



# **Prison Overcrowding and the Need for Urgent Reform**





Assistance Association for Political Prisoners (Burma)

December 2018

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## **ACRONYMS**

<b>AAPP</b>	Assistance Association for Political Prisoners
<b>CCP</b>	Code of Criminal Procedure
<b>ICCPR</b>	International Covenant of Civil and Political Rights
<b>ICESCR</b>	International Covenant of Economic, Social and Cultural Rights
<b>MNHRC</b>	Myanmar National Human Rights Commission
<b>NLD</b>	National League for Democracy
<b>SMRs</b>	Standard Minimum Rules for the Treatment of Prisoners
<b>UDHR</b>	Universal Declaration of Human Rights
<b>UNCAT</b>	United Nations Convention against Torture and Other Cruel, Inhuman or degrading Treatment or Punishment
<b>UNDOC</b>	United Nations Office on Drugs and Other Crime
<b>UNHRC</b>	United Nations Human Rights Council



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# Acknowledgements

This research project was made possible with the generous funding and support of the United States Department of State's Bureau for Democracy, Human Rights and Labor and the National Endowment for Democracy.

We extend our thanks to the efforts to the research team involved with compiling the data, writing the report and assisting with editing including Ko Bo Kyi, Katherine Lee, Georgia Field, Maximilian Morch and AAPP research team. Our thanks go to the AAPP staffs involved in this report, Ko Bo Kyi and Ko Zaw Moe who translated and Ko Tate Naing, Ko Aung Myo Kyaw who edited the Burmese version of this report, and Ko Moe Kyaw who was a copy editor and proofreader of this report.



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# Introduction

Prisons are a direct reflection of a country's administrative, legislative and judicial systems<sup>1</sup>.

Hidden from public view, facing stigmatization and afforded little public sympathy, prisoners face a greater risk of having their human rights abused<sup>2</sup>. These issues are compounded even further in light of rising prison populations around the world and the prevalence of prison overcrowding. Reducing prison overcrowding, is an essential first step in reforming the criminal justice system in Burma where prisons have a notorious history of human rights abuses and impunity.

Presidential amnesties, as have occurred in Burma and the construction of more prisons, as is proposed, are short term and costly solutions to much more systemic issues, that contribute to prison overcrowding. If laws and prison conditions remain unchanged, these measures will not have a lasting impact on improving human rights in prisons. Systemic reform, addressing issues related to broader issues of social justice, disproportionate punishments, and the lack of an adequate separation of powers in Burma will ensure sustainable and long-term solutions to prison overcrowding can be implemented, reducing the high social and financial costs of incarceration. This will improve prospects for development, the advancement of human rights and social justice for all of Burma<sup>3</sup>.

The Assistance Association for Political Prisoners (AAPP) urges the Government of Myanmar to seize this opportunity to demonstrate their commitment to ending human rights abuses across Burma by actively engaging in prison reform, starting with the most pressing issue of prison overcrowding.



1. Prison Conditions in Burma and the Potential for Prison Reform, Assistance Association for Political Prisoners, 2016
2. Ibid. (1)
3. Ten-Point Plan to Reduce Prison Overcrowding, Penal Reform International,

Prison overcrowding places an enormous amount of strain on public resources. Its prevalence results in the violation of a number of human rights, creating conditions detrimental to the physical and mental health of prisoners, as well as prison staff<sup>4</sup>. Overcrowding inhibits the ability of correctional facilities to perform the 'corrective' functions they should aim to achieve with a view to the re-entry of prisoners into society. In addition to the dangerous conditions overcrowding creates for prisoners themselves, prison staff are often overworked and face threats to their own health and safety.

## THE SITUATION OF PRISON OVERCROWDING IN BURMA



Myingyan Prison

There are currently 93 prisons and labour camps in Burma, with an overall prison population of around 92,000 people, including both convicted and pre-trial detainees<sup>5</sup>. Prison capacity across the 93 prisons and prison labour

4. Ibid. (1)

5. <https://www.youtube.com/watch?v=4UGVDMFFpIE&feature=youtu.be>



camps is 66,000, putting overcrowding nation-wide at over 139 per cent<sup>6</sup>.

An investigation conducted by the Myanmar National Human Rights Commission (MNHRC) in 2017 revealed rampant overcrowding. Of the 30 prisons investigated by MNHRC, there was a total capacity of 31,500 but the prisons were found to have over 50,000 prisoners resident, 19,000 above capacity.<sup>7</sup> In Myingyan prison in Mandalay region, had over 2800 prisoners behind bars, despite only having a capacity of 1000 people.<sup>8</sup> This problem has not improved since the publication of this report.

Similarly, in February 2018, Insein Prison was found to be holding 12,392 prisoners, despite its 5000-inmate capacity<sup>9</sup>.

