

Introduction

In the past two years there has been an increasing trend to look at Burma through the lens of international law, rather than just as a civil liberties or human rights issue. This approach gained momentum in March 2010, when the United Nations Special Rapporteur on Burma called for a UN Commission of Inquiry into possible war crimes and crimes against humanity in Burma.

Most attention on possible war crimes and crimes against humanity taking place in Burma has focused on attacks and persecution on ethnic minorities, particularly crimes committed against the ethnic Karen, Karenni and Shan in Eastern Burma, and against the Rohingya in Western Burma, and the Chin in the Northwest.

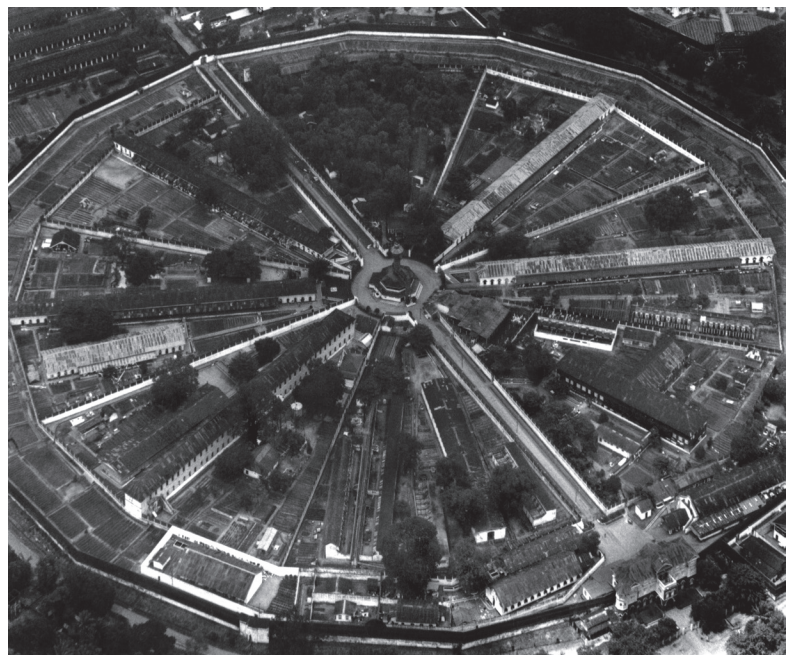
This briefing looks at an area which has so far not received much attention, the detention and treatment of political prisoners. This briefing is not intended as a detailed legal analysis, but rather to highlight this issue as one which should also be looked at in the context of international law.

The detention and mistreatment of political prisoners in Burma implicates breaches of Article 7 of the Rome Statute, and as such, would be crimes against humanity. This briefing recommends further research into this issue and for the detention and treatment of political prisoners to be included in the remit of any future UN Commission of Inquiry into possible war crimes and crimes against humanity in Burma. It argues that the detention and mistreatment of political prisoners provides yet another justification for the establishment of such an Inquiry.

Political Prisoners in Burma

In March 2011 there were 2076 documented political prisoners in Burma. However, the true figure is likely to be significantly higher, as it is not easy to document political prisoners in remote areas, especially those people held in military camps or bases in ethnic areas where the Burmese Army is engaged in attacks against ethnic minorities.

Torture is commonly used against political prisoners. It is used to extract information, to punish, and as a psychological way of 'breaking' the will and the spirit of political prisoners. Political prisoners are also subject to other forms of deprivation designed to cause physical or mental suffering, such as poor food and prison conditions, being moved to remote prisons, and limited contact with family.



Insein prison in Rangoon
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International Law

The Rome Statute of the International Criminal Court was adopted in July 1998 and came into force in July 2002. The jurisdiction of the Court applies to four areas:

- The crime of genocide
- Crimes against humanity
- War crimes
- The crime of aggression

Article 7 of the Rome Statute defined eleven acts which could constitute crimes against humanity. The acts must be '*committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.*'

Five acts defined as crimes against humanity could apply to the detention and treatment of political prisoners in Burma. These are:

- 7(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law
- 7(f) Torture
- 7(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within jurisdiction of the Court
- 7(i) Enforced disappearance of persons
- 7(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health

Meeting Criteria for Crimes Against Humanity

For any of the five acts identified as taking place against political prisoners in Burma to meet criteria of crimes against humanity, they must be; '*committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.*'

Widespread

For an attack to be widespread it is generally considered that the attack must be large-scale in terms of the nature of the attack, and the number of victims, and it must not be a one-off isolated incident. The attack does not need to be in the form of the use of military force.

At first appearances the number of political prisoners in Burma, at around 2,000 out of a population of around 59 million, may not appear to be widespread. However, this headline figure does not accurately represent the true scale of the detention of political prisoners in Burma.

