



The Trial of the Peacock Generation Troupe: Myanmar

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TRIALWATCH FAIRNESS REPORT
A CLOONEY FOUNDATION **FOR** JUSTICE INITIATIVE

ABOUT THE AUTHOR

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ABOUT THE CLOONEY FOUNDATION FOR JUSTICE'S TRIALWATCH INITIATIVE

The **Clooney Foundation for Justice's TrialWatch initiative** monitors and grades the fairness of trials of vulnerable people around the world, including journalists, women and girls, religious minorities, LGBTQ persons, and human rights defenders. Using this data, TrialWatch advocates for victims and is developing a Global Justice Ranking measuring national courts' compliance with international human rights standards.

The legal assessment and conclusions expressed in this report are those of the author and not necessarily those of the Clooney Foundation for Justice.

EXECUTIVE SUMMARY



Leila Sadat, James Carr Professor of International Criminal Law at Washington University School of Law and member of the TrialWatch Experts Panel, assigned this trial a grade of D:

The prosecution violated the accused's right to freedom of expression, and the evidence adduced showed that six of the seven accused were convicted of a crime they did not commit. The proceedings were marred by the judge's lack of impartiality, intimidation by the police, and mistreatment of the accused, who were imprisoned and handcuffed during the trial. The trial appeared to be a form of political persecution or harassment.

Because a review of the trial monitors' notes and the record show that these violations affected the outcome and resulted in significant harm to the defendants, in particular the sentence of all but one of the defendants to one year of imprisonment with hard labor, the trial has been assigned a "D" under the grading methodology described in the Annex. Further, due to the evidently improper motives of the proceedings, the trial barely merits a D and is close to an F.

From June to November 2019, the Clooney Foundation for Justice's TrialWatch initiative monitored the criminal trial of members of the Peacock Generation troupe in Myanmar. Six out of seven of the accused were convicted and sentenced to jail time. The proceedings were marred by serious fair trial violations and constituted a violation of the right to freedom of expression. Exacerbating these violations, the accused are facing additional criminal proceedings on the basis of the same charges and same underlying conduct in courts throughout the country.

The Peacock Generation troupe performs *thangyat*, a traditional form of slam poetry that functions as social criticism. In April 2019, Peacock Generation performed *thangyat* in Yangon's Botataung Township as part of a celebration for the Burmese New Year Festival. During the performance, the troupe donned military regalia, made jokes about the military, and criticized the military's role in politics. Videos of the performance were livestreamed to Facebook.

Subsequently, a lieutenant who had viewed the performance online filed a complaint under Section 505(a) of the Myanmar Criminal Code, which proscribes making statements "with intent to cause, or which is 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." Seven members of the troupe were criminally charged on this basis and all were detained without bail in Insein Prison pending trial.

As is true of complaints initiated by the military, the law officer (state prosecutor) took the case forward. The proceedings before the Botataung Township Court began on June 3, 2019 and concluded on November 18, 2019 with the conviction of six of the accused and the acquittal of one of the accused. The court imposed a sentence of one year of imprisonment with hard labor on each individual convicted.

As one of the early members of the UN, Myanmar voted in favor of the Universal Declaration of Human Rights (UDHR), adopted by the UN General Assembly in 1948. The UDHR provides for the right to a fair trial. While the UDHR is not formally binding, many of its provisions - including components of the right to a fair trial - are widely considered part of customary international law, with which all states are required to comply. And although Myanmar has yet to ratify the International Covenant on Civil and Political Rights (ICCPR), that treaty also reflects customary international law on due process and the right to a fair trial. The present report thereby draws on both the ICCPR and UDHR to assess the case against the Peacock Generation troupe.

At the pretrial stage, the defendants were unjustifiably detained. The UDHR and the ICCPR reflect the right to be free from arbitrary detention. As articulated by the UN Human Rights Committee, this right requires courts to undertake an individualized assessment of the necessity of pretrial detention, which should *always* be an exceptional measure. In the current case, because Section 505(a) offenses are classified as non-bailable, the accused were denied individualized judicial review and were automatically detained - in contravention of the presumption of pretrial release.

