



CENTRE FOR LAW
AND DEMOCRACY

Imprisoned for Reporting

**A Legal Analysis of the Detention of
Five Burmese Journalists**

October 2011

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Introduction

On 12 October 2011, Burma reportedly released some 200 political prisoners, including the high profile popular comedian and dissident, Zarganar. The Centre for Law and Democracy (CLD) welcomes the release of these prisoners, but notes that 1000s of other political prisoners remain in jail. This Note highlights the cases of five journalists working for the Democratic Voice of Burma (DVB) – Hla Hla Win, Sithu Zeya, U Zeya, Win Maw, and Ngwe Soe Lin – all of whom remain in prison.

Freedom of expression is, as international courts and commentators have repeatedly reaffirmed, a widely recognised and foundational human right. It is guaranteed under international law, specifically under Article 19 of the *Universal Declaration of Human Rights* (UDHR),¹ which is widely regarded as having attained the status of customary international law, and is therefore legally binding on all States. The right to freedom of expression should be enjoyed by everyone, but is of particular significance in relation to the media and journalists, given the important role they play in ensuring the free flow of information and ideas in society. The imprisonment of these five journalists is a matter of particular concern, representing, as it does, such a severe restriction on freedom of expression.

The five journalists covered in this Note were arrested and charged between 2007 and 2010, and sentenced to prison terms of between 8 and 27 years. In each case, the sentences were imposed for activities which are a standard part of the journalistic profession: conducting interviews, videotaping newsworthy events and so on. In essence, these five individuals were imprisoned simply for being journalists. CLD notes that the cases here related to just five of the 17 journalists employed by DVB who are in prison in Burma. DVB has only released specific information about five of the 17 detainees out of concern for the safety of the others.

This Note examines the circumstances surrounding the arrest and detention of these journalists. It also provides an analysis of why their convictions breach international human rights law, in particular on grounds of freedom of expression

The Facts

The circumstances under which the five journalists were detained differ, but the cases are united by several commonalities.

Hla Hla Win was arrested in September 2009. At the time of her arrest, she was in the town of Pakokku interviewing a variety of people including monks, a peanut farmer, a child soldier and an individual who spoke to her about political leagues. Pakokku police began to follow her after receiving a report that there were suspicious people riding a motorcycle within the town. Police followed her and

¹ UN General Assembly Resolution 217A(III), 10 December 1948.

searched the home she was staying in, finding that the motorcycle had been illegally imported and that Win had failed to properly register as a guest within Pakokku as required by the *1907 Cities Act*.

Win was arrested and charged with violating Section 10(3) of the *1907 Cities Act*, which she pled guilty to. She was also charged with violating Section 5(1) of the *1947 Control of Imports and Exports (Temporary) Act*, but she pled not guilty because the motorcycle did not belong to her (she had just been a passenger on it). She was found guilty on both counts and was convicted and sentenced to 7 years and 15 days in prison. While in prison, she was further charged with violating Section 32(a) of the *1996 Television and Video Act*, Section 505(b) of the *Myanmar Penal Code*, and Sections 33(a) and 38 of the *Electronic Transactions Law*. She received the maximum sentence for these crimes and is serving an additional 20 years in a labour prison.

Sithu Zeya was arrested in April 2010 after being found taking photographs of a recently bombed market. Many of his possessions were seized, including a computer, video camera and mp3 player, and he was detained without charges from April 15 to May 4. During this time he alleges he was tortured in a variety of ways, including having the soles of his feet beaten, being hung upside-down, being deprived of food and being forced into stress positions. Under these conditions, he confessed to being a journalist. He also revealed that his father, U Zeya, worked as a video-journalist for DVB.

On 4 May 2010, after confessing, Sithu Zeya was officially charged, and his trial began the following day. Sithu Zeya confessed again in court, admitting to being a video-journalist for the DVB and to having attended journalist training in Thailand. He was tried under the *Burma Immigration Act (Emergency Provisions)*, the *Electronic Transactions Law* and the *Unlawful Associations Act*. On 23 December 2010, Sithu Zeya was sentenced to three years in prison under the *Unlawful Associations Act* and five years under the *Immigration Act*. The charge under the *Electronic Transactions Law* was dropped. The convictions were based entirely upon his confessions, and no additional evidence was presented.