Pre-trial detention contributes greatly to overcrowding in Burma. Conservative estimates place pre-trial detainees at over 10 per cent of the entire prison population<sup>10</sup>. Pre-trial detention disproportionately affects people of disadvantaged backgrounds as they are unlikely to be able to afford bail or adequate (if any) legal representation<sup>11</sup>. This makes them more likely to falsely confess or plead guilty, impeding peoples' right to a fair trial and unnecessarily increasing the prison population. These circumstances place extreme pressure on the families of defendants, perpetuating cycles of crime, poverty and disadvantage<sup>12</sup>. Pre-trial detention is extremely costly and represents a great loss of opportunity for the use of funds on wider measures that increase public safety and security, such as increased spending on policing.<sup>13</sup> In some areas, a single police officer is responsible for up to 1000 people at one time<sup>14</sup>. Redirecting resources into this area would allow the government to increase police presence and capacity in order to prevent crimes from occurring.<sup>15</sup>

6. Ibid.

7. Release some inmates to ease overcrowding: rights group, Myanmar Times, Feb 2018

8. Overcrowding is a serious human rights problem in Myanmar prisons: commission, Myanmar Times, October 2017

9. AAPP internal information

10. Myanmar (Formerly Burma), World Prison Brief, 2009

11. Presumption of Guilt: The Overuse of Pretrial Detention, Open Society Justice Initiative, 2014

12. Ibid. (14)

13. Ibid. (12)

14. Rangoon Parliamentary Committee to Submit Report on Judicial Reform, Irrawaddy, 2017

15. Ibid. (14)



**“The government budgets the price of one viss [1.63kg] of pulses at 1400 kyat (US\$1) but we can’t buy this much anywhere for less than 2800 kyat (US\$2)”**

According to Deputy Director of the Correctional Department Min Htun Soe, people convicted of drug crime make up around 50% of the total prison population<sup>16</sup>. In individual prisons the rates are even higher with some government officials estimating that the number of prisoners incarcerated for drug crimes in Myitkyina Jail in Kachin State is over 70 per cent<sup>17</sup>. Most arrests

made under drug law are used to target drug users and small time dealers and it is rare that large-scale drug traffickers are arrested or imprisoned<sup>18</sup>. The harsh criminalization of drugs in Burma also contributes to corruption, with many drug users subjected to extortion and abuse from police officers and armed groups<sup>19</sup>. Reducing the amount of people imprisoned under these laws will significantly reduce the prison population and provide opportunities for prevention through better policing and opportunities for rehabilitation.

Overcrowding is detrimental for the government and society of Burma more broadly, draining already limited state resources. Commodity prices continue to rise in Burma and there has not been an increase in prison budgets to match, resulting in further restrictions on already limited food, sanitation, and medical supplies for prisoners<sup>20</sup>. For prisoners, the number of medical staff for the current prison population is severely inadequate. Only 30 prison doctors are currently employed to provide services to the 74,893 prisoners incarcerated across Burma<sup>21</sup> and the prison population has become

16. Interview with Min HtunSoe, Deputy Director and Spokesman of the Correctional Department, Mawkun, 2017 (Burmese Source)

17. ‘Found in the Dark’ The Impact of Drug Law Enforcement Practices in Myanmar, the Transnational Institute, Drug Policy Briefing, 2016

18. Rangoon Parliamentary Committee, Irrawaddy, 2017

19. Ibid. (21)

20. Prisons Department Seeks Food Budget Bump, Myanmar Times, 2016

21. Interview with Min HtunSoe, Deputy Director and Spokesman of the Correctional Department, Mawkun, 2017 (Burmese Source)



over 92,000 currently<sup>22</sup>. Additionally, at least 199 nurses are required, of which there are currently only 80. Without an adequate number of medical professionals in prisons, their essential functions under Rules 24–26 of the SMRs, including the inspection of food, sanitation, ventilation and the suitability of clothing, in addition to assessing the health of prisoners, are severely restricted.

Deputy Director of the Correctional Department, Min TunSoe, highlighted the inadequacies of the current budget in being able to provide food and nutrition to prisoners in December 2016 saying “The government budgets the price of one viss [1.63kg] of pulses at 1400 kyat (US\$1) but we can’t buy this much anywhere for less than 2800 kyat (US\$2)”. Under the previous budget, as of December 2016, the Correctional Department allocates 600 kyat (US\$0.43) per prisoner, per day<sup>23</sup> and according to U Min Tun Soe, the amount has increased to 975 kyat (US\$0.73) from 1 Jan 2018 onwards<sup>24</sup>. Based on these figures, the government spends around 89.7 million kyat (US\$67,160) per day on imprisonment. Reducing the prison population, by 26,000 people, to its full capacity (100%), has the potential to save the government 25,350,000 kyat (US\$18,988) per day and a total of over (9.25)billion kyat (US\$6,930,620) per year, reducing the amount of money spent on imprisonment by around 28% of current expenditure. Reducing the prison population will allow the government to save and redirect this enormous amount of state resources to improve living and working conditions for prisoners and prison staff in a way that reduces corruption and advances human rights.

Broader societal and legislative reform is essential, as reducing prison overcrowding cannot be achieved from within prisons alone. Co-operation between Government Ministries, public servants, and the private sector (for example education, drug treatment, mental health providers) is of utmost importance in addressing the complex, imbedded and interrelated issues that contribute to overcrowding.

22. Presentation by U MyintSoe, Deputy Director General of Prison Department, <https://www.youtube.com/watch?v=4UGVDMFFplE&feature=youtu.be>

23. Ibid (3)

24. <http://www.7daydaily.com/story/114615>



# LEGISLATION SURROUNDING OVERCROWDING IN PRISONS



Prisoners queuing for food

Prison overcrowding does not just violate international law, but sections of Burma's own domestic laws as well. Despite promises made by former and current governments to ratify international treaties and end widespread human rights abuses in Burma, little progress has been made. International law allows states to enhance their capacity to deal with challenges related to human rights, and share knowledge and best practise among states and other knowledgeable bodies. The ultimate purpose of justice is to ensure a system of law which in turn secures good governance and a socio-economic and political regime that can uphold human dignity and security<sup>25</sup>. Systems of law and justice are therefore an integral instrument of development for the government of Burma and are essential in bringing about equal opportunity and the protection of human rights and dignities. AAPP strongly urges the NLD Government to promote and practically implement international standards pertaining to the prison system, and the justice system more broadly, to reduce prison overcrowding and its inhumane consequences.