Once the trial began, violations and concerns persisted. On at least one occasion the authorities obstructed public entry into the courtroom and denied the media access. This conduct was inconsistent with international standards regarding the right to a public hearing. Further, the accused were presented to the court in shackles, violating the presumption of innocence - reflected in the UDHR and ICCPR. Throughout the trial, it was not uncommon for there to be upwards of 50 police officers guarding the courtroom and court building, seemingly a means of intimidation.

Troublingly, the conviction of the accused appeared a foregone conclusion. The presiding judge repeatedly posed leading questions to the defendants, implying - or at times, asserting - that they had violated Section 505(a). Such conduct raised concerns that the court was biased, contravening the right to an independent and impartial tribunal - another core fair trial right reflected in the UDHR and ICCPR.

Beyond fair trial issues, the authorities violated the accused's right to freedom of expression. In accordance with international standards, restrictions on the right to freedom of expression must, as described by the UN Human Rights Committee, (i) be prescribed by law, (ii) serve a legitimate objective, and (iii) be necessary to achieve and proportionate to that objective. Speech that contributes to public dialogue is worthy of the highest level of protection, as is speech that constitutes artistic expression.

Even assuming that the proceedings against the troupe possessed the legitimate objective of maintaining public order or protecting national security, the authorities failed to meet the necessity and proportionality standards. The troupe's criminal prosecution was not the least intrusive instrument available and was thus unnecessary to achieve the potential objective of safeguarding public order or security. The lack of any pressing imperative was highlighted by the complainant's inability to produce evidence that the performance had negatively impacted the military. Likewise, the use of criminal proceedings and the subsequent imposition of prison sentences was disproportionate to the dubious gains achieved, if any, particularly when balanced against the high value of the speech at issue. Given that the performance was both art and situated within a public debate on the military's role in politics, it merited heightened protection.

More broadly, international bodies have made clear that imprisonment for speech offenses should be reserved for exceptionally grave acts, such as incitement to genocide and terrorism.¹ Section 505(a)'s expansive criminalization of speech and provision for custodial sentences thus raises serious concerns. Affording the judiciary unfettered discretion to jail individuals for speech perceived as damaging to the military will chill public debate and criticism.

Indeed, the Peacock Generation's conviction by the Botataung Township Court is just a small piece of a broader pattern of harassment. At the very end of the trial under Section 505(a), the accused were separately charged with violating Section 66(d) of the Telecommunications Law - despite the fact that these charges should have been joined to the original trial. The accused were then subjected to a second trial pursuant to Section 66(d). Three out of the seven were convicted. Meanwhile, members of the troupe have been convicted of the same charges on the basis of similar *thangyat* performances by two additional township courts. Proceedings against troupe members are still pending before several other courts. This barrage of criminal trials sends a message not just to the Peacock Generation troupe but also to the rest of society: Do not speak out.

¹ See U.N. General Assembly, Promotion and Protection of the Right to Freedom of Opinion and Expression, Sixty Sixth Session, U.N. Doc. A/66/290, August 10, 2011, para. 40.

BACKGROUND INFORMATION



A. POLITICAL AND LEGAL CONTEXT

The trial of the Peacock Generation troupe is emblematic of the deterioration of freedom of expression in Myanmar.

Freedom of Expression

In the 2015 democratic elections in Myanmar, Aung San Suu Kyi's National League for Democracy (NLD) party won a majority of seats in the legislature, with the result that Ms. Suu Kyi assumed the role of State Counsellor - equivalent to a Prime Minister - in 2016. Although the historic elections heralded the passage from military rule to nascent democracy, Freedom House and others have reported continued attacks on dissent.² Human Rights Watch, for example, noted a severe decline in freedom of expression in 2019, with over 250 Burmese citizens "fac[ing] lawsuits under various rights-restricting laws."³

The most recent U.S. State Department Human Rights Report likewise raised concerns regarding freedom of expression, stating that the Burmese government had used "charges of defamation, incitement, protesting without a permit, or violating national security laws" as tools to intimidate, arrest, detain, prosecute, and incarcerate those who expressed "political opinions critical of the government and the military."⁴ According to the UN Special Rapporteur on the situation of human rights in Myanmar, there were reportedly 647 political prisoners in Myanmar as of January 2020.⁵ Notably, Freedom House's 2020 assessment of countries' respect for political rights and civil liberties categorized Myanmar as "Not Free": by contrast, Myanmar was listed as "Partly Free" in 2019.⁶

