



February 2020

Myanmar: UN Human Rights Council must act to secure key reforms ahead of 2020 elections

In the year since the Human Rights Council (the Council) adopted Resolution 40/29¹ on the situation of human rights in Myanmar, the space for political discourse and participation in the country has continued to shrink. Ahead of national elections widely expected to be held in November 2020, Myanmar authorities must facilitate the full political participation of all sectors of society, ensuring that individuals may freely express their opinions, even when they are controversial or critical of the government, military or other vested interests.

In the past year, Myanmar authorities have continued to violate the rights to freedom of expression, information, peaceful assembly and association while cracking down on online and offline speech. Under the guise of tackling ‘hate speech,’ Myanmar authorities have expedited efforts to pass so-called ‘anti-hatred’ legislation, which risks aggravating discrimination against religious and ethnic minority groups. Authorities have yet to take meaningful steps to promote the rights of religious or ethnic minorities within the country and to guarantee their full political participation. The ongoing internet shutdown in Rakhine State – affecting nine townships and now entering its ninth month – is one of the longest ever recorded and an egregious violation of the rights to freedom of expression and information. It disproportionately affects some of Myanmar’s most vulnerable minorities and hinders the reporting of human rights violations in an active conflict zone.

The government has arbitrarily applied restrictive legislation to stifle criticism of political leaders and military authorities. Given the judicial harassment of activists, journalists and others, self-censorship will be a key concern during the election period. Restrictive election laws and directives issued by the Union Election Commission are likely to exacerbate this problem.

Against this backdrop, it is imperative that UN Member States support the adoption of a strong resolution on Myanmar that reflects the severity of the ongoing restrictions on civil and political rights in the country. The Council should call on the government to dismantle restrictions on freedom of expression and take immediate and concrete steps to create an enabling environment for free and fair elections.

1. Prosecution of journalists, human rights defenders and others exercising the right to freedom of expression and assembly

In March 2019 the Council called upon the government of Myanmar to ‘safeguard those who report violations and abuses,’ encouraged ‘the Government to amend restrictive laws and to end restrictions on exercising the rights to the freedoms of religion or belief, expression, association and peaceful assembly,’

¹ Human Rights Council, Situation of human rights in Myanmar, UN Doc. A/HRC/RES/40/29, 11 April 2019.

and called for specific legal reforms to ensure compliance with international human rights obligations.² The Council also called for the release of 'journalists, media workers, human rights defenders and activists detained, charged and arrested under these restrictive laws.'³ Myanmar authorities have continued to target those criticising military activities, government policies or the conduct of public officials, however, and have made no efforts to repeal or reform repressive legislation.

In the past year, authorities have increasingly used section 505(a) of the Myanmar Penal Code to target individuals who criticize the military. Section 505(a) prohibits the publication or circulation of statements 'with intent to cause, or which [are] likely to cause, any officer, soldier, sailor or airman, in the Army, Navy or Air Force to mutiny or otherwise disregard or fail in his duty as such.'⁴ In November 2019, the Myanmar military filed charges under section 505(a) of the Penal Code against a prominent lawyer, poet and former military officer for statements on constitutional amendment made in April 2019.⁵ Offences under 505(a) are not bailable⁶ and carry prison sentences of up to two years.

On 29 August 2019, documentary filmmaker and founder of the Human Rights, Human Dignity Film Festival Min Htin Ko Ko Gyi was sentenced to one year's imprisonment under section 505(a) in relation to Facebook posts critical of Myanmar's 2008 Constitution and the role it gives the military in government.⁷ Min Htin Ko Ko Gyi was denied bail during his trial despite suffering from health problems stemming from liver cancer. He was released on 21 February 2020.⁸

The 'incitement' provision contained in section 505(b) of Myanmar's Penal Code has likewise been used to target activists and others expressing critical viewpoints. In the past year, a military critic⁹ and an individual who threw a pair of sandals at a photo of a township court have been convicted under section 505(b).¹⁰

Youth activists have been a favourite target of authorities. In 2019 and 2020, six members of the Peacock Generation thangyat troupe – a satirical performance group – were convicted in four separate cases under section 505(a) of the Penal Code and section 66(d) of the Telecommunications Act in relation to a performance deemed critical of the military. The six are serving sentences of up to three years' imprisonment, and additional charges are pending.¹¹

In February 2019, police fired rubber bullets into a crowd of people protesting the erection of a statue of General Aung San in Loikaw, Kayah State, injuring up to ten people.¹² On 7 November 2019, six Karenni youth activists were convicted under section 10 of the Law Protecting the Privacy and Security of Citizens

² Ibid, para 9.