On 26 April 2010, shortly after Sithu Zeya had been detained, police raided U Zeya's house. They confiscated many of his belongings, claiming that they were tools of illegal activity, and bought with money supplied by organisations associated with the National Coalition Government of the Union of Burma, an outlawed political opposition group. U Zeya was arrested on suspicion of being involved in the market bombing that his son had photographed. While he was detained by police, U Zeya alleges that he was drugged, as he experienced a lack of hunger, heightened energy and only urinated three or four times during twenty days of interrogation. U Zeya's email account was searched by the police who found that, among 3000 emails sent from his account, two were sent to organisations associated with outlawed groups. These emails contained photos of public places (they appear to be "stock" photos). U

Zeya remained in jail until his trial, where he pled not guilty to all charges. On 6 February 2011, he was convicted and sentenced to five years in prison on two separate violations of the *Unlawful Associations Act*, one year under the *Immigration Act*, and seven years under the *Electronic Transactions Law*.

Win Maw was arrested on 27 November 2007 and charged with violating the *Burma Immigration Act (Emergency Provisions)* for having crossed the Burmese border without a valid passport. While in custody his apartment was raided by the police. Inside they found and confiscated a number of items including jewellery, photographs of Aung San Suu Kyi, and video and recording equipment. None of the items listed, or any of the items found in his apartment, are illegal in Burma. Based on these items, the police accused him of violating Section 505(b) of the *Myanmar Penal Code*. Win Maw was also accused of having violated the *Electronic Transaction Law* by sending letters to the DVB from an Internet café. Win Maw detained for nearly a year before being convicted in a closed trial held on 11 November 2008. He was sentenced to seven years in prison for violating Section 505(b) of the *Myanmar Penal Code* and the *Burma Immigration Act (Emergency Provisions)*. In March 2009, his sentence was extended for another ten years for violating the *Electronic Transactions Law*, raising his total sentence to 17 years. The 11 months he spent in detention before his trial were not counted against his sentence.

Ngwe Soe Lin (aka Tun Kyaw) was arrested on 26 June 2009 in the Tamwe Township of Yangon for violating Section 33(a) of the *Electronic Transactions Act* by sending video footage to the DVB. He was also charged with violating Section 13(1) of the *Burma Immigration Act (Emergency Provisions)* by secretly leaving and reentering Burma. Ngwe Soe Lin was accused of attending a DVB video editing and journalist training meeting in Moe Sat, Thailand, during March and April of 2008. On 29 June 2009, the Burmese police went to Ngwe Soe Lin's residence and confiscated a video camera, which reportedly contained footage relating to the stoppage of water supplies to Yangon. Following his arrest, Ngwe Soe Lin was detained for seven months at the notorious Insein prison prior to his trial. Soe Lin was tried by the Insein Prison Special Court, and was convicted and sentenced on 27 January 2010 to 13 years in prison. The trial was closed to the public and no court documents have been released.

In each of these cases, routine journalistic behaviour led to charges and conviction. Equally troubling are the harsh sentences imposed for unrelated offences that are trivial or of dubious veracity, such as Hla Hla Win's conviction for import violations because she was a passenger on an unregistered motorcycle, or the use of immigration violations to convict Ngwe Soe Lin, U Zeya, Sithu Zeya and Win Maw for attending DVB training sessions in Thailand. These suggest that these journalists were targeted for particularly harsh treatment as a result of their professional work. As the next section indicates, the authorities' actions in these cases in violation of international law and international human rights standards.

The Centre for Law and Democracy is a non-profit human rights organisation working internationally to provide legal expertise on foundational rights for democracy

Violations of Freedom of Expression

According to international law, any restrictions on the right to freedom of expression may be legitimate only where they meet a three-part test: they must be set out in a clear legal rule, they must pursue a legitimate aim, and they must be necessary in order to protect that aim, which implies that they do not infringe the right to free expression more than is necessary to protect the aim.

All of the cases described here signally fail to meet this test. Section 33(a) of the *Electronic Transaction Act*, under which the journalists were charged, stipulates that any person found using electronic technology to do “any act detrimental to the security of the State, or the prevalence of law and order, or community peace and tranquillity” is punishable by a minimum of seven years imprisonment. Section 38 further extends this penalty to anyone who “attempts to commit” any offence, or “conspires” or “abets” in the commission of any offence under the Act.

