A Summary of a Briefing Paper on the Shrinking Space for Civil Society in Burma/Myanmar

1. Overview

This Summary is a summary of the accompanying Briefing Paper written by the Assistance Association for Political Prisoners (AAPP) and Burma Partnership. In addition to greater levels of detail and analysis, all relevant case examples and footnotes are only included in the longer version.

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. Political prisoners were freed throughout 2013, culminating in two "final" releases on 11 December (41 freed) and 31 December (16 freed). 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, 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 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. 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 (Assembly Law), and Article 505(b) of the Penal Code 1861 (Penal Code), 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.

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

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 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. However, when President Thein Sein signed the amendment on 24 June 2014, only minor, almost cosmetic, amendments had been made to the repressive Assembly Law.

First, those who wish to conduct a peaceful assembly or procession must now obtain "*consent*" from the authorities rather than "*permission*", which makes no difference in practice and is still illegal under international law and norms on the right to freedom of assembly. 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 consent from the authorities. Yet, this amendment is of little comfort to those whose rights – particularly the right to liberty – have been violated.

Potentially more significantly though, the amended legislation now removes mention of the authorities' having the option to deny consent, which would convert the requirement to seek consent into more of a notification requirement, a welcome amendment that would seem to bring the Assembly Law much more in line with international law. Nevertheless, the amended legislation still leaves plenty of scope for the authorities to deny consent, especially as a result of the requirement that applicants must submit "*in accordance with the rules for consent*". Furthermore, if the authorities had genuinely wanted to reduce the requirement to one of notification, they would have amended "*permission*" to "*notification*" rather than "*consent*".

However, regardless of the above considerations, 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. 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

With the enactment of the Association Registration Law on 25 June 2014, the draconian Law Relating to Formation of Organizations 1988 has been repealed. 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.

However, it 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. 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 or *de facto* mandatory registration by making it difficult or impossible for associations and CSOs to function viably due to logistical and administrative restrictions. Any 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.

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 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. 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. 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.

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 and revocation of licenses. Given that any individual or media outlet printing or publishing without registering will be subject to sanctions, the vague law could intimidate editors to self-censor and curtail investigative journalism and reporting on sensitive topics such as religious violence, the plight of the Rohingya, human rights abuses by the Burma Army, corruption and abuses of power. 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, 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. 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.

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, many of which were mentioned in interviews recently conducted by Burma Partnership with media outlets in Burma, and which are outlined in detail in the longer Briefing Paper.

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. 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. 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.

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. 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). 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 land rights activists in particular.

3. 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 Summary and the longer 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 (A/HRC/22/58), to ensure that it is in line with international human rights law and norms such as the UDHR and the ICCPR, 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
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Mae Sot, Thailand