³ Ibid, para 10.

⁴ San Yamin Aung, 'Military Using Lawsuits to Impede Freedom of Expression: Athan,' *The Irrawaddy*, 2 July 2019, available at: <https://www.irrawaddy.com/news/burma/military-using-lawsuits-impede-freedom-expression-athan.html>.

⁵ Zaw Zaw Htwe, 'Myanmar Court Grants Bail to Lawyer and Poet Sued by Military,' *The Irrawaddy*, 3 February 2020, available at: <https://www.irrawaddy.com/news/burma/myanmar-court-grants-bail-lawyer-poet-sued-military.html>.

⁶ Criminal Procedure Code, Schedule II. Exceptions to this provision are permitted in certain circumstances.

⁷ ARTICLE 19, 'Myanmar: Yangon court convicts prominent filmmaker Min Htin Ko Ko Gyi,' 29 August 2019, available at: <https://www.article19.org/resources/myanmar-yangon-court-convicts-prominent-filmmaker-min-htin-ko-ko-gyi/>.

⁸ Amnesty International, 'Myanmar: Further Information: Filmmaker Released After Serving His Term: Min Htin Ko Ko Gyi,' 21 February 2020, available at: <https://www.amnesty.org/en/documents/asa16/1849/2020/en/>.

⁹ Burma Human Rights Network, 'BHRN Condemns Sentence Against Activist Ko Htin Kyaw,' 3 July 2019, available at: <http://www.bhrn.org.uk/en/press-release/1086-bhrn-condemns-sentence-against-activist-ko-htin-kyaw.html>.

¹⁰ Kyaw Ko Ko, 'Ex-lawyer gets 2 years for throwing slippers,' *The Myanmar Times*, 22 November 2019, available at: <https://www.mmtimes.com/news/ex-lawyer-gets-2-years-throwing-slippers.html>.

¹¹ Amnesty International, 'Myanmar: More 'outrageous' convictions for satire performers,' 17 February 2020, <https://www.amnesty.org/en/latest/news/2020/02/myanmar-more-outrageous-convictions-for-satire-performers/>.

¹² ARTICLE 19, 'Myanmar: End Crackdown on Protesters in Kayah State,' 12 February 2019, available at: <https://www.article19.org/resources/myanmar-end-crackdown-on-protesters-in-kayah-state/>.

and sentenced to six months' imprisonment after the activists alleged that the state government had abused its power in allocating funds for the erection of the statue.¹³

Several more youth and ethnic minority activists have been convicted under the Peaceful Assembly and Peaceful Procession Law. On 2 September 2019, Kachin youth leaders Seng Nu Pan and Paw Lu were convicted under section 19 of the Law for their role in a gathering commemorating the war in northern Myanmar.¹⁴ Paw Lu was later given an additional three-month sentence after he handed the judge a set of broken scales in a symbolic protest.¹⁵ On 2 September 2019, Karen activists Naw Ohn Hla, Saw Albert Cho and Saw Thein Zaw Min were convicted under section 20 of the Law and sentenced to fifteen days' imprisonment for organizing a ceremony commemorating Karen Martyr's Day. The protest location was changed from the location included in their notification and authorities had prohibited the use of the word 'martyr'.¹⁶

The Council must continue to expressly call for the repeal or reform of legislation that impermissibly restricts the rights to freedom of expression, information, peaceful assembly and association, including the Media Law, the Official Secrets Act, the Unlawful Associations Act, the Peaceful Assembly and Peaceful Procession Law, sections 33 and 34(d) of the Electronic Transactions Law, articles 66(d) and 80(c) of the Telecommunications Act, section 8(f) of the Law Protecting the Privacy and Security of Citizens, and articles 124A, 295A, 499-500 and 505 of the Penal Code. The Council must call on the Myanmar authorities to immediately cease all forms of harassment, including arbitrary arrest and detention, of individuals exercising their rights. The Council should also call for the immediate and unconditional release of those detained for the exercise of their rights to freedom of expression and peaceful assembly, including members of the Peacock Generation thangyat troupe.

2. Hate Speech

In March 2019, the Council called on the government of Myanmar to, 'step up without delay action to combat hate speech and incitement to violence and hatred',¹⁷ and in its September 2019 session, called on Myanmar to adopt anti-'hate speech' legislation.¹⁸ However, the draft 'anti-hatred' legislation being developed by the Myanmar government is incompatible with international human rights law and could exacerbate discrimination and marginalisation.