The detention of political prisoners can in no way be described as an isolated incident. In a report on Burma in December 1965, Amnesty International referred to the detention of 2,500 political prisoners. The United Nations General Assembly has made reference to political prisoners in all 20 of its Resolution on Burma since 1991.

In December 2002, in his first report since the Rome Statute came into force, the United Nations Special Rapporteur on Burma, Mr. Paulo Sérgio Pinheiro, reported that there were 1,448 political prisoners in Burma. This number remained fairly stable until 2007, when a peaceful pro-democracy uprising took place in August and September. During the protests the number of political prisoners steadily increased. When the main crackdown began on the night of 26th September, thousands of Monks from all over the country were detained. On October 1st 2007 the BBC reported that around 4,000 monks were detained in Rangoon alone. Most were later released, but overall the number of political prisoners increased by 78 percent following the uprising and subsequent arrest of those who took part. In August 2007 there were 1192 political prisoners. By September 2008 there were 2,123.

The United Nations Working Group on Arbitrary Detention operates under the auspices of the United Nations Human Rights Council. It has considered several individual cases of political prisoners in Burma, and has repeatedly found that the detention of these prisoners by the dictatorship is contrary to international law.

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In Opinion 28/2010, concerning the case of Ko Mya Aye, one of the 88 Generation Students who was detained for their part in the uprising in 2007, the Working Group stated:

'Finally, the Working Group notes with concern that during the past years, it has been called upon to render opinions on many similar cases from the Union of Myanmar....The Working Group therefore does not see the present case as an isolated one, and urges the Government of Myanmar to seriously investigate the practice and re-consider its vague, overly general and broad charges for arrest and detention.'

These examples demonstrate the widespread detention of political prisoners. However, they do not fully reveal the true scale, as while the number of political prisoners has with occasional exceptions remain roughly between 1,100 and 2,100 since 2002, these are not all the same political prisoners. Many have been detained and then released, only to be replaced by new political prisoners.

Taking this into account, the total number of political prisoners in Burma since 1962 is likely to number in the high tens of thousands, and well over 10,000 since 2002. Clearly the number of political prisoners is much larger than headline figures suggest, and can be described as widespread.

Systematic

The attack must be widespread or systematic. It does not need to be both. However, in the case of the detention and treatment of political prisoners, it could be argued that both are taking place. For an attack to be systematic, it is generally accepted that the attack must involve a high degree of organisation, and be part of a plan. In terms of the monitoring and detention of political activists, this has been widely documented by the United Nations in reports by the Special Rapporteur, and by governments, and human rights organisations, and is clearly taking place.

Directed against any civilian population

That civilians in Burma are targeted for arrest, torture and detention based on their political activities is not disputed. For example, as of March 2011 the Assistance Association for Political

prisoners reported that 387 of the prisoners in detention were from the National League for Democracy, and 253 were monks.

Acts by the dictatorship which could constitute crimes against humanity

Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law

As already described, the United Nations Working Group on Arbitrary Detention has repeatedly found that the detention of prisoners by the dictatorship is contrary to international law.

In 2008, the last year for which full figures have been released, the Working Group issued six Opinions relating to 16 political prisoners in Burma, and in each, found that their detention was arbitrary.

It could be argued that these cases might not be representative, and so based on these examples, an assessment cannot be made on whether the imprisonment of other political prisoners is in violation of fundamental rules of international law. However, there are three reasons for believing that these cases are representative of most political prisoners in Burma.

First, the charges are the same or very similar for many of the other political prisoners, and relate to activities for the same organisations, such as the 88 Generation Students.

The second is the Opinion of the Working Group itself.

In 2008 it issued Opinion No. 46/2008, stating that the ongoing house arrest of Aung San Suu Kyi was in violation of international law (its fifth such Opinion since 2002). However, in this statement it went further, stating not only that:

'Ms Aung San Suu Kyi's placement under house arrest (is) arbitrary, being in contravention of Articles 9,10 and 19 of the Universal Declaration of Human Rights.' It then went on to state this was in contravention *'even of domestic law . . . which in itself contradicts to the basic principles and norms of modern international law.'*

Here the United Nations is stating that the laws under which political prisoners are detained violate the fundamental rules of international law.

And finally, it has been repeatedly documented, including by the UN Special Rapporteur on Burma, and the UN Working Group on Arbitrary Detention, that the judiciary in Burma is neither independent nor impartial and especially in political cases, there is an abject lack of due process accorded to detainees. These include such violations of the right of access to counsel of one's choosing, to cross-examine witnesses, and the presumption of innocence.