The immediate problem with this provision is that it is, in particular as interpreted and applied in these cases, overly broad. The terms “security of the State” and “community peace and tranquillity” are not defined, and the underlying behaviour can be “any act”. As applied in the cases of the five DVB journalists, it is clear that these terms are used to restrict speech far beyond what is legitimate under the UDHR. The maintenance of “community peace and tranquillity” is in any case not a legitimate ground for restricting freedom of expression, since it implies that offensive speech can be censored on the grounds that it may upset people.

This provision, again as applied in these cases, also clearly violates the necessity part of the test. There is simply no demonstrable link between the behaviours found to violate the law (conducting interviews, filming events and so on) and any real risk to legitimate interests such as national security or public order.

These problems recur in the other legislation which was used against the journalists. Section 505(b) of the *Myanmar Penal Code* makes it an offence for any person to “publish or circulate any statement, rumour, or report...with intent to cause or is likely to cause fear or alarm to the public...whereby any person may be compelled to commit an offence against the State or the public tranquillity”. Once again, this law criminalises anything that might upset public tranquillity, and treats as an offence anything that would be likely to give rise to fear or alarm. This is a clear violation of freedom of expression, which protects material that may be offensive, thought-provoking or controversial.

A particular problem in these cases is the use of vagueness and overbreadth in the relevant provisions to facilitate an abusive interpretation which clearly infringes upon the fundamental human rights of these five journalists. As a result, their

convictions were based on a legitimate exercise of their right to free expression, and none of the acts they committed threatened Burma's legitimate national interests.

Other aspects of these cases reinforce the idea that, more than the letter of the laws at issue, their interpretation and implementation constitutes a violation of human rights. The *1996 Television and Video Act* requires "any person who holds or uses a television set or video recorder" to obtain a licence. In some countries, licence fees are charged on the ownership of television sets, for example to support public broadcasting (this is the case in the United Kingdom). However, it is clearly illegitimate to use this provision to target journalists and to prevent them from working, which is exactly what the Burmese government has done in these cases.

Similarly, the convictions under the *Control of Imports and Exports (Temporary) Act* and the *Burma Immigration Act (Emergency Provisions)* represent an abuse of otherwise potentially legitimate laws in order to stifle independent journalism in Burma in violation of the right to free expression. All States exercise some degree of control over their borders, but the fact that these journalists were targeted for having attended media training sessions, were convicted on flimsy evidence, and were then sentenced to extremely lengthy prison terms for what, in most countries, would either simply be legal or at best would be deemed to be minor violations, strongly suggests that the authorities chose to target them as a result of their work. This abuse of process, carried out for the purpose of silencing dissenting voices, is a clear violation of their fundamental human rights.

Other Violations of Human Rights

The *Unlawful Associations Act*, under which Sithu Zeya and U Zeya were charged, is problematic from a human rights perspective. Freedom of association is protected under Article 20 of the UDHR and, like freedom of expression, is widely recognised as being part of customary international law. This law makes it illegal for individuals to contribute or assist in any way in the functioning of any organisation which the President declares (unilaterally and according to his discretion) to be illegal. Granting the President the power to criminalise association at will is not legitimate. The arbitrary nature in which organisations are outlawed, and the fact that DVB was banned for exercising its right to free expression, constitutes a violation of both freedom of expression and freedom of association.

In addition, there are allegations that Sithu Zeya and Win Maw were tortured during their detention. Although Burma has not signed the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (itself a troubling fact), prohibitions on torture are also broadly recognised as having been entrenched in customary international law. If the Burmese authorities did commit the atrocities alleged in these cases, that would be a grave violation of international law.

Conclusion

The treatment of these five journalists by the Burmese authorities constitutes a clear violation of international human rights law. These journalists are prisoners of conscience and their continued imprisonment is unacceptable. In particular, the length of the sentences they received merely for exercising their right to freedom of expression is a matter of very serious concern.

The Centre for Law and Democracy calls on the Burmese government to release all five of these prisoners, as well as all others that have been imprisoned for exercising their right to freedom of expression. We also call on the Burmese authorities to review and amend or repeal legislation restricting freedom of expression as necessary to bring the legal framework into line with international law. Finally, we call on other States to put pressure on the government of Burma to free the men and women held in violation of their human rights.