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25. Use of Informal Justice Mechanisms in Criminal Justice System: Critical Observation of Principles, Theories and Prospects, Kathmandu School of Law Review, 2016



## International Law:

Prison overcrowding in its most severe of forms leads to “Conditions that constitute inhumane and degrading treatment for prisoners and unacceptable working conditions for prison staff”<sup>26</sup>. This is in direct violation of the United Nations Convention Against Torture (UNCAT) and Article 7 of the International Convention on Civil and Political Rights (ICCPR) that prohibit any form of torture and cruel, inhumane, or degrading treatment or punishment. Under international law torture is recognized as a peremptory norm, meaning that its use is not justifiable under any circumstances; including during a state of emergency, times of internal instability and times of war. Torture is a widespread, systematic, and ongoing problem in Burma, commonly used in places of imprisonment as a tool for interrogation and punishment. Ratification of the ICCPR, the UNCAT and its Optional Protocol is particularly important as it provides for the establishment of complaints procedures and an independent system of review into places of detention. The Thein Sein government failed to fulfil its promise to ratify this convention by 2014 and it remains this way under the NLD Government. This is an essential step in demonstrating accountability and abolishing the widespread use of torture and inhumane treatment in Burma. AAPP calls on the government to urgently ratify the UNCAT, the ICCPR and their Optional Protocols to emphasize that torture will no longer be tolerated or go unpunished under the NLD.

The overuse of pre-trial detention and the detention of individuals without the timely, due process of the legal system directly violates the right to be presumed innocent until proven guilty under Article 11(1) of the Universal Declaration of Human Rights (UDHR) and Article 9(3) of the ICCPR, which states that “It shall not be the general rule that persons awaiting trial shall be detained in custody”. Pre-trial detention is one of the largest contributing factors to overcrowding in Burma’s prisons, and also directly violates Article



26. “Prison Reforms and Alternatives to Imprisonment,” United Nations Office on Drugs and Crime, 2014

**“The right of everyone to the enjoyment of the highest attainable standard of physical and mental health”**

9(1) of the ICCPR that provides for the right to liberty and freedom from arbitrary detention. Arbitrary detention continues to be used as a tool for silencing political dissent in Burma, even under a civilian government. Bail is continually denied in an arbitrary and extremely costly manner, and in direct

contravention of international law. AAPP calls on the government to honour its obligation to promote and protect the freedoms enshrined in the UDHR and other international treaties. Ratification of the ICCPR is a fundamental step in protecting people from being denied bail and criminalized for exercising their civil and political rights in Burma. Its ratification requires the government to submit a report to the United Nations Human Rights Council (UNHRC) every four years detailing the human rights situation in the country and steps which have been undertaken for improvement. This is an important mechanism in holding the current and future governments accountable for ensuring consistent progression in human rights. AAPP urges the government to immediately and unconditionally ratify the ICCPR as an important step in reducing prison overcrowding and ensuring the right to liberty and the presumption of innocence is protected in Burma. It also and honours the commitment Burma made before the UN Human Rights Council on November 6, 2015; to ensure that freedom of opinion and expression are protected, and that those who exercise these rights are not subject to reprisals<sup>27</sup>.

Overcrowding in prisons results in an enormous strain on the resources required to provide adequate sanitation. Access to soap, clean water, adequate food, and timely medical care are severely restricted meaning that prisoners often rely on their families to provide essential items for health

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27. They Can Arrest You at Any Time: the Criminalization of Peaceful Expression in Burma, Human Rights Watch, 2016





Talapaw curry is made from a small amount of unwashed vegetables

and hygiene. Given that the International Covenant on Economic, Social and Cultural Rights (ICESCR) recognizes “The right of everyone to the enjoyment of the highest attainable standard of physical and mental health”, a right also echoed in Article 25 of the UDHR, the provision of adequate food, sanitation and medical care becomes the responsibility of the state when a person is deprived of their liberty. Article 12(2) of the ICESCR outlines the steps to be taken by state parties to achieve this right. Lack of access to these essential resources, and the extent of overcrowding, results in a higher prevalence of preventable disease in prison than in the general community, such as various strains of influenza, HIV, tuberculosis and dengue fever<sup>28</sup>. This is not only detrimental to the health of prisoners, but also to the outside community. Often, prisoner health is looked at as separate to, or less important than the health of other members of the public. However, prisoners are routinely transferred between prisons, released, and in contact with visitors and prison staff who regularly move in and out of prisons<sup>29</sup>. Standards of cleanliness and health, therefore, are not just a matter for prisoners but an urgent matter of public health. AAPP strongly recommends the government consider issues of prisoner health in their broader context, and acknowledge the intrinsic



28. Priority Communicable Diseases, World Health Organization, Health in Asia and the Pacific, Chapter 7, 177-396, 2008

29. Infection Control in Jails and Prisons, Clinical Infectious Diseases, 2007



Poun San- A commonly used stress position

relationship between health in prison and the health of the wider community. The ICESCR, which Burma signed in 2015, six years later, has been ratified in 2017. Ratification of the ICESCR is a fundamental step in achieving the right to the highest attainable standard of physical and mental health. Ratification of the ICESCR Optional Protocol establishes an important mechanism to address complaints of rights abuses, but also assists states in the practical implementation of these rights.

The SMRs are a set of comprehensive rules prescribing best practise, minimum standards for the treatment of prisoners and the management of prison systems. The rules are a set of guiding principles that assist governments in ensuring prison systems are administered in a manner that protects human rights and maximizes prospects for rehabilitation, recognising that the protection of society from crime “Can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his return to society the offender is not only willing but able to lead a law-abiding and self-supporting life”. Undertaking prison reform in line with these guidelines is essential in improving conditions related to the registration, separation, and the discipline of prisoners; as well as establishing complaints mechanisms and addressing issues of prisoner health and well-being, including exercise, medical care, and hygiene. The prison system in Burma falls short on these standards in many areas. Therefore, these rules are an



invaluable resource in assisting the government to bring the prison system in Burma in line with widely accepted best practice standards. Under a civilian and democratic government, the realization of these standards needs to be prioritized to increase the effectiveness of the justice system and create a culture of respect for the rule of law. AAPP urges the government to immediately begin reforming the prison system in Burma in a manner consistent with the principles in the SMR's.

A substantial barrier in bringing the prison system in line with the SMR's is a lack of information kept and publicly available in Burma. Rule 7(1) of the SMR's specifically states that every place of imprisonment must keep a registration book containing all information regarding prisoners' identity, reason/s for imprisonment, and the date and time of admission of each person. "Experience shows that detainees who are not properly documented are extremely vulnerable to gross violations of their human rights"<sup>30</sup>. Without accurate record keeping, policies and plans to address issues of overcrowding cannot be formulated strategically and impunity for human rights abuses will continue to be widespread. Chapter five of the United Nations Office on Drugs and Crime (UNDOC) 'Handbook on Prisoner File Management' provides a checklist for creating and maintaining prisoner files. It lists necessary and vital information that needs to be collected regarding prisoners' identity and details of their detention, judicial proceedings, arrest, and investigation<sup>31</sup>. This is an essential resource for implementing systematic data collection and case management across the justice system. Thorough documentation is an extremely cost effective way of reducing corruption and protecting against impunity. It is also a fundamental step in planning for, and undertaking prison reform. The collection of prisoner information in Burma is an issue that urgently needs to be reformed in line with the SMRs and the guidelines in the UNDOC Handbook. Accurate data is an essential tool for protecting human rights and a key aspect of an accountable, functioning democracy.



30. Philip Alston, United Nations Special Rapporteur on Extrajudicial Summary or Arbitrary Executions, Handbook on Prisoner File Management, United Nations Office on Drugs and Crime, 2008

31. Handbook on Prisoner File Management, United Nations Office on Drugs and Crime, 2008

Rule 8 of the SMRs provides for the categorization and separation of prisoners based on their sex, age, criminal record, and treatment needs. Likewise, this separation is enshrined in Article 10, 2(a) of the ICCPR which states that “Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons”. The separation of prisoners is fundamental in ensuring the security of prisons and ensuring imprisonment does not perpetuate cycles of crime<sup>32</sup>. It is also an important measure of preserving the presumption of innocence in relation to the separation of pre-trial and convicted detainees, and essential to ensuring each prisoner is subjected to the most appropriate prison conditions for his or her needs. Separating prisoners based on their security needs ensures that the risk of harm for both prisoners and staff is minimized. This not only mitigates security concerns in prisons but ensures prison staff are not overworked and reduces the number of staff necessary to ensure a safe environment, saving limited human and financial resources. Despite provisions for the separation of prisoners under domestic law in Burma.

This does not occur at an adequate level, reinforcing the need for the government to strengthen its domestic provisions by ratifying the ICCPR and its optional protocol to achieve these important ends.

Another set of guiding principles relevant to prison overcrowding, and useful as a basis for reform are the United Nations Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules), adopted by the UN General Assembly in 1990. The Tokyo Rules were established in recognition that providing alternatives to imprisonment can be an effective way of reducing rates of incarceration and rehabilitating offenders within the community to the advantage of both the offender and society. These rules reflect the

32. The Paradox in Incarceration and Crime, Justice Action, University of Ottawa Faculty of Law, 2008



sentiment that deprivation of liberty should always be used as a method of last resort and that the ultimate aim of the criminal justice system should be to rehabilitate offenders and provide people with the opportunity to correct their behaviour before entering prison. The outdated nature of the Penal Code (1861) and Code of Criminal Procedure (CCP) in Burma, means there are limited sentencing options available for judges to apply. Currently, under these two codes, the only sentence types available are death, transportation, imprisonment or fine, under the Penal Code; or Probation under the CCP, meaning the courts have very little access to alternatives to detention<sup>33</sup>. Fundamental Aim 1.5 of the Tokyo Rules emphasizes the use of non-custodial measures as punishment that consider human rights principles and the social justice and rehabilitation needs of the offender. Consistent with the aims of the Tokyo Rules, implementing alternatives to imprisonment would allow the government to drastically reduce the prison population without compromising the need for punishment or rehabilitation.

“ **The judiciary does not enjoy the independence necessary to administer justice impartially** ”

## Domestic Law

Despite there being a number of provisions included in domestic law to manage and respond to prison overcrowding, the problem itself and related human rights abuses remain unresolved and largely unaddressed. For example, Chapter 3(17) of the Burma Jail Manual (1969) clearly acknowledges that prison overcrowding is unsafe, and detrimental to the health and management of prisoners and prison staff, outlining the following solution “Make provisions for the shelter and safe custody [of prisoners] in



33. Recent Development in Probation and Non-Custodial Measures in Myanmar, ASEAN Plus Three Conference on Probation and Non-Custodial Measures, 2013

temporary prisons.”This however is an ineffective, costly, and short-term solution to reducing issues of overcrowding. Domestic law urgently needs to be revised in line with international standards to reduce human rights abuses in prisons, including measures and reforms that prevent overcrowding from initially occurring. Many domestic laws in Burma are extremely outdated and desperately need to be modernized to reflect the changing nature of Burmese society and ensure laws are as comprehensive, effective, and as respected as possible. The change to a civilian government is the perfect opportunity to implement these changes and establish a solid foundation for a democratic state well into the future.

The law governing criminal procedure in Burma - the CCP, was created in 1898. It is severely outdated and requires urgent amendment. The outdated CCP does not provide specific information around the creation of new legislation, which leaves newer laws vague and open to arbitrary interpretation. For example, the Telecommunications Law (2013), before amended in (2017), did not account for bail, allowing the judiciary to consistently deny bail for defamation under 66(d), even in cases when the defendant is suffering from severe or life threatening health conditions.



The Vegetable farm in Prison

AAPP has documented several these cases<sup>34</sup>. The similar, but much older, offense of defamation under Section 500 of the Penal Code (1861), however, is specifically included as a ‘bailable’ offense under Schedule 2 of the CCP. Defamation offences under the Penal Code are not always granted bail



but specific legislation allows for less arbitrary interpretation and provides individuals with greater legislative protection. Domestic laws relating to bail are not comprehensive, nor are they applied consistently. Many laws are extremely ambiguous and outdated and allow determinations to be made in an arbitrary and inconsistent manner. This highlights the need for system wide legal reform and urgent ratification of international law to strengthen current inadequate provisions.

Prison overcrowding cannot be adequately addressed without system wide reform and cooperation. Structural reform is urgently needed to enhance the independence of the judiciary and encourage a greater separation of powers between the legislature, the executive and the judiciary in Burma. Separation between these three branches of government is enshrined in the 2008 Constitution, theoretically ensuring the “Reciprocal control, check and balance among themselves” (Chapter 1, Article 11(a)) and the role of the judiciary to “Administer justice independently according to law” (Chapter 1, Article 19(a)). Similarly, Chapter two of the Union Judiciary Law (2010) states that the purpose of the judiciary is to, “To support in building of rule of law and regional peace and tranquillity by protecting and safeguarding the interests of the people” and to “educate the people to understand and abide by the law and nurture the habit of abiding by the law...”. Although these principles are provided for in domestic law, there is enormous discrepancy between these principles in law and in practise<sup>35</sup>. There is no effective separation of powers in Burma. A high concentration of power in the Commander-in-Chief of the armed forces and executive means the judiciary does not enjoy the independence necessary to administer justice impartially.<sup>36</sup> The role of an independent judiciary is essential in a functioning democracy to divide governmental responsibility and prevent the abuse of power.

34. E.g. see November 2016 - January 2017 Chronologies for cases of Eleven Media’s Than Htut Aung and Wai Phyto and the NLD’s Myo Yan Naung Thein

35. The 2008 Constitution: Analysis and Assessment, Burma Library, 2008

36. Ibid. (39)



In June, 2013 the MNHRC recommended that the government ratify the ICESCR, along with the ICCPR however four years later, despite becoming a signatory to the ICESCR in 2015 and ratification of the ICESCR in 2017, the government has still not taken any action towards doing so<sup>37</sup>. This is reflected in the current status of the prison system and the persisting human rights abuses which continue in Burma's prisons. The existence of the domestic provisions enshrined in the Constitution, Union Judiciary Law, the Jail Manual and the CCP, and their lack of existence in practice, highlights the need to strengthen domestic law by ratifying and incorporating international law. International law provides important systems of accountability and mechanisms of assistance and redress that complement existing domestic law, and will assist Burma in achieving a more rapid transition to a democratic society, free from widespread human rights abuses. Immediate ratification of the ICCPR and the UNCAT, along with their Optional Protocols, and urgent prison reform in line with the SMRs, is fundamental in assisting Burma to incorporate the rights enshrined in these documents into domestic law and establish mechanisms to assist the government in doing so. Ratification is a strong signal to the international community that the NLD government is committed to solidifying Burma's democratic transition and improving human rights in the country now, and well into the future.

## **EXAMPLES OF COUNTRIES WHICH HAVE DEALT WITH / ARE DEALING WITH PRISON OVERCROWDING**

This section provides specific examples of methods other countries have implemented to reduce prison overcrowding. The examples are successful measures which have enabled governments around the world to address the high costs of unnecessary incarceration, both financially and socially

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37. Transforming the Culture of Human Rights in Myanmar, Human Rights Watch, 2013



in their countries. AAPP strongly recommends that the implementation of these measures are considered in order to reduce prison overcrowding, and improve human rights on a large scale.

## EDUCATION – United States

Once a person enters the prison system, there is a high risk of recidivism unless they are assisted in their reintegration back into society<sup>38</sup>. Providing education services in prisons is an important way of minimizing this risk and recognizing the right of all people to education under Article 13(1) of the ICESCR. Education plays an important role in providing alternative pathways to crime for offenders upon release and enhances prospects for positive reintegration<sup>39</sup>. It was found in the US that when prisoners were provided with education services in prison, recidivism rates reduced from around 50%-13%<sup>40</sup>. Adopting measures that ensure the effective reintegration of offenders back into society is one of the best and most cost-effective ways to ensure effective reintegration upon release from prisons and reduce prison overcrowding<sup>41</sup>. In low-middle income countries factors that contribute to crime, such as poverty, social exclusion, and lack of access to health and education are even further aggravated, compounding the issues prisoners from these countries face on release<sup>42</sup>. This makes education in prisons even more important and benefits the whole community. Min HtunSoe confirmed that at present, only “Three central prisons” out of the 46 in Burma provide formal education opportunities<sup>43</sup>. A

“ **Small type drug offenders are one group who would benefit immensely from probation** ”

38. Education Reduces Recidivism, Loyola University Chicago School of Law, Education Law and Policy, 2015

39. Education Reduces Recidivism, 2015

40. Ibid. (38)

41. Introductory Handbook on the Prevention of Recidivism and the Social Reintegration of Offenders, United Nations Office on Drugs and Crime, Criminal Justice Handbook Series, 2012

42. Ibid. (40)

43. Interview with Min HtunSoe, Mawkun, 2017



lack of these opportunities only increases the likelihood of recidivism and contributes to prison overcrowding and cycles of poverty in Burma.

Positive developments regarding educational provisions within some prisons in Burma should be noted and commended. Recently, some student inmates have recently been able to matriculate, and even granted amnesty on doing so. AAPP commends such educational provisions and hopes to see their continued role out and expansion if education on offer to increase. In 2017, 7 of the matriculating students, who passed with distinctions, were granted a presidential pardon.<sup>44</sup> In 2018, 106 students took the matriculation exam, in Insein Prison, Obo Prison, Hpa-an and Myeik prison<sup>45</sup>. Following this, 33 students passed the matriculation exam, and were thus granted an amnesty. Those inmates passed with distinction and were serving under one year were released immediately, while those inmates who passed with two distinctions but were serving sentences of more than one year, having their jail time halved. For the students who passed without distinction, had their sentence reduced by a quarter<sup>46</sup>. This is a very positive step in both reducing the number of inmates in prison, and also in the promotion of education in prison.

## PROBATION – Pakistan

Probation has been found to be a useful tool in helping keep prisoner numbers down, while also playing a powerful role in society. Penal Reform International found that probation had numerous benefits, including reduces chances of reoffending and the ability to play a productive role to society, through community service.<sup>47</sup> Probation has been successfully rolled out in Kenya, with the introduction of probation through Community Service

44. Inmates who passed matriculation exam with distinctions granted amnesty, released from jail Coconuts Yangon, 2017

45. More than 100 Prisoners to Sit Matriculation Exam This Year Irrawaddy, 2018

46. President U Win Myint amnesties inmates who passed matriculation examination Myanmar Times, 2018

47. On probation: models of good practice for alternatives to prison, Penal Reform International 2016



Orders,, which are non-custodial sentences that entail those convicted to perform unpaid public work in lieu of imprisonment<sup>48</sup>. Studies found that those who received such sentences were able to maintain links with their community, earn income, all the while reducing levels of incarceration. Further, levels of absconding were found to be rare.<sup>49</sup>

Small type drug offenders are one group who would benefit immensely from probation. Undergoing rehabilitation services and opportunities for drug counselling/treatment could form the condition for granting of probation. Adding certain conditions for probation to current provisions under the CCP would ensure that granting probation is a more effective alternative to imprisonment. Probation, coupled with an order to undergo drug counselling, for example, provides small-time drug offenders with an opportunity to address their behaviour and improve their health without the need to enter prison. In the US, where prison overcrowding and drug use are also serious issues, the Senate of California has stated their commitment to diverting vital state resources away from incarceration and towards reducing the prison population by investing in addressing mental health and substance abuse issues<sup>50</sup>. As drug offenders make up around 50% of the prison population in Burma, implementing conditional probation for lesser drug offences would reduce the prison population in Burma dramatically.

## **NON-CUSTODIAL DIVERSION FOR FIRST-TIME OR LESSER OFFENDERS – Malaysia**

Section 173a(2) of the Criminal Procedure Code (2012) in Malaysia provides discretion for judges to apply a range of non-custodial punishments,

“Having regard to the character, antecedents, age, health or mental condition of the person charged, or to the trivial nature of the offence, or to

48. A Second Chance - Alternatives to Imprisonment and the Social Reintegration of Offenders In Kenya. Dandurand, Yvon. (2012).

49. Community service and probation for women A study in Kenya, Penal Reform International, Kenya Probation and Aftercare Service, 2016

50. 10 Ways to Reduce Prison Overcrowding and Save Taxpayers Millions, Huffington Post, 2013



the extenuating circumstances under which the offence was committed”.

In consideration of these factors by the court, offences can be dismissed unconditionally, with a caution or reprimand under Section 173a(2), or conditionally; requiring a surety, the imposition of a good behaviour bond, community service, a record of conviction, or a combination of these conditions. In addition to these sentences the court can also order monetary compensation for victims for loss of property, injury, or livelihood through injury.

Applying non-custodial sentences for first or small time offenders, enhances prospects for rehabilitation without the need for incarceration. This reduces the cycle of crime which can occur if people are not given an initial chance to correct their behaviour outside of prison, and is consistent with the Tokyo Rules<sup>51</sup>.

## **REDUCING PRE-TRIAL DETENTION – India**

India has been successful in significantly reducing its pre-trial prison population by allowing judges to visit prisons to determine more minor cases, known as ‘Camp Courts’<sup>52</sup>. Prison authorities can submit a list of prisoners who have been pre-selected to have their cases determined by visiting magistrates to make the process more efficient. ‘Camp Courts’ reduce instances of people being held in prison awaiting trial for longer than they are eventually sentenced to and increase the efficiency of the criminal justice system. In Bihar, where over 12,000 pre-trial prisoners were waiting to be sentenced with minor offences, Camp Courts were able to dispose of 5383 minor cases (42%) across the state in a single day.<sup>53</sup>

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51. Non-Custodial Sentencing Options in Malaysia, 2005

52. Penal Reform International, 2003

53. Ibid. (45)



If this number of cases could be disposed of in Burma in this way, this would enable the government to rapidly cut the number of people in pre-trial detention. Due to the large number of Burma's prison population held as pre-trial detainees, this is a measure that AAPP strongly recommends. These measures are of fundamental importance not just in reducing the prison population, but also to ensuring peoples' right to liberty and the presumption of innocence are upheld. The use of camp courts, while speeding up the judicial process, is useful in addressing the symptoms of a poorly function judicial system. Therefore it would be a useful method to be used to speed up legal cases, while judicial reform is implemented.

## PAROLE – North America

Parole is a system of early release that allows prisoners to leave prison before the end of their sentence subject to community supervision and certain conditions. Prisoners may be selected as eligible for parole after having satisfied a number of pre-defined requirements, for example; having completed two thirds of their sentence, or showing good behaviour during their imprisonment<sup>54</sup>. Parole can also be granted on a gradual basis, with escorted temporary leave from prison, leading to longer and less supervised day release and eventually conditional early release<sup>55</sup>. Gradual release and supervised, conditional parole is one of the most effective ways to provide incentives for good behaviour and reduce recidivism rates, whilst balancing the need for public safety<sup>56</sup>. In the United States, the percentage of parolees who return to prison on a new sentence following their release (as opposed to breaching conditions of their parole order) was found to be less than five per cent<sup>57</sup>. In addition to this, the cost of parole compared to imprisonment is significantly lower. In the United States, imprisonment costs approximately

54. Conditional Release and Human Rights in Canada: A Commentary, Canadian Journal of Criminology and Criminal Justice, 2012

55. Ibid. (47)

56. Ibid. (47)

57. Probation and Parole in the United States, Bureau of Justice Statistics Bulletin, 2009



eight times the amount it does to provide community supervision by a parole officer<sup>58</sup>.

Liberty, human rights, and public safety are all affected by parole decisions, providing reason for necessary safeguards against corruption and undue influence of any branches of government. Existing provisions under Section 401 of the CCP, allow only for the President of the Union to suspend the execution of a prisoner's sentence, leaving this practise open to individual discretion and arbitrary decision making. To counter this, AAPP recommends the establishment of an independent Parole Board made up of police, judges, and civil society, to be overseen by a Ministry of Justice. This follows the path of countries like Canada who transferred the power to make decisions regarding early release from the wardens of correctional facilities and the Attorney General to an independent board in 1959, with members of the board appointed by the Governor in Council<sup>59</sup>. This will strengthen and encourage the use of existing provisions under Section 401 relating to the suspension and remittance of sentences, encouraging greater use of conditional early release, and protecting against corruption.

## **RELEASE ON GERIATRIC, MEDICAL AND COMPASSIONATE GROUNDS – United States**

In the US, geriatric, medical and compassionate reasons are also used as grounds for early release to reduce overcrowding. Imprisoning people of around 50 years and over is extremely expensive compared to their younger counterparts. A 2004 report from National Institute of Corrections in the US estimated the average cost of imprisoning an older person to be US\$70,000 (almost 97,000,000 kyat) per year, more than double the national average, due to increased needs for more extensive medical care<sup>60</sup>. Aside from the large costs associated with imprisoning this population, recent research from

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58. Supervision Costs Significantly Less than Incarceration in Federal System, United States Courts, 2013

59. Ibid. (47)

60. It's About Time: Aging Prisoners, Increasing Costs and Geriatric Release, Vera Institute of Justice, 2010



the Vera Institute of Justice has also found that being over 50, is one of the largest predictors of lower recidivism rates<sup>61</sup>.

Compassionate and medical release applies to prisoners who are eligible for early release based on the diagnosis of a terminal, or debilitating illness. In these cases, prisoners are generally so incapacitated, either physically, psychologically, or both, that they no longer pose a threat to society<sup>62</sup>. Incarceration should be based on principles of punishment, rehabilitation, and the protection of society; therefore, changes in health status can also result in a change for the need for incarceration<sup>63</sup>. Illnesses that amount to grounds for compassionate or medical release, often undermine the prisoner's ability to comprehend punishment, engage in rehabilitation or pose a threat to society, and therefore render their continued imprisonment unjustifiable, both ethically and financially.



Thayet Prison



61. Aging Inmates: A Prison Crisis, Law Street Media, 2015

62. Balancing Punishment and Compassion for Seriously Ill Prisoners, *Annals of Internal Medicine*, 2011

63. *Ibid.* (59)

# RECOMMENDATIONS

AAPP strongly urges the Government of Myanmar to adopt the measures and recommendations in this report in order to reduce prison overcrowding and begin reforming the justice system and domestic law in line with international law and human rights.

- To establish the Justice System, to independently oversee and appoint judges, with discretion of judiciary
- Immediately and unconditionally ratify the UNCAT, the ICCPR and their optional protocols, incorporating their principles into domestic law and establishing important accountability mechanisms
- Ensure prison reform is undertaken consistently with all relevant sections of the SMR's.
- Establish a thorough, consistent and transparent system of monitoring and record keeping in prisons using the UNDOC Handbook on Handbook on Prisoner File Management as a guide.
- Provide alternatives to imprisonment, consistent with the Tokyo Rules, implementing probation and other non-custodial forms of punishment to divert first-time and lesser offenders (particularly drug offenders) from entering the prison system.
- Ensure all existing and future laws contain specific provisions relating to their application, especially bail, to reduce the potential for arbitrary interpretation.
- Impose maximum time limits on pre-trial detention except for felonies, ensuring bail is granted to all people facing trial, except in cases where detention is absolutely necessary to prevent the accused from absconding, committing another offence or interfering in the trial.
- Provide opportunities for education and rehabilitation within prisons to



reduce recidivism and ensure prisons fulfil their correctional functions.

