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Myanmar: Briefing Paper on Criminal Defamation Laws

Myanmar's Parliament must abolish or extensively amend its criminal defamation laws to ensure the protection of the right to freedom of opinion and expression, said the International Commission of Jurists (ICJ) today.

Criminal defamation laws in Myanmar impose harsh sanctions, such as imprisonment, to punish free expression. The prospect of arrests, detentions, criminal trials and prison time could chill the exercise of free expression of opinions and exchange of information.

The ICJ, the United Nations Human Rights Committee (which monitors and supervises States' compliance with their international human rights obligations), the UN Special Rapporteur on freedom of opinion and expression and other international human rights authorities and an increasing number of governments consider that criminal defamation laws should be abolished, as they are incompatible with the right to freedom of expression and opinion.

Myanmar's 2008 Constitution provides for the protection of freedom of expression,¹ but sets out broad and ambiguous restrictions that limit the enjoyment of these rights. In addition, the judiciary of Myanmar currently struggles to adjudicate such criminal defamation cases with impartiality and competence.² The result is that enforcement of the defamation laws can result in violations of a number of international laws and standards protecting human rights, and also could have an overall chilling effect on the freedom of opinion and expression in the country.

Just last month, three people faced criminal defamation charges and were detained pending trial for posting material on Facebook that allegedly defame either the Myanmar army or a political leader.

- Kachin activist Patrick Kum Jaa Lee was arrested in Yangon for allegedly posting a Facebook post showing someone stepping on a photo of an army Commander-in-Chief Senior General;

¹ Article 354, 2008 Constitution of Myanmar, limits the freedom of expression to the extent that it is "not contrary to the laws, enacted for the Union security, prevalence of law and order, community peace and tranquility or public order and morality."
[http://www.burmalibrary.org/docs09/Myanmar_Constitution-2008\(en&bu\)-red.pdf](http://www.burmalibrary.org/docs09/Myanmar_Constitution-2008(en&bu)-red.pdf)

² International Commission of Jurists, The Right to Counsel: Independence of Lawyers in Myanmar: <http://www.burmalibrary.org/docs16/ICJ-MYANMAR-Right-to-Counsel-en-red.pdf>

- Chaw Sandi Tun was arrested for a Facebook post pointing out that an army official was wearing clothes of a similar colour to those of then opposition leader Aung San Suu Kyi; and
- Maung Saungkha was arrested for allegedly posting a poem on Facebook he had written about having a tattoo of the President on his penis. His next hearing at Shwepyithar Township has been scheduled for tomorrow.

The ICJ is monitoring some of these trials to assess their compliance with international laws and standards. In one such trial, involving Patrick Kum Jaa Lee, the accused has been denied bail for the fifth time this week despite his ailing health.

The laws used to charge and detain the accused are the Electronic Transaction Law, specifically under provision 34(d), the Myanmar Telecommunications Law, specifically under provision 66(d), and Article 500 of the Penal Code.

Each of these laws is detailed below.

Electronic Transaction Law³

Section 34(d) under the Electronic Transaction Law is directed at those committing the offences of *"creating, modifying or altering of information or distributing of information created, modified or altered by electronic technology to be detrimental to the interest of or to lower the dignity of any organization or any person."*

The Electronic Transaction Law was signed into law in 2004 by General Than Shwe, former junta leader and Chairman of the State Peace and Development Council. This law has been used to imprison activists and political dissidents for sending or receiving "detrimental" e-mails.

In 2013, however, the seventh regular session of the Lower House approved a proposal to amend the Electronic Transactions Law and reduce the penalties from the possibility of imprisonment to fines only.⁴

Myanmar Telecommunications Law⁵

66. Whoever commits any of the following acts shall, on conviction, be liable to imprisonment for a term not exceeding three years or to a fine or to both:

³ Electronic Transaction Law: <http://www.pyithuhluttaw.gov.mm/?q=laws&page=10>

⁴ Punishments reduced but Burma's harsh online law remains, The Irrawaddy, 24 October 2015: <http://www.irrawaddy.org/burma/punishments-reduced-burmas-harsh-online-law-remains.html>

⁵ The Myanmar Telecommunications Law: <http://www.mcit.gov.mm/content/telecommunications-law.html>

(d) Extorting, coercing, restraining wrongfully, defaming, disturbing, causing undue influence or threatening to any person by using any Telecommunications Network.

