 May 2014, [http://elevenmyanmar.com/index.php?option=com\\_content&view=article&id=5984:mDCF-activist-detained-for-anti-government-protest&catid=32:politics&Itemid=354](http://elevenmyanmar.com/index.php?option=com_content&view=article&id=5984:mDCF-activist-detained-for-anti-government-protest&catid=32:politics&Itemid=354).



the Penal Code. In addition, he has been sentenced to 10 months' imprisonment under Section 18 of the Assembly Law, and is now serving an 11-year-and-four-months' sentence in Insein Prison. As of 1 October 2014, he still faces charges at Kyauktada Township Court.

Although the release of political prisoners is always an event to be celebrated, this cycle of arrest, detention and release of HRDs, activists and peaceful protestors on conditional presidential amnesties fails to address the underlying conditions that lead to their incrimination. Furthermore, this cycle illustrates the inadequacy of the current legislative and judicial system to protect the fundamental rights to freedom expression and assembly in Burma. In order to break this cycle, and enter a period in which the people of Burma are free to express themselves without fear of government reprisal, reform of the Penal Code in line with international law and norms is urgently required. Section 505(b) should be repealed on the grounds of the potential for abuse posed by dangerously vague terms such as "*crimes against the state*" and "*public order*", as well as for its violation of the rights to freedom of assembly, association and expression.

Section 500 stipulates a prison sentence for criminal defamation, in contravention of international law and norms on the right to freedom of expression, as protected by Articles 19 of the UDHR and the ICCPR. Moreover, General Comment 34 of the Human Rights Committee (CCPR/C/GC/34) calls for the decriminalization of defamation, as does the report of the United Nations (UN) Special Rapporteur on promotion and protection of the right to freedom of opinion and expression (A/HRC/20/17). Nevertheless, late last year, Eleven Myanmar journalist, Naw Khine Khine Aye Cho, also known as Ma Khine, was sentenced to three months in prison under charges of defamation (as well as trespass and abusive language) for investigating a story on the illegal trade in pirate video rentals, against which the Myanmar Journalists Network staged a rare protest in Rangoon.<sup>37</sup>

Furthermore, other standard criminal charges under the Penal Code, such as trespass (Article 447), vandalism (Article 427), and kidnapping and abduction (Articles 359-368), are increasingly being used to target HRDs, journalists, peaceful protestors and activists. Despite having been released in the December 2013 presidential amnesty, land rights activist Thaw Zin was arrested on 11 February 2014 and charged on 24 March 2014 for trespass under Article 447 of the Penal Code.<sup>38</sup> In addition to being tortured in custody, Thaw Zin was sentenced to 15 months' imprisonment in total, including three months' imprisonment for trespass. His "crime" was to help local villagers defend their land rights and protest against the notorious Chinese-backed Letpadaung copper mine in Salingyi Township, Sagaing Region. Four Letpadaung villagers who protested against his detention were then charged under Section 18 of the Assembly Law.

Land confiscation issues have not gone away, nor are they even showing signs of abating. In fact, as investment in Burma increases, they are only getting worse. The relationship between the Burma Government and private companies is such that the rights of farmers and villagers who reside on the land are considered secondary to the need for investment and development in Burma. The old military and government ties to big business have resulted in an endemic, country-wide scourge of

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<sup>37</sup> "Journalists Stage Protest Against Ma Khine Prison Sentence", Eleven Myanmar, 8 January 2013, [http://www.elevenmyanmar.com/index.php?option=com\\_content&view=article&id=4665:journalists-stage-protest-against-ma-khine-prison-sentence&catid=44&Itemid=384](http://www.elevenmyanmar.com/index.php?option=com_content&view=article&id=4665:journalists-stage-protest-against-ma-khine-prison-sentence&catid=44&Itemid=384).

<sup>38</sup> "Letpadaung activist Thaw Zin detained", DVB, 11 February 2014, <https://www.dvb.no/news/politics-news/latpadaung-activist-thaw-zin-detained-burma-myanmar/37099>.

illegal forced land evictions and confiscations in favor of use by large international companies or the Burma Army. The extent of this problem is outside of the scope of this Briefing Paper, but is an important factor in the ever-increasing number of farmers and land rights activists being arrested and imprisoned: those who protest against land rights abuses – often for re-plowing their confiscated land or for causing damage to fences and barriers preventing them from entering their farmland – frequently feel the full force of the law. The above-mentioned charges account for a large number of those farmers arrested, sentenced and imprisoned.