Torture

The Rome Statute states that torture *'means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.'*

The Burmese regime is notorious for its use of torture against political prisoners. Use of torture has been documented in numerous reports of the UN Special Rapporteur on Human Rights in Burma, as part of General Assembly, Human Rights Council, and former Commission on Human Rights resolutions, and by NGOs such as the respected Assistance Association for Political Prisoners – Burma (AAPPB), which works on behalf of political prisoners in the country.



Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within jurisdiction of the Court.

Examining the statistics about the identity of political prisoners provided by AAPPB reveals they are often targeted because of their political, ethnic, or religious characteristics. As an illustration, among the current group of political prisoners are some 400 NLD members, 37 88 Generation Students, 300 ethnic minority leaders, 250 monks, and 600 individual activists.

The UN Working Group on Arbitrary Detention, in Opinion 28/2010, on the case of Ko Mya Aye, specifically referred to *'A common thread running through these case is the arrest and detention of persons on similar charges as the case in hand, and where the detainees had attempted to exercise their human rights to free speech, expression, association and assembly and to participate in the movement for democracy.'*

Here the UN is stating that an identifiable political group, those participating in the movement for democracy, are being targeted for arbitrary detention.

Enforced disappearance of persons

The Rome Statute defines the enforced disappearance of persons as meaning; *'The arrest, detention or abduction of persons by, or with the authorizations, support or acquiescence of, a State or a political organisation, followed by the refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.'*

Political activists arrest in Burma have frequently been detained for days, weeks and months following their arrest, without relatives being informed of their whereabouts or wellbeing. In January 2003 AAPPB reported a case of 15 political prisoners who had disappeared from Mergui Prison.

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There have also been many anecdotal reports of villagers in ethnic states who are suspected of political activities being taken by Burmese Army soldiers and not seen again. However, access in these areas is extremely limited and there has not been adequate documentation to reveal the true scale of this problem.

Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health

There is extensive evidence that political prisoners in Burma are treated in such a way as to intentionally cause great suffering, or serious injury to body or to mental or physical health. This has been documented by the UN Special Rapporteur on Burma, and has been gathered from former political prisoners interviewed by AAPPB.

Acts include not only torture but terrible prison conditions without adequate food, water, or medical care, including medicine. Being removed to remote prisons to make family visits more difficult, and severe limits on family being able to pay visits. In addition, political prisoners are also subjected to malnutrition, disease spread by rodents, mosquitoes, and general filth are rampant.

Admissibility and Impunity

Even if the human rights abuses described in this Briefing did constitute crimes against humanity, it does not automatically follow that there will be an international response. Two key criteria apply here. Whether the dictatorship in Burma will act, and whether the United Nations Security Council is prepared to make a referral to the International Criminal Court.

The Rome Statute of the International Criminal Court is based on the principle of complementarity. It is to supplement, not replace, State based legal systems. The International Criminal Court can only act when States are unwilling or unable to act. This is outlined in Article 17 of the Rome Statute.

Unwilling To Act

The dictatorship in Burma has repeatedly shown that it is unwilling to end, or to investigate, serious violations of international law.

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To date, the dictatorship has ignored 18 separate requests by the United Nations General Assembly for investigations into serious human rights abuses in Burma. In February 2011, as part of the Universal Periodic Review into human rights in Burma, the dictatorship rejected 16 separate recommendations to respect international law and investigate possible breaches of international law.

Further evidence that the dictatorship in Burma will not act to end or investigate breaches of international law is that the dictatorship has given itself immunity from prosecution. In the 2008 Constitution of Myanmar, which was drafted by the dictatorship and approved in a rigged referendum; Article 445 states:

‘..No proceeding shall be instituted against the said Councils or any member thereof or any member of the Government, in respect of any act done in the execution of their respective duties.’

In addition to this evidence regarding the dictatorship’s overall refusal to end or investigate breaches of international law, there is also an important issue that relates specifically to political prisoners. The dictatorship denies that there even are political prisoners in Burma. In its response to questions about political prisoners made as part of the Universal Period Review on Burma’s human rights record, published 2nd February 2011, the dictatorship stated:

‘Those referred to as “political prisoners” and “prisoners of conscience” are in prison because they had breached the prevailing laws and not because of their political belief.’

These examples provide conclusive evidence that the dictatorship has no intention of investigating breaches of international law.

International Responsibility

Burma is not a party to the Rome Statute establishing the International Criminal Court. This means that although acts in Burma may constitute war crimes or crimes against humanity, the ICC does not currently have jurisdiction to begin an investigation. The only way to have the ICC

investigate and potentially prosecute these abuses would be to receive a referral from the UN Security Council, which appears unlikely in the short-term.