In January 2020, the Ministry of Foreign Affairs announced that it would expedite passage of the draft law as part of its efforts to combat discrimination.¹⁹ The proposed legislation relies primarily on criminal measures to curtail speech and fails to incorporate important positive policy measures, including those set

¹³ Zaw Zaw Htwe, 'Karenni Activists Who Were Jailed Over Myanmar's Gen Aung San Statue Dispute Freed,' *The Irrawaddy*, 13 December 2019, available at: <https://www.irrawaddy.com/news/burma/karenni-activists-jailed-myanmars-gen-aung-san-stature-dispute-freed.html>.

¹⁴ ARTICLE 19, 'Myanmar: Kachin Youth Leaders face Imprisonment for Commemoration of War Anniversary,' 30 August 2019, available at: <https://www.article19.org/resources/myanmar-kachin-youth-leaders-face-imprisonment-for-commemoration-of-war-anniversary/>.

¹⁵ 'Kachin Peace Activist's Jail Term Extended After Myitkyina Courtroom Protest,' *BNI Online*, 13 September 2019, available at: <https://www.bnionline.net/en/news/kachin-peace-activists-jail-term-extended-after-myitkyina-courtroom-protest>.

¹⁶ Naw Betty Han, 'Activists Protest After Three Sentenced for Karen Martyr's Day Ceremony,' *Frontier Myanmar*, 3 October 2019, available at: <https://frontiermyanmar.net/en/activists-protest-after-three-sentenced-for-karen-martyrs-day-ceremony>.

¹⁷ Human Rights Council, Situation of human rights in Myanmar, UN Doc. A/HRC/RES/40/29, 11 April 2019, para 10.

¹⁸ Human Rights Council, Situation of human rights in Myanmar, UN Doc. A/HRC/RES/42/3, 3 October 2019, para 7.

¹⁹ The Republic of the Union of Myanmar, Ministry of Foreign Affairs, 'Rakhine State: A Snapshot of Myanmar's current efforts for peace and reconciliation,' available at: <https://www.mofa.gov.mm/rakhine-state-a-snapshot-of-myanmars-current-efforts-for-peace-and-reconciliation/>.

out in Human Rights Council Resolution 16/18 and the Rabat Plan of Action.²⁰ The draft legislation contains an overly broad-definition of 'hatred' that includes any form of expression that may cause 'conflict' or 'dissension' between individuals or groups of people on the basis of a range of characteristics including, among others, race, religion and political views. Any expression of 'hatred,' so defined, may be prosecuted without regard for the intention of the speaker or the severity of the harm caused or likely to be caused. The draft legislation establishes penalties of up to one year's imprisonment, a fine or both for first time offenders and up to three year's imprisonment, a fine or both for repeat offenders.²¹ If passed, the vague criminal provision contained in the law could easily be applied in an arbitrary manner.

Viewed in the context of the raft of recent prosecutions against political and military critics, there is cause for concern that the proposed legislation would be used to target legitimate political speech rather than speech that must be prohibited under international law. As described above, authorities frequently target political and youth activists with the 'incitement' provisions already contained in Myanmar's Penal Code. At the same time, Myanmar has failed to act against those alleged to be most responsible for inciting violence and discrimination on the basis of race and religion. For example, government officials charged ultranationalist monk U Wirathu, whose preaching tours were linked by the UN Fact-Finding Mission to attacks against Muslims,²² with sedition for his comments critical of the government rather than thoroughly investigating his potential role in inciting violence.²³ The government has further failed to specifically criminalise direct and public incitement to commit genocide.²⁴

Not only has the government failed to effectively address racial and religious animus, its actions have aggravated hatred and discrimination. Officials continue to refuse to use the word 'Rohingya,' instead disparagingly referring to the group as 'Bengalis,' or simply as 'Muslims.'²⁵ In November 2019, a commissioner of the Myanmar National Human Rights Commission said that the Commission had found no evidence of human rights violations against 'Bengalis' in Rakhine State.²⁶ He further stated that 'Bengalis only killed and troubled our ethnic groups,' contradicting extensive reporting by human rights groups, journalists and the UN-mandated Independent International Fact-Finding Mission.

The government of Myanmar should focus its efforts on addressing the root causes of discrimination, including its own role in disseminating harmful narratives. To this end, it should adopt a national action plan to implement Human Rights Council Resolution 16/18 and the Rabat Plan of Action.

The Council should express concern that the draft anti-'hatred' law fails to comply with international law and standards, and emphasize that any measures criminalizing 'hate speech' or 'hatred' must be in line with international standards, including Human Rights Council Resolution 16/18 on combating intolerance, negative stereotyping and stigmatization of, and discrimination, incitement to violence and violence against, persons based on religion or belief and the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to

²⁰ ARTICLE 19, 'Myanmar Briefing Paper: Countering "Hate Speech",' 4 February 2020, available at: <https://www.article19.org/resources/myanmar-briefing-paper-countering-hate-speech/>.