Even being associated with supporting farmers and their families has caused problems for individuals. In another recent case, Phyu Hnin Htwe, a female member of the All Burma Federation of Student Unions (ABFSU) was arrested on trumped-up charges of kidnapping and abduction on 13 September 2014 as a result of her legitimate HRD activities relating to the same Letpadaung copper mine.<sup>39</sup> Simply by being a prominent member of the ABFSU and being willing to support the farmers by teaching them and their families, she has been subjected to judicial harassment, unjust and prejudiced charges, and a possible jail sentence.

With the assistance of a compliant judiciary, the Burma authorities are able to use trumped-up criminal charges to achieve the same objective of stifling civil society space and silencing those who criticize them, while avoiding using more controversial legislative provisions, such as those highlighted above. In so doing, it can re-label political prisoners “criminals”, in the hope of avoiding the condemnation of the international community. However, using this different tactic does not avoid the fact that the Burma Government is still very much in breach of international human rights law and norms on the right to freedom of assembly and expression, as protected by relevant provisions of the UDHR and the ICCPR.

Existing repressive laws – including those listed above, as well as others highlighted by Tomás Ojea Quintana, the former Special Rapporteur on the situation of human rights in Burma (A/HRC/22/58), such as the Electronic Transactions Law 2004, the Emergency Provisions Act 1950, and the State Protection Act 1975 – should be reviewed, amended or repealed to ensure that all laws in Burma are in full compliance with international human rights law and norms, such as the UDHR and the ICCPR.

### **3. UN Declaration on Human Rights Defenders**

The UN Declaration on Human Rights Defenders states (under Article 1): *“Everyone has the right, individually and in association with others, to promote and to strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.”* Moreover, Article 2 stipulates: *“Each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms [...]”* The Burma Government should therefore be enabling, rather than restricting, the peaceful and legitimate human rights activities of brave, hard-working and principled HRDs. Rather than viewing them as a threat to the country, the Burma Government should see HRDs – and other members of civil society – as a valuable component of the country’s fabric, as a necessary element in the furtherance of Burma’s political and democratic reforms. A country that does not have a vibrant and free civil society, that restricts

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<sup>39</sup> Please see for further details: “Arrest of Student on Trumped-up Charges is a Damning Indictment of Justice in Burma”, Burma Partnership, 23 September 2014, <http://www.burmapartnership.org/2014/09/arrest-of-student-on-trumped-up-charges-is-a-damning-indictment-of-justice-in-burma/>.

civil society space, and which penalizes and criminalizes HRDs and the defense of human rights, is quite simply not on the road to becoming a genuine democracy, and is at odds with international human rights standards.

#### **4. Fair Trial Rights**

Under Article 9 of the UDHR, “*no one shall be subjected to arbitrary arrest, detention or exile.*” Article 9 of the ICCPR expands upon this, saying: “*no one shall be subjected to arbitrary arrest or detention, deprived of his [or her] liberty except on such grounds and in accordance with such procedure as are established by law.*” According to the UN Working Group on Arbitrary Detention (WGAD), UN Resolution 1997/50 considers that deprivation of liberty is not arbitrary if it results from a final decision taken by a domestic judicial instance and which is (a) in accordance with domestic law; and (b) in accordance with other relevant international standards set forth in the UDHR and the relevant international instruments accepted by the States concerned.<sup>40</sup> To enable it to carry out its tasks using sufficiently precise criteria, the WGAD adopted criteria applicable in the consideration of cases submitted to it, drawing on the provisions of the UDHR and the ICCPR as well as the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.<sup>41</sup> Consequently, according to the WGAD, deprivation of liberty is arbitrary if a case falls into one of the following three categories:

1. When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an applicable amnesty law (Category I);
2. When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by certain articles of the UDHR or, insofar as States parties are concerned, certain articles of the ICCPR (including those which pertain to the fundamental freedoms) (Category II); or
3. When the total or partial non-observance of the international norms relating to the right to a fair trial, spelled out in the UDHR and the ICCPR, is of such gravity as to give the deprivation of liberty an arbitrary character (Category III).<sup>42</sup>