This is why the call of the UN Special Rapporteur on Human Rights in Burma to create a Commission of Inquiry into potential war crimes and crimes against humanity is so important.

Such an investigation, established through the General Assembly or Human Rights Council, could make legal conclusions about the status of crimes committed in Burma, providing justification for further action.

Yet despite this clear and unequivocal call for an investigation, the United Nations has yet to act. This is an extraordinary inconsistency of approach by the United Nations, given the unanimous call from the United Nations, through its resolutions, judgments from the Working Group on Arbitrary Detention, Special Rapporteur, and previous Special Envoys to end the impunity for the commission of human rights abuses in Burma.

Conclusions

It is likely that the acts committed in Burma against political prisoners constitute crimes against humanity.

We therefore recommend:

1. Further investigation into the detention and mistreatment of political prisoners as crimes against humanity and incorporating the results of these efforts into the broader call for justice and accountability in Burma;
2. The immediate establishment of a Commission of Inquiry to investigate potential war crimes and crimes against humanity in Burma, including the detention and treatment of political prisoners; and
3. Increased pressure on the Burmese dictatorship to release all political prisoners and engage in meaningful tripartite dialogue with the National League for Democracy and ethnic groups that would result in an irreversible process of national reconciliation and restoration of democracy to Burma.

Ko Mya Aye - A Political Prisoner Case Study



The case of Ko Mya Aye is just one example of how the detention and treatment of political prisoners in Burma could constitute a crime against humanity.

Ko Mya Aye was born on 10th March 1966. He was one of the graduate students involved in organising the pro-democracy uprising in 1988. In 1989 he was arrested because of his political activities.

While being questioned about his political activities he was tortured. He was sentenced to 8 years in jail, and held in the notorious Insein Jail for the first six years. At the time of his arrest he had a five month old daughter. It was four years before he was able to see her again, through prison bars.

After his release Ko Mya Aye continued his political activities, and in 2004 was one of the founder members of the 88 Generation Students group, along with high profile democracy activists Min Ko Naing and Ko Ko Gyi.

Ko Mya Aye was arrested again in August 2007, after organising protests against a 500 percent rise in fuel prices. Ko Mya Aye was taken from his home at midnight, held incommunicado for two months, and sent back to Insein jail.

The following year he was charged with 21 offences, and on 11th November 2008, was sentenced to 65

years and 6 months in jail. He was moved to the remote Loikaw Prison in Karenni State. In April 2010 he was moved to Taunggyi Prison, which is more than 450 miles from his family home, requiring a full day's travel, so making family visits very difficult.

In the midst of his trial and prior to conviction, his two lawyers U Khin Maung Shein and U Aung Thein were found in contempt of court for their vigorous advocacy on behalf of their client and were themselves sentenced to four months imprisonment.

Ko Mya Aye has serious medical problems associated with heart disease, including angina, and has been denied access to adequate medical facilities or treatment.

In his report of 15th September 2010 the UN Special Rapporteur on Burma highlighted the case of Ko Mya Aye, referring specifically to his removal to a remote prison, and denial of adequate medical care. He also stated:

'The Special Rapporteur has repeatedly reminded the Government of its responsibility to ensure the protection and proper treatment of those put in detention, including providing adequate food and medical care in accordance with universally accepted standards and the principles contained in international human rights instruments.'

Represented by barristers Sappho Dias and Adam Zellick, and solicitor Jared Genser, all providing pro bono representation of Ko Mya Aye through the Burma Justice Committee, the UN Working Group on Arbitrary Detention issued Opinion No. 28/2010 regarding the case of Ko Mya Aye.

The Working Group, which consists of independent experts from Chile, Norway, Pakistan, Senegal, and Ukraine – concluded that Ko Mya Aye's detention is arbitrary and in breach of articles 13, 18, 19, and 21. It concluded that in view of his unlawful arrest and detention, he should be released and provided appropriate reparations.

The detention and treatment of Ko Mya Aye could constitute crimes against humanity as defined by the Rome Statute.

Article 7(e) refers to imprisonment in violation of international law. The UN has ruled that Ko Mya Aye's detention is in violation of international law.

Article 7(f) refers to torture. Ko Mya Aye has been tortured.

Article 7(h) refers to persecution against an identifiable group. Ko Mya Aye has been targeted as a member of the democracy movement, in particular the 88 Generation Students group.

Article 7(i) refers to enforced disappearance. Following his arrest in 2007 Ko Mya Aye was kept incommunicado for two months.

Article 7(k) refers to inhumane acts intentionally causing suffering. Ko Mya Aye has been denied adequate medical care for a condition serious enough to threaten his life, and cause him great pain and discomfort. He has also been moved to remote prisons to make family visits difficult, and kept on death row.

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