- Establish 'Camp Courts', or similar, to determine bail and minor cases, immediately reducing the prison population and unnecessary pre-trial detention.
- Implement a system of parole, administered by an independent Parole Board, to provide incentives for good behaviour in prison and conditional early release.
- Provide for, and utilize the use of compassionate, geriatric, and medical release in recognition that imprisonment can become an ineffective and unnecessary form of punishment.



An elderly prisoner who was released under amnesty



# CONCLUSION

Developing countries are more likely to face systemic barriers that contribute to rising trends in criminal activity<sup>64</sup>. Lack of education and employment opportunities that encourage knowledge of human rights and domestic laws, as well as dissatisfaction with social and political structures, and prolonged political instability are all factors that are known to proliferate crime<sup>65</sup>. Urgent action is needed to address these factors and reduce prison overcrowding and related human rights abuses in Burma, now, and into the future. Reforms are desperately needed to reduce the high social and financial costs of incarceration for the whole community and bring conditions of detention in line with the standards expected by the international community. A demonstrated commitment to regular monitoring, data retention and review, and careful implementation of the reforms outlined in this report have enormous potential to improve Burma's prospects for sustainable economic and social development. Moreover, administering justice with compassion and in respect of human rights is an important model to create for the broader Burmese community and to increase prospects for progressive development and harmony in the country. Considering alternatives to imprisonment does not mean neglecting punishment or the need to repent for crimes committed, but creates the opportunity to do so in a less costly and punitive manner which currently perpetuates the prevalence and cycle of crime in Burma and does little to address prison conditions which are inhumane, degrading and in violation of international law. AAPP strongly urges the NLD to seize political momentum and international support to implement the recommendations in this report and demonstrate a lasting commitment to improving prospects for development and human rights, beginning with the prison system. Imprisonment should only be used when it is a punishment proportionate to the crime committed and there are no other appropriate sentencing options available.

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64. Use of Informal Justice Mechanisms, 2016

65. Crime and Development in Africa, United Nations Office on Drugs and Crime, 2005



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# APPENDIX 1 – INTERNATIONAL AND DOMESTIC LAW

## International Law:

Universal Declaration of Human Rights (UDHR)

Article 11

1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

Article 25

1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

## The International Covenant on Civil and Political Rights

Article 7

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention...



3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial...

#### Article 10

1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person
2.
  - a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;
  - b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication

## The International Covenant on Economic, Social and Cultural Rights

#### Article 12

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.
2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:
  - (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;
  - (b) The improvement of all aspects of environmental and industrial



hygiene;

- (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;
- (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

## **The United Nations Standard Minimum Rules for the Treatment of Prisoners**

### **Rule 7**

(1) In every place where persons are imprisoned there shall be kept a bound registration book with numbered pages in which shall be entered in respect of each prisoner received:

- (a) Information concerning his identity;
- (b) The reasons for his commitment and the authority therefor;
- (c) The day and hour of his admission and release.

### **Rule 8**

The different categories of prisoners shall be kept in separate institutions or parts of institutions taking account of their sex, age, criminal record, the legal reason for their detention and the necessities of their treatment.

### **Rule 85**

(1) Untried prisoners shall be kept separate from convicted prisoners.



# The United Nations Standard Minimum Rules for Non-Custodial Measures (The Tokyo Rules)

Fundamental Aim 1.5 of the Tokyo Rules states that;

Member States shall develop non-custodial measures within their legal systems to provide other options, thus reducing the use of imprisonment, and to rationalize criminal justice policies, taking into account the observance of human rights, the requirements of social justice and the rehabilitation needs of the offender.

## Domestic Law:

### Burma Jail Manual

Chapter 3, General Supervision - The Inspector-General of Prisons

17. Whenever it appears to the Inspector-General that the number of prisoners in any prison is greater than can conveniently or safely be kept therein, and it is not convenient to transfer the excess number to - some other prison, or whenever, from the outbreak of epidemic disease within any prison, or for any other reason, it is desirable to do so, he shall make provision for the shelter and safe custody, in temporary prisons of so many of the prisoners as cannot be conveniently or safely kept in that prison.

### Code of Criminal Procedure

Chapter 1 (4)

(a) "bailable offence" means an offence shown as bailable in the second schedule, or which is made bailable by any other law, for the time being in force; and "non-bailable offence" means any other offence



**Schedule 2 (500) - Excerpt**

<b>Section</b>	<b>Offence</b>	<b>Whether the police may arrest without warrant or not</b>	<b>Whether bailable or not</b>
500	Defamation	Shall not arrest without warrant	Bailable

**Constitution of the Republic of the Union of Myanmar 2008****Chapter 1, Basic Principles of the Union**

11.

- (a)The three branches of sovereign power namely, legislative power, executive power and judicial power are separated, to the extent possible, and exert reciprocal control, check and balance among themselves

19. The following are prescribed as judicial principles

- (a)to administer justice independently according to law

**Union Judiciary Law**

## Chapter 2, Judicial Principles

3.The administration of justice shall be based upon the following principles:

- (a)to administer justice independently according to law;
- (d)to support in building of rule of law and regional peace and tranquillity by protecting and safeguarding the interests of the people;



- (e)to educate the people to understand and abide by the law and nurture the habit of abiding by the law by the