It is beyond the scope of this Briefing Paper to analyze in any great detail whether any of the Burma cases mentioned in Section 2 above would qualify as arbitrary detention, in breach of international law and norms on arbitrary detention. However, given the fact that the aforementioned case examples generally pertain to instances where HRDs, activists and peaceful protestors are arrested, detained, charged and/or imprisoned for their legitimate exercise of their right to the fundamental freedoms under the UDHR and ICCPR – particularly the rights to freedom of assembly and expression – it is reasonable to assert that most, if not all, would likely qualify as arbitrary detention under Category II. Furthermore, with respect to cases that have seen grave abuses of fair trial rights – particularly the right to be presumed innocent until proven guilty according to law under Article 11(1) of the UDHR and Article 14(2) of the ICCPR, and the right to a fair and public hearing by an independent and impartial tribunal under Article 10 of the UDHR and Article 14(1) of the ICCPR – it is

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<sup>40</sup> Fact Sheet No. 26, UN Working Group on Arbitrary Detention, <http://www.ohchr.org/Documents/Publications/FactSheet26en.pdf>.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

reasonable to assert that they would likely qualify as arbitrary detention under Category III. The case of Phyu Hnin Htwe highlighted at Section 2 above is an egregious example of a Category III case of arbitrary detention.

One final judicial consideration is that many political prisoners granted amnesty are released conditionally under Article 401 of the Code of Criminal Procedure with outstanding criminal records. This means that they are in a state of limbo and are constantly at risk – and in fear – of being re-arrested and sent straight back to jail without warrant at any time for any violation of existing laws, at the discretion of the executive branch of government, to serve the remainder of their sentences – often exceeding 50 years. Not only is this an abuse of their rights to a fair trial, liberty and to be free from arbitrary arrest or detention, but it also undermines their valuable and legitimate human rights work, as protected by the UN Declaration on Human Rights Defenders (discussed at Section 3 above). This in turn creates doubt over the political will of the Burma Government. Many recently released political prisoners also face harassment and restrictions of their civil rights, including their right to freedom of movement, such as via the denial of passports. In addition, their lives can be blighted by the negative implications of their status, for example in finding employment.

## **5. Reform of the Judiciary, the National Human Rights Commission and the Legislature**

The Burma judiciary is politically pliable and lacks independence, competence, and transparency. As such, there is an utter lack of effective and accessible redress mechanisms, judicial or otherwise, within Burma, as seen from the various cases of judicial harassment and arbitrary detention of HRDs, activists and peaceful protestors highlighted throughout this Briefing Paper. Victims have little to no meaningful means of seeking redress for the human rights violations that they have suffered, and the judiciary is increasingly used as a tool to silence critics of the regime and to stifle civil society and democratic space in Burma.

Furthermore, as the charges leveled at HRDs, activists and peaceful protestors tend to fall increasingly under standard criminal legislation, such as the Penal Code, rather than under more controversial, repressive and “political” legislation, such as the Assembly Law, the judiciary is more shamelessly breaching people’s fair trial rights in that it is finding people guilty of trumped-up charges for which there is no evidence. As the laws themselves improve, albeit very slowly, and as the authorities increasingly shy away from using more controversial, repressive legislation, it will be more important to the Burma Government to ensure that the judiciary will do its bidding. In doing so, the judiciary is conspicuously failing to uphold international human rights law and norms, especially as regards fair trial rights and rights to the fundamental freedoms, as protected by the UDHR and ICCPR.

In addition, the Myanmar National Human Rights Commission (MNHRC) has so far failed to fill the judicial gap and offer an alternative means for people to access justice. The objective of the MNHRC, established on 5 September 2011, was to promote and safeguard the fundamental rights of citizens in accordance with the 2008 Constitution. However, Win Mra, Chairman of the MNHRC, clearly stated in an interview that the MNHRC would not investigate human rights abuses in ethnic conflict areas. Moreover, it would not have the mandate to investigate abuses committed before its establishment. Above all, with so many of the MNHRC Commissioners government-appointed or government-aligned, in no way can the MNHRC be said to be an independent or effective

mechanism, in line with the UN “Paris Principles” – the international standards for national human rights institutions.<sup>43</sup> Given that the MNHRC has thus far failed to investigate a single case of human rights abuse, fears are proving to be well-founded.<sup>44</sup> The outlook is therefore increasingly gloomy as regards judicial reform and access to justice in Burma.

Meanwhile, as highlighted above, the Burma Parliament is still enacting legislation that is not consistent with international human rights law and norms, particularly as regards the fundamental freedoms, and failing to repeal repressive laws that remain on the statute books. Moreover, there has been very little movement towards signing and ratifying the raft of international human rights covenants – including the ICCPR and its Optional Protocols – which would incorporate international human rights principles into domestic law.