Many of the cases brought against dissenting voices mirror the proceedings brought against the Peacock Generation troupe. In 2018, for example, eight students were

² Freedom House, "Unyielding Attacks on Free Speech in Myanmar Signal a Transition in Peril", June 17, 2019. Available at <https://freedomhouse.org/article/unyielding-attacks-free-speech-myanmar-signal-transition-peril>; Foreign Policy, "Myanmar Has Blazed a Path to Democracy Without Rights", January 16, 2020. Available at <https://foreignpolicy.com/2020/01/16/myanmar-democracy-rohingya/>; Reuters, "Human Rights Watch says Myanmar government using 'abusive laws' to punish critics", January 31, 2019. Available at <https://www.reuters.com/article/us-myanmar-journalists-rights/human-rights-watch-says-myanmar-government-using-abusive-laws-to-punish-critics-idUSKCN1PQ3L9>.

³ Human Rights Watch, "World Report 2020: Myanmar (Burma)", 2020, pg. 413. Available at https://www.hrw.org/sites/default/files/world_report_download/hrw_world_report_2020_0.pdf.

⁴ U.S. Department of State, "2019 Country Reports on Human Rights Practices: Burma", March 11, 2020, pg. 16. Available at <https://www.state.gov/reports/2019-country-reports-on-human-rights-practices/burma/>. See also U.N. General Assembly, "Report of the Special Rapporteur on the situation of human rights in Myanmar", U.N. Doc. A/HRC/74/342, August 30, 2019, pgs. 7-8.

⁵ U.N. General Assembly, "Report of the Special Rapporteur on the situation of human rights in Myanmar" (advanced unedited version), U.N. Doc A/HRC/43/59, March 4, 2020, para. 15.

⁶ Freedom House, "Freedom in the World 2020: Myanmar". Available at <https://freedomhouse.org/country/myanmar/freedom-world/2020>.

convicted of defamation for writing and performing a satirical play critiquing the military.⁷ According to local freedom of expression group Athan, military officials in Myanmar have filed at least 47 defamation suits since Aung San Suu Kyi's NLD assumed power.⁸ Moreover, artists have repeatedly come under attack, as evidenced by the aforementioned case of the eight students and the case of filmmaker Min Htin Ko Ko Gyi, discussed below.

As part of this crackdown, the authorities have increasingly deployed Section 505(a) of the Criminal Code, which proscribes making statements “with intent to cause, or which is 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,” and Section 66(d) of the Telecommunications Act, which provides that “anyone found guilty of extorting, coercing, restraining wrongfully, defaming, disturbing, causing undue influence or threatening any person by using any telecommunications network shall be punished with a maximum three years in prison, a fine or both.”⁹

In 2019, 11 lawsuits comprising over 50 accused were filed under Section 505, including a suit that resulted in the conviction of filmmaker Min Htin Ko Ko Gyi for Facebook posts criticizing the military.¹⁰ Correspondingly, local group Athan reported that approximately half of the charges filed against media outlets and journalists in 2019 were brought pursuant to Section 66(d).¹¹ Noting that “[j]ournalists, activists and others continue to face charges and convictions under laws that criminalise legitimate expression and democratic activity,” the UN Special Rapporteur on the situation of human rights in Myanmar recently urged the legislature to revise the Telecommunications Law.¹²

Fair Trial Rights

As described below, international and local bodies have concluded that fair trial rights are often not respected in Myanmar.¹³ The most recent U.S. State Department human rights

⁷ Human Rights Watch, “Dashed Hopes: The Criminalization of Peaceful Expression in Myanmar”, February 2019, pgs. 27-28. Available at https://reliefweb.int/sites/reliefweb.int/files/resources/myanmar0119_web2.pdf.