²¹ Ibid.

²² Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, UN Doc A/HRC/39/CRP.2, 17 September 2018, paras 742 and 1325-1326.

²³ 'Arrest warrant issued for Myanmar firebrand monk Wirathu,' *AFP*, 29 May 2019, available at: <https://frontiermyanmar.net/en/arrest-warrant-issued-for-myanmar-firebrand-monk-wirathu>.

²⁴ State parties to the Genocide Convention have an obligation to make punishable direct and public incitement to commit genocide. Genocide Convention, article 3.

²⁵ International Court of Justice, Public sitting held on Wednesday 11 December 2019, at 10 a.m., at the Peace Palace, President Yusuf presiding, in the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Verbatim Record, available at: <https://www.icj-cij.org/files/case-related/178/178-20191211-ORA-01-00-BI.pdf>.

²⁶ 'No evidence that military violated human rights of Bengalis: MNHRC,' *Eleven*, 16 November 2019, <https://elevenmyanmar.com/news/no-evidence-that-military-violated-human-rights-of-bengalis-mnhrc>.

discrimination, hostility or violence, and call upon the government of Myanmar to adopt a national action plan to address the root causes of discrimination in line with these standards.

3. Internet Shutdown in Rakhine State

In September 2019, the Council called on the government of Myanmar to restore internet access to Rakhine State and to repeal section 77 of the Telecommunications Law.²⁷

On 20 June 2019, Myanmar's Ministry of Transport and Communications ('MOTC') ordered mobile phone operators to 'stop mobile internet traffic' in nine townships in Rakhine State and Chin State due to 'disturbances of peace and use of internet services to coordinate illegal activities.' In doing so, the MOTC cited its authority to suspend services in 'emergency situations' under section 77 of the Telecommunications Law. In September, the MOTC lifted the ban in five townships. However, on 3 February 2020, the ban was re-imposed in those townships for a period of three months, with the possibility of extension.²⁸

The Council has repeatedly condemned measures that deliberately disrupt access to or dissemination of information online, and called on States to refrain from such practices.²⁹ The Special Rapporteur on the situation of human rights in Myanmar called on the government of Myanmar to 'reverse its decision to impose the mobile internet ban,' citing humanitarian concerns.³⁰

Advocates have raised alarm that the shutdown inhibits dissemination of information relating to safety and security, prevents civilians from contacting one another in case of an emergency, impedes access to healthcare, impedes the operations of organisations working and delivering aid in rural areas, and frustrates attempts to document ongoing human rights abuses.³¹ A report released in January 2020 estimates that the shutdown has cost the Myanmar economy USD 75.2 million.³²

In the wake of the internet shutdown being re-imposed in the five additional townships in Rakhine and Chin States, activists reiterated that the shutdown has prevented the international community from receiving information about ongoing human rights abuses at a time when conflict in Rakhine State is escalating.³³ Others criticized it as a direct violation of the provisional measures ordered by the International Court of Justice.³⁴ Four UN experts voiced their concern over human rights violations amid the internet shutdown.³⁵

The extended nature of the shutdown is significant in the lead-up to the elections. Those impacted may have difficulty accessing information about candidates and polling procedures or may be excluded from the elections entirely.

²⁷ Human Rights Council, Situation of human rights in Myanmar, UN Doc. A/HRC/RES/42/3, 3 October 2019, para 9.

²⁸ Thompson Chau, 'Govt doubles down on internet shutdown in western Myanmar,' *The Myanmar Times*, 3 February 2020, available at: <https://www.mmtimes.com/news/govt-doubles-down-internet-shutdown-western-myanmar.html>.

²⁹ Human Rights Council, 'The promotion, protection and enjoyment of human rights on the Internet,' UN Doc A/HRC/32/L.20, 27 June 2016, paras 10.

³⁰ Office of the UN High Commissioner for Human Rights, 'Myanmar: UN expert 'fears for civilians' after Internet shutdown,' available at:

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24733&LangID=E>.

³¹ ARTICLE 19, 'Briefing Paper: Myanmar's Internet Shutdown in Rakhine and Chin States,' 2 August 2019, available at: <https://www.article19.org/resources/briefing-myanmars-internet-shutdown-in-rakhine-and-chin-states/>.

³² Samuel Woodhams and Simon Migliano, 'The Global Cost of Internet Shutdowns in 2019,' 7 January 2020, available at: <https://www.top10vpn.com/cost-of-internet-shutdowns/>.