The Myanmar Telecommunications Law, signed into law by President Thein Sein on 8 October 2013, sets the general framework for the telecommunications sector in Myanmar.

If convicted under 66(d) of the Myanmar Telecommunications Law, the accused is liable for imprisonment not exceeding three years or a fine or both.

Article 500 of the Penal Code⁶

Whoever defames another shall be punished with simple imprisonment for a term which may extend to two years, or with fine, or with both.

International Standards on the Freedom of Opinion and Expression

Freedom of opinion and expression are universal and inalienable rights of every human being and are indispensable for the fulfilment and enjoyment of many other human rights. This has been recognized in multiple international instruments, including in the Universal Declaration of Human Rights (UDHR) and the International Covenant of Civil and Political Rights (ICCPR).⁷ These standards are now part of general international law and customary international law.⁸ The UN Human Rights Committee has provided the most authoritative interpretation of the scope of the right to freedom of expression. In its General Comment 34, which states that this right includes “the expression and receipt of communications of every form of idea and opinion capable of transmission to others to others such as political discourse, commentary on one’s own and on public affairs.”⁹

Misuse of defamation laws to criminalize freedom of opinion and expression

Myanmar’s criminal defamation complaints severely curtail the exercise of the right to freedom of opinion and expression.

⁶ Myanmar Penal Code:

<http://www.wipo.int/edocs/lexdocs/laws/en/mm/mm004en.pdf>

⁷ Universal Declaration of Human Rights, Article 19; International Covenant of Civil and Political Rights (Article 19). Article 19 of the ICCPR on the right to freedom of expression, also includes the right to impart information.

⁸ At UPR meetings that the ICJ had held in Geneva in October 2015, the diplomatic community had stated that they would continue to recommend that Myanmar signs up to the ICCPR, a central component to the International Bill of Rights, in its upcoming review in the Human Rights Council on 6 November 2015. Myanmar has stated that it would consider signing up to the ICCPR, in both of its Universal Periodic Review (UPR) cycles in 2011 and 2015 after pressure from the international community.

⁹ UN Human Rights Committee, *General Comment No. 34, Article 19: Freedoms of opinion and expression, UN Doc CCPR/C/GC/34 (2011)*, para. 11.

This right to freedom of expression protects every form of expression including electronic and internet-based.¹⁰

The UN Special Rapporteur on freedom of expression has underscored that, since the internet has become a major means by which individuals can exercise their rights, including freedom of expression, the framework of international human rights law is especially important for application to this context as well.¹¹ The Special Rapporteur has reiterated that justifying any limitation on the freedom of expression on the basis of protecting other rights or reputation of others must not be used to protect the State and its officials from public opinion or criticism.¹² He has clarified that, even though restrictions on this right are allowed under certain conditions, there are some aspects that should never be limited, such as reporting on government activities and corruption in government.¹³

The Special Rapporteur has also called for all criminal defamation acts to be revised to remove criminal sanctions and for civil liability proceedings to be the sole form of redress for complaints of damage to reputation.¹⁴ He clarifies, however, that civil penalties for defamation "should not be so heavy as to block freedom of expression and should be designed to restore the reputation harmed, not to compensate the plaintiff or to punish the defendant."¹⁵

The UN Human Rights Committee said that defamation laws must be crafted so that they do not serve in practice to stifle penal expression. It had also expressed its concern at the misuse of defamation laws to criminalize freedom of expression and has said that such laws should never be used when expression is made without malice¹⁶ and in the public interest.¹⁷

It has further clarified that imprisonment is never an appropriate penalty for defamation and poses an impermissibly severe impediment to the exercise of

¹⁰ General Comment No. 34, *op. cit.*, para. 12.

¹¹ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Doc A/HRC/17/27 (2011), paras. 20-21.

¹² This is confirmed by the UN Human Rights Committee: "All public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition." Also see: UN Doc A/HRC/14/23 (2010), *op. cit.*, para. 82; and General Comment 34, *op. cit.*, para. 84.

¹³ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, UN Doc A/HRC/14/23 (2010), para. 81.

¹⁴ Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 20 April 2010, Para 83

¹⁵ *Ibid*

¹⁶ "At least with regard to comments about public figures, consideration should be given to avoiding penalizing or otherwise rendering unlawful untrue statements that have been published in error but without malice," HRC General Comment No. 34, *op. cit.*, para. 47

¹⁷ See ICJ's statement on Thailand's Phuketwan Trial, 28 August 2014: <https://www.hrw.org/news/2014/08/28/thailand-immediately-withdraw-criminal-defamation-complaint-against-human-rights>

free expression.¹⁸ In its General Comment on freedom of expression and opinion, the HRC states that “States parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases and imprisonment is never an appropriate penalty. It is impermissible for a State party to indict a person for criminal defamation but then not to proceed to trial expeditiously – such a practice has a chilling effect that may unduly restrict the exercise of freedom of expression of the person concerned and others.”¹⁹ The HRC further states that “any particular penal defamation laws, should include such defences as the defence of truth and they should not be applied with regard to those forms of expression that are not, of their nature, subject to verification”²⁰ and “in any event, a public interest in the subject matter of the criticism should be recognized as a defence.”²¹

Principle of Legality

Myanmar’s defamation laws, by being either vague or overly broad, also do not conform to the principle of legality. This undermines the rule of law as they are not formulated clearly and precisely to ensure that individuals can regulate their conduct accordingly.

Notions such as “disturbing” or “causing undue influence”, as set out in the Telecommunication Law, are particularly vague and prone to arbitrary and highly subjective interpretation and application. It is unclear what constitutes “disturbing” content or what influence is “undue.” They leave the door open to selective prosecution and interpretation by the State to crack down on certain forms of online media content, such as Facebook.

Conclusion

The capacity of people to freely impart and receive information, including through free political discourse, is critical for a functioning democracy under the rule of law. Should Myanmar courts convict and imprison those detained for criminal defamation, this would not only violate the rights of those unjustly punished, but would also continue to cast a chilling effect on the freedom of expression in Myanmar.

¹⁸ The Inter-American Commission on Human Rights has recognized that restricting the freedom of expression through disproportionate sanctions transforms democracy into a system where authoritarianism and human rights violations find fertile ground for imposing themselves on the will of society. It has ruled that in a democratic society, “public officials are more exposed to scrutiny and criticism by the general public. This different protection threshold is justified by the fact that public officials have voluntarily exposed themselves to a stricter scrutiny. Their activities go beyond their private life and expand to enter the arena of public debate.” Inter-American Commission on Human Rights, *Report on the situation of human rights defenders in the Americas*, OEA/Ser.L/V/II.124(2006), para. 81.

¹⁹ General Comment No. 34, *op. cit.*, para. 47

²⁰ *Ibid*

²¹ *Ibid*

In its last Universal Periodic Review (UPR) before the UN Human Rights Council on 6 November 2015,²² Myanmar accepted recommendations from the international community relating to the protection of the freedom of opinion and expression and to ensure that those who legitimately exercise their right to freedom of expression are not subject to reprisals. Myanmar must fully implement its UPR commitments and ensure that its domestic laws, and the practice of such laws, are not in violation of the international standards that guarantee the right to freedom of opinion and expression.

The ICJ calls on State prosecutors to exercise their prosecutorial discretion and drop charges of criminal defamation in a legal system that is still marked by broad and harsh criminal laws. Both in terms of justice and effectiveness in law enforcement and fundamental interests of the society, such prosecutorial decisions have far-reaching implications.

The ICJ calls on Myanmar's Parliament to extensively abolish or amend its criminal defamation laws to ensure the protection of the right to freedom of opinion and expression.

Myanmar must establish domestic standards conforming to international human rights law, and reaffirm its commitment to building a more representative, legitimate government where all people can enjoy the right to freedom of opinion and expression.

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²² See: http://www.upr-info.org/sites/default/files/document/session_23_-_november_2015/a_hrc_wg.6_23_1.9.pdf