⁸ Radio Free Asia, “Myanmar Files Nearly 50 Lawsuits Against Critics in Last Four Years, Watchdog Group Says”, January 7, 2020. Available at <https://www.rfa.org/english/news/myanmar/myanmar-military-files-nearly-50-lawsuits-01072020171805.html>. Pursuant to Myanmar’s Criminal Procedure Code, private parties - including military officials - may file criminal complaints.

⁹ Burma Campaign UK, “Section 66d Telecommunications Law”. Available at <https://burmacampaign.org.uk/take-action/free-political-prisoners/section-66-d-of-the-telecommunications-law/>; Human Rights Watch, “Dashed Hopes: The Criminalization of Peaceful Expression in Myanmar”, February 2019, pgs. 3-4; Human Rights Watch, “World Report 2020: Myanmar (Burma)”, 2020, pgs. 413-415.

¹⁰ Human Rights Watch, “World Report 2020: Myanmar (Burma)”, 2020, pg. 415.

¹¹ *Id.* at pg. 413. See also Human Rights Watch, “Burma: Repeal Section 66(d) of the 2013 Telecommunications Law”, June 29, 2017. Available at <https://www.hrw.org/news/2017/06/29/burma-repeal-section-66d-2013-telecommunications-law>.

¹² U.N. General Assembly, “Report of the Special Rapporteur on the situation of human rights in Myanmar” (advanced unedited version), U.N. Doc A/HRC/43/59, March 4, 2020, para. 10.

¹³ See U.S. State Department, “2019 Country Reports on Human Rights: Burma,” March 11, 2020, pgs. 8-9.

report found the judiciary to be susceptible to bribery and government influence.¹⁴ In the Department's words: "the government manipulated the courts for political ends."¹⁵ A 2016 report by the International Commission of Jurists similarly stated: "[d]epending on the nature of the case, judges often render decisions based on orders coming from government officials, in particular local and regional authorities."¹⁶ Judicial independence is undermined by executive control over the appointment of judges and a lack of transparency regarding judicial selection and promotion.¹⁷

Local organization Justice Base has documented cases in which judges explicitly "predetermined the outcome," asserting that the accused was guilty prior to the defense's presentation of evidence.¹⁸ Further abuses chronicled by Justice Base include violation of the right to counsel, with courts preventing lawyers from privately consulting with their clients; violation of the right to call and examine witnesses, with courts rushing defense counsel through questioning; and prolonged, unreasonable delays, with courts ordering an excessive number of adjournments.¹⁹

Additionally, Burmese legislation permits courts to force defendants to take the stand and answer questions posed by judges (called testifying "as an accused"), even if the accused declines to give evidence as a witness and thereby declines to be subjected to cross-examination.²⁰ The court is permitted to draw adverse inferences if a defendant chooses not to testify as a witness.²¹ As assessed by the International Bar Association's Human Rights Institute, this practice is inconsistent with the privilege against self-incrimination.²²

In light of the above, the UN Special Rapporteur on the situation of the human rights in Myanmar has called upon the government to "engage all actors in the justice sector to

¹⁴ *Id.*

¹⁵ *Id.* at pg. 8.

¹⁶ International Commission of Jurists, Handbook on Habeas Corpus in Myanmar, May 2016, pg. 20. Available at

<https://www.myjusticemyanmar.org/sites/default/files/ICJHandbook%20on%20Habeas%20Corpus%20in%20Myanmar.pdf>.

¹⁷ See International Commission of Jurists, "Myanmar: Appointment and Promotion of Judges; Security of Tenure", March 18, 2014. Available at <https://www.icj.org/cijlcountryprofiles/myanmar-introduction/judges/appointment-and-promotion-of-judges-security-of-tenure/>.

¹⁸ Justice Base, "Monitoring Myanmar: An Analysis of Myanmar's Compliance with Fair Trial Rights", October 2017, pgs. 17-18. Available at <https://www.burmalibrary.org/sites/burmalibrary.org/files/obl/docs24/Justice-Base-Monitoring-in-Myanmar-en-red.pdf>.

¹⁹ *Id.* at pgs. 11-12, 14.

²⁰ IBAHRI, "The murder of U Ko Ni – IBAHRI report details fair trial concerns in Myanmar", July 4, 2019, pgs. 28-29. Available at <https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=c92a7ec7-0e02-48c7-b017-8aee9a095f0c>.

