

## Press release

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### **Myanmar: Writ of *Habeas Corpus* Can Help Protect Human Rights**

*Yangon, Myanmar* – The Myanmar government should begin using the writ of habeas corpus to prevent unfair arrests and detention, the International Commission of Jurists (ICJ) said today as it released its *Handbook on Habeas Corpus in Myanmar*.

The Handbook describes the legal practice in Myanmar since the writ of *habeas corpus* was reintroduced in the country's 2008 Constitution after decades of neglect.

Along with international standards regarding this important legal safeguard for human rights, the Handbook outlines judicial precedent before the writ was effectively abandoned in the late 1960s following the establishment of military rule in the country, the ICJ says.

Although Articles 296(a) and 378 (a) of Myanmar's 2008 Constitution guarantee that a person deprived of his or her liberty has the right to petition for a writ of *habeas corpus*, in practice the ICJ could not find a single case in which the writ had been used successfully to challenge the lawfulness of anyone's arrest or detention.

"Around the world, the writ of *habeas corpus* is one of the key legal devices to prevent unlawful detention and other human rights violations such as torture or other ill-treatment and enforced disappearance," said Sam Zarifi, ICJ's Asia Director. "When Myanmar's military rulers began cracking down on political dissent and imposed authoritarian rule, they naturally got rid of this protective mechanism."

"It's crucial that this writ now be used properly to ensure that there are no more political prisoners or people improperly detained without due process," he added.

The right to habeas corpus entitles petitioners for the writ of habeas corpus to challenge the legality of their arrest or detention before a Court.

The Court issues an order to bring the petitioner before it to review and determine the legality of his or her arrest and detention.

If the authorities cannot prove the legality of arrest and detention, the Court may order the detainee's release if appropriate.

The ICJ's analysis in the Handbook shows that, notwithstanding some reform, there are still multiple cases of arbitrary or otherwise unlawful arrest and detention in the country, particularly as a tool to suppress political dissent.

Despite the 1898 Criminal Procedure Code (CrPC) setting out the procedures for arrest and detention, in practice, security forces rarely adhere to these procedures, the ICJ says.

The ICJ has observed and documented pre-trial and trial phases of several cases, where the failure to comply with due process rights could have provided an effective basis on which to mount habeas corpus challenges against deprivation of liberty.

For instance, the habeas corpus procedure could have been used to challenge the arbitrary arrest and detention of human rights defender U Gambira, who has been detained since 19 January 2016.

The writ of habeas corpus would have allowed him to contest several shortcomings in his arrest and detention, for instance, that he was not promptly notified of the reasons for his arrest when he was detained, the ICJ adds.

Likewise, defendants in a number of cases accused of offences against religion should be able to exercise their right to habeas corpus to challenge their detention if it was the result of a conviction solely for the lawful enjoyment of one's freedom of expression.

The writ would entitle the Supreme Court to review the case and re-examine whether there was deliberate and malicious intent to insult a religion. If the basic criminal law requirement of intent was not met then the detainees should be set free.

"Until now, many lawyers are convinced that it's not useful even to try to use the habeas corpus petition to protect their clients, in part because they're unfamiliar with the writ, and in part because they believe that Myanmar's judiciary has lacked the independence to review the decisions of the Executive branch, and particularly the security and intelligence authorities," said Zarifi.

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### **BACKGROUND**

The right to challenge the lawfulness of detention before a court is a self-standing human right, the denial of which constitutes a human rights violation. Thus the right of detained people to a habeas corpus procedure should be applicable to all people at all times, under any form of detention, including during a state of emergency or armed conflict, even in countries, such as Myanmar, that are not yet State Parties to relevant international treaties.

In all cases in which arrest or detention is unlawful or arbitrary, the habeas corpus procedure may secure release from detention, whether the detention was ordered by the highest powers of the state, imposed by state armed forces or police and other security agencies. Myanmar's Judiciary, however, is not yet used to challenge the Executive branch or the Military.

Obstacles remain to the procedure's implementation in practice. The systematic dismantling of Myanmar's legal system has rendered judges, lawyers and members of the government unfamiliar with international laws and standards. Few have ever seen the writ of habeas corpus used properly. In addition, the Myanmar judiciary remains drastically under-resourced and requires capacity building.

Another significant practical obstacle is that only the country's Supreme Court, located in Nay Pyi Taw and far away from many of the country's population centers, can hear a petition for habeas corpus—discouraging many lawyers from incurring the costs and logistical difficulties involved in bringing proceedings before the Supreme Court. Moreover, lawyers claim that the petition process can take months, when international standards clearly call for it to be simple, expeditious and cost-free.

"Myanmar has a unique opportunity to address the rule of law and human rights," said Zarifi. "One potential remedy for arbitrary arrest and detention is already on the books but not used – the Constitutional writ of habeas corpus. It should be promoted through training for lawyers, judges, police and prosecutors."