It is beyond the scope of this Briefing Paper to conduct a thorough analysis of the workings of the Burma Parliament, but it is revealing to dwell once again on the process concerning the amendments to the Assembly Law, as discussed at Section 2 above: despite the fact that some Members of Parliament believed in March that they had succeeded in amending the notorious and repressive Section 18, it turned out that the final version enacted in June had retained the substance of the provision, thereby entirely undermining the parliamentary process. Suffice it to say then that the Burma Parliament still has a long way to go in terms of competence, transparency and independence.

Thus, both the legislature and judiciary are sorely in need of significant and urgent reform, so that they can function independently of the executive, and reflect not only the principle of the separation of the three branches of government, but also all human rights principles, as protected by international law and norms. The international community must continue to apply pressure on the Burma Government, so that these reforms are made, to the benefit of all peoples and communities in Burma.

## **6. Conclusion and Recommendations**

Given the significant backsliding in many areas of human rights in Burma, including those highlighted above, which has undermined the progress made in other areas in the country, **it is vital to adopt a new UN General Assembly (UNGA) Resolution to reflect the failure of the Burma Government to implement the recommendations from UNGA Resolution 68/242, adopted in 2013.** It is essential that a new UNGA Resolution highlights these failures, as well as takes account of updates on the ground, as highlighted by this Briefing Paper. In particular, all UN Member States should call upon the Burma Government to:

1. Review, amend or repeal repressive legislation, including those laws highlighted above and all those listed by the UN Special Rapporteur on the situation of human rights in Burma

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<sup>43</sup> UN General Assembly, A/RES/48/134, 20 December 1993, <http://www.un.org/documents/ga/res/48/a48r134.htm>.

<sup>44</sup> For an up-to-date review of the MNHRC and its flaws, please see: “Burma: All the President’s Men” (MNHRC Report), Burma Partnership and Equality Myanmar, September 2014, <http://www.burmapartnership.org/wp-content/uploads/2014/09/All-the-Presidents-Men1.pdf>, as well as: “NGOs Slam Performance of National Human Rights Commission”, The Irrawaddy, 25 September 2014, <http://www.irrawaddy.org/burma/ngos-slam-performance-national-human-rights-commission.html>, for a brief analysis of the announcement of President Thein Sein’s Office – on the same day as the launch of the MNHRC Report – that it had replaced several members of the Commission – without consulting civil society at all.

(A/HRC/22/58), to ensure that it is in line with international human rights law and norms, and upholds rather than restricts people's rights to the fundamental freedoms;

2. Ensure that any legislation enacted in future is in line with international human rights law and norms, and involves civil society and communities affected by human rights abuses in a transparent and inclusive process as regards its discussion, formulation and enactment;
3. Ratify all remaining core international human rights treaties – in particular the ICCPR and its two Optional Protocols – recognize the competence of the Human Rights Committee to receive and consider communications under Article 41 of the ICCPR, and align domestic laws and practices with the ICCPR and the Optional Protocols;
4. Immediately cease the stifling of civil society space and the silencing of political activists, peaceful protestors and HRDs – achieved by the criminalization of their legitimate human rights activities under repressive legislation and trumped-up criminal charges, as well as other forms of threats, harassment and intimidation – and ensure that all Burma people's fundamental rights to assembly, association and expression are respected and protected at all times;
5. Release all political prisoners unconditionally, including those detained since the start of 2014, and resolve any discrepancies regarding the number detained by ensuring a thorough investigation by an independent review panel composed of competent domestic and international experts, including UN representatives;
6. Establish the rule of law in Burma and undertake urgent judicial reforms to ensure the independence, competence, impartiality and accountability of judges, lawyers and prosecutors, so that they are free from any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason, and to draw on the assistance of the UN and other international organizations in this regard;
7. Ensure that the Myanmar National Human Rights Commission (MNHRC) fully complies with the UN Paris Principles so that the MNHRC is independent, transparent and effective, investigates all human rights abuses without limitations, and protects and promotes human rights, particularly in relation to cases of judicial harassment and arbitrary detention; and
8. Undertake full, transparent and independent investigations into all allegations of violations of rights to the fundamental freedoms as protected by international human rights law and norms.

**Burma Partnership & the Assistance Association for Political Prisoners**

**1 October 2014**

**Mae Sot, Thailand**