³³ ARTICLE 19, et al, 'Myanmar: Lift Internet Restrictions in Rakhine and Chin States,' 13 February 2020, <https://www.article19.org/resources/myanmar-lift-internet-restrictions-in-rakhine-and-chin-states/>.

³⁴ 'Myanmar Reimposes Internet Ban in Rakhine And Chin Townships,' *Radio Free Asia*, 4 February 2020, <https://www.rfa.org/english/news/myanmar/myanmar-reimposes-internet-ban-02042020164134.html>.

³⁵ Office of the UN High Commissioner for Human Rights, 'UN experts concerned at surge in civilian casualties in northwest Myanmar after internet shutdown,' 18 February 2020, available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25572&LangID=E>.

The Council should again call on the government of Myanmar to immediately restore internet access in Rakhine State and repeal Article 77 of the Telecommunications Law, and should urge the government to refrain from all measures that intentionally prevent or disrupt access to or dissemination of information online in violation of international human rights law.

4. Election Law

Myanmar's legal framework contains several flawed provisions that restrict the right to freedom of expression of political parties and candidates.

Myanmar's 2008 Constitution requires political parties to be 'loyal' to the state and prohibits them from abusing religion for political purposes.³⁶ The near-identical Amyotha Hluttaw Election Law, Pyithu Hluttaw Election Law, and Regional and State Election Law contain vague language that prohibits abuse of race and religion for political gains. Some provisions result in disqualification of candidates, while others, such as a provision prohibiting 'uttering, making speeches, making declarations and instigating to vote or not to vote on grounds of race and religion or by abetment of such acts' can result in imprisonment for up to year or a fine or both.³⁷ Given the large number of prosecutions under other criminal laws of individuals expressing opinions critical of the government or military, these provisions open the door to abuse against ethnic or religious minorities.

In previous elections, the Union Election Commission ('UEC') has enacted measures that facilitate the censorship of political parties and political candidates. In advance of the 2015 general elections, for example, the UEC required all political parties appearing on state-owned television to submit their speeches to the UEC and Ministry of Information in advance, and to refrain from criticising the military or encouraging protests against the government.³⁸ It prohibited a range of actions including "hate speech" which can harm rival parties' or candidates' dignity.³⁹ Political candidates were also required to seek UEC permission before campaigning on private media.⁴⁰ In 2017, the UEC reportedly required political parties to submit any press statements to the UEC prior to publication after several parties had issued statements critical of the National League for Democracy's handling of the situation in Rakhine State.⁴¹ In its follow-up mission the EU Election Observation Mission recommended amendment of Directive 1/2014 to remove requirements of prior campaign message approval.⁴² These measures amount to prior censorship, and given the importance of free political debate in the context of elections, should be lifted immediately.

The Council should urge the government of Myanmar to reform its legal framework to comply with international law ahead of the 2020 elections, including by amending sections 10(i) and 58(c) of the Amyotha Hluttaw Election Law, Pyithu Hluttaw Election Law and Regional and State Election Law, as well as any other measures restricting freedom of expression in the context of the elections. The Council should call upon the Union Election Commission to refrain from introducing any new measures that require political candidates and parties to seek prior approval of campaign communications or materials.

³⁶ The Constitution of the Republic of the Union of Myanmar, 2008, section 407(d).

³⁷ Amyotha Hluttaw Election Law, 2010, sections 10(i), 58(c); Pyithu Hluttaw Election Law, 2010, sections 10(i), 58(c); Regional and State Election Law, 2010, sections 10(i), 58(c).

³⁸ The Republic of the Union of Myanmar, Union Election Commission, Notification No. 52/2015, 2015 August 27. See also, The Carter Center, 'Observing Myanmar's 2015 General Elections; Final Report,' available at: https://www.cartercenter.org/resources/pdfs/news/peace_publications/election_reports/myanmar-2015-final.pdf.

³⁹ ARTICLE 19, 'Myanmar Briefing Paper: Criminalisation of Free Expression,' May 2019, <https://www.article19.org/wp-content/uploads/2019/06/2019.06.6-A19-Criminalisation-of-Free-Expression-final.pdf>.

⁴⁰ The Republic of the Union of Myanmar, Union Election Commission, Directive 1/2014.

⁴¹ Naw Betty Han, 'Parties fear new rule will restrict them,' *The Myanmar Times*, 7 November 2017, available at: <https://www.mmtimes.com/news/parties-fear-new-rule-will-restrict-them.html>.

⁴² European Union Election, "Follow-up Mission, Republic of the Union of Myanmar, Final Report," April 2019, available at: https://eeas.europa.eu/sites/eeas/files/efm_myanmar_2019_-_final_report_english.pdf.