²¹ *Id.*

²² See *id.* at pgs. 6, 43.

undertake meaningful reforms to improve the independence of the judiciary and fair trial rights for all.”²³ The Peacock Generation case unfolded against this backdrop.

B. CASE HISTORY

The Peacock Generation troupe is a Burmese performance group that satirizes contemporaneous trends through *thangyat*:²⁴ a traditional form of slam poetry that “has long been a vehicle for humorous criticism of everything from politics to social behavior.”²⁵ In April 2019, the Peacock Generation performed *thangyat* in Yangon’s Botataung township as part of a celebration for Myanmar’s New Year holiday. During the performance, the troupe donned military regalia and made jokes about the military (known as the Tatmadaw): in particular, the troupe derided the military’s outsized role within the legislature, emphasizing the necessity of constitutional reform, and discussed the potential of prosecutions before the International Criminal Court.²⁶ Members of the troupe livestreamed the show on various social media platforms.

After a military officer viewed the performance on Facebook and filed a complaint with the police,²⁷ the Botataung Township Court accepted charges against seven troupe members under Section 505(a) of the criminal code, which proscribes making statements “with intent to cause, or which is 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.” Between April 2019 and May 2019, the authorities arrested members of the troupe. All seven were detained without bail pending trial.

The proceedings began before the Botataung Township Court on June 3, 2019. The law officer (state prosecutor) took the case forward in terms of questioning witnesses, presenting evidence, and making arguments, as is practice in Myanmar. Although the prosecutor handled such tasks, the case was brought by the complainant and prosecuted in the complainant’s name: the report will thereby refer to witnesses supporting the complaint as witnesses for the complainant; to the presentation of evidence in support of the complaint as the complainant’s presentation of evidence; and to the case as a whole as the complainant’s case. Over 10 hearings from June 3, 2019, the complainant and five witnesses for the complainant testified and the defense conducted cross-examination. Over 3 hearings from October 7 to October 21, the seven defendants were questioned by the court (testifying as accused).

²³ U.N. General Assembly, “Report of the Special Rapporteur on the situation of human rights in Myanmar”, U.N. Doc. A/HRC/74/342, August 30, 2019, pg. 19.

²⁴ Radio Free Asia, “Another Myanmar Satirical Poetry Performer Arrested for Mocking Military”, April 19, 2019. Available at <https://www.rfa.org/english/news/myanmar/another-myanmar-satirical-poetry-performer-04192019173106.html>.

²⁵ Human Rights Watch, “Myanmar: Surge in Arrests for Critical Speech”, April 26, 2019. Available at <https://www.hrw.org/news/2019/04/26/myanmar-surge-arrests-critical-speech>.

²⁶ See Monitor’s Notes, June 17, 2019; Judgement, Botataung Township Court, November 18, 2019, pg. 2.

²⁷ *Id.*

On November 4, 2019, the day that the defense gave its closing arguments, the court informed the defense that charges had been brought against the accused under Section 66(d) of the Telecommunications Law - the result of a complaint filed by the military.²⁸

On November 18, 2019, the trial concluded with the conviction of six of the accused and the acquittal of one of the accused.²⁹ The court imposed a sentence of one year with hard labour on each individual convicted.³⁰ The Section 66(d) proceedings began on December 9, 2019 and concluded on February 17, 2020 with the conviction of three members of the group and the acquittal of four.³¹

The troupe is facing/has faced the same charges before other township courts on the basis of similar satirical performances and corresponding complaints filed by the military. In late 2019, members of the troupe were convicted of violating Section 505(a) and Section 66(d) by the Mayangon Township Court in Yangon for a performance in that township.³² In June 2020, three members of the troupe were convicted under Section 505(a) by the Maubin Township Court in Ayeyarwady Region for a performance in that township.³³ Additional Section 505(a) and Section 66(d) charges are pending before several other township courts.³⁴

²⁸ Monitor's Notes, November 4, 2019.

²⁹ Monitor's Notes, November 18, 2019; Judgment, Botataung Township Court, November 18, 2019.

³⁰ Id.

³¹ Amnesty International, "Myanmar: More Outrageous Convictions for Satire Performers", February 17, 2020. Available at <https://www.amnesty.org/en/latest/news/2020/02/myanmar-more-outrageous-convictions-for-satire-performers/>.

³² Id.

³³ The Irrawaddy, "Satirical Troupe Face Extra Prison Terms for Ridiculing Myanmar's Military", June 11, 2020. Available at <https://www.irrawaddy.com/news/burma/satirical-troupe-face-extra-prison-terms-ridiculing-myanmars-military.html>.

³⁴ Id. See also Radio Free Asia, "Myanmar Political Prisoners Get No Love From Aung San Suu Kyi Four Years On", June 17, 2020. Available at <https://www.rfa.org/english/news/myanmar/political-prisoners-06172020171244.html>.

METHODOLOGY



A. THE MONITORING PHASE

The TrialWatch initiative deployed several monitors to the trial of the Peacock Generation troupe before the Botataung Township Court in Yangon. The monitors spoke Burmese and were able to follow the proceedings. They did not experience any impediments in entering the courtroom and were present for the entirety of the trial, which lasted from June 3, 2019 to November 18, 2019. The monitors used the CFJ TrialWatch App to record and track what transpired in court and the degree to which the defendants' fair trial rights were respected.

B. THE ASSESSMENT PHASE

To evaluate the trial's fairness and arrive at a grade, TrialWatch Expert Leila Sadat reviewed notes taken during the proceedings, CFJ TrialWatch App responses, and court documents. Professor Sadat found that in addition to the free speech violations at the core of the government's case, the trial violated the fundamental rights of the accused. Although the court at times appeared to follow the requisite procedures to protect the defendants, as a general matter the proceedings were characterized by arbitrary treatment of the accused as well as intimidation of the accused, their lawyers, and their supporters. Barbed wire barriers were placed outside the court. There were often as many as 50 police present, with some guarding the courtroom and others present inside; and Special Branch officers (police intelligence) and members of the Ma Ba Tha nationalist group were present in significant numbers.³⁵

Conversely, especially at the outset, there was little room in court for the accused's family members and supporters. Although public access improved with time, the number of police in attendance remained extremely high. The accused were handcuffed throughout the hearings and at times handcuffed during their "lunch breaks"³⁶ as well as during bathroom breaks. There were frequent adjournments. On one occasion, the judge did not show up to a hearing, necessitating yet another adjournment.³⁷ On another occasion there was confusion about the time of the hearing and the accused were brought in late.

From June 3 until September 16, in 10 separate sessions, the judge heard only from the witnesses for the complainant. No evidence supporting the accused was introduced, although defense counsel was permitted to question the complainant and the complainant's witnesses. Defense counsel noted many irregularities with the evidence produced by the complainant, whose case was largely based upon military officers watching the performance on Facebook, not witnessing it first-hand. Although one witness

³⁵ Monitor's Notes, June 3, 2019; Monitor's Notes, June 17, 2019; Monitor's Notes, June 24, 2019.

³⁶ Monitor's Notes, June 24, 2019.

³⁷ Monitor's Notes, July 8, 2019.

for the complainant alleged that he had recorded the performance with his phone, he was unable to produce said phone, which he claimed was damaged the day after he transferred the recording to a VCD.³⁸

On September 16, approximately four months after the complaint was filed and three months after the start of trial, the complainant's presentation concluded. The judge subsequently confirmed the charges even though it was clear both that the accused did not have the intent to provoke the armed forces to "mutiny or otherwise disregard or fail in [their] duty as such," and that the performance was not likely to have caused such a disruption - a fundamental and material element of the Section 505(a) offense. The complainant likewise put forth no evidence that the performance had actually caused any disruption within the armed forces. In the three days of trial that ensued, during which the defendants were forced to take the stand, the presiding judge proceeded to question them in a leading and accusatory manner.³⁹ Notably, all of the defendants denied their guilt.

After very summary final arguments on November 4, six of the accused were convicted notwithstanding the complainant's failure to prove the aforementioned key element of Section 505(a) - that the accused either intended to cause members of the armed forces to mutiny or fail in their duties or that the performance was likely to have caused such disruption. Thus, not only did the trial itself violate the defendants' right to freedom of expression but the convictions were wrongful and the proceedings marred by a lack of impartiality on the part of the judge.

³⁸ Monitor's Notes, August 5, 2019.

³⁹ Monitor's Notes, October 21, 2019; Monitor's Notes, October 29, 2019.

ANALYSIS



A. APPLICABLE LAW

As discussed above, this report draws on the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), both of which reflect international standards on due process and fair trial rights that are part of customary international law. The Universal Declaration on Human Rights, adopted by the UN General Assembly in 1948, provides for the right to freedom from arbitrary detention,⁴⁰ the right to an independent and impartial tribunal,⁴¹ and the right to the presumption of innocence.⁴² The ICCPR contains parallel provisions, with Article 9 protecting against arbitrary arrest and detention and Article 14 protecting defendants' right to a fair trial.

The UN Human Rights Committee has previously explained that some "provisions in the Covenant . . . represent customary international law."⁴³ In particular, the Committee has stated that "while reservations to particular clauses of article 14 may be acceptable, a general reservation to the right to a fair trial would not be,"⁴⁴ indicating that the overall right to a fair trial is a norm of customary international law.⁴⁵ Other human rights mechanisms, such as the African Commission on Human and Peoples Rights, have adopted the same view: according to the Commission, "there are certain rights such as . . . the right to a fair trial . . . that cannot be derogated from for any reason, in whatever circumstances."⁴⁶

Notably, the sub-components of the right to a fair trial at issue in the Peacock troupe case - the right to the presumption of innocence, the right to be tried by an impartial court, and the right against self-incrimination⁴⁷ - are among those widely considered non-derogable. The UN Human Rights Committee, for example, has stated that derogation from "fundamental principles of fair trial, including the presumption of innocence" is not permissible.⁴⁸

⁴⁰ UDHR, Article 9.

⁴¹ *Id.*

⁴² *Id.* at Article 11(1).

⁴³ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/21/Rev.1/Add.6, November 4, 1994, para. 8.

⁴⁴ *Id.*

⁴⁵ See also Patrick L. Robinson, "The Right to a Fair Trial in International Law, with Specific Reference to the Work of the ICTY", *Berkeley Journal of International Law*, 2009, pg. 5 ("That the provision of Article 14 on the right of an accused to a fair trial reflects customary international law is beyond dispute.").

⁴⁶ African Commission on Human and Peoples' Rights, Article 19 v. Eritrea, Case No. 275/03, May 30, 2007, para. 98.

⁴⁷ See Inter-American Commission on Human Rights, "Report on Terrorism and Human Rights", October 22, 2002, para. 235 ("International human rights law requires that . . . a defendant must not be compelled to be a witness against himself or herself or to plead guilty").

⁴⁸ Human Rights Committee, General Comment No. 29, U.N. Doc. CCPR/C/21/Rev.1/Add.11, August 31, 2001, para. 11.

Protections against arbitrary detention, enshrined in the UDHR and ICCPR and at issue in the present case, also reflect customary international law. As stated by the Working Group on Arbitrary Detention, there exists a consensus that the “prohibition of arbitrary deprivation of liberty is of a universally binding nature under customary international law.”⁴⁹

In addition to the UDHR and the ICCPR, the report draws on commentary from various UN Special Procedures, jurisprudence from the European Court of Human Rights, and domestic legislation.

B. INVESTIGATION AND PRETRIAL STAGE VIOLATIONS

Arbitrary Detention and Violation of the Presumption of Innocence

The pretrial detention of the Peacock Generation troupe was arbitrary. Article 9 of the UDHR provides: “No one shall be subjected to arbitrary arrest, detention or exile.” Article 9(1) of the ICCPR states: “[e]veryone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.”

The UN Human Rights Committee has noted that with respect to detention, the concept of “arbitrariness” must be “interpreted broadly, to include elements of inappropriateness, injustice, lack of predictability and due process of law as well as elements of reasonableness, necessity and proportionality.”⁵⁰ Not only should pretrial detention be the exception and as short as possible, but detention must be “lawful” (in accordance with domestic law) and “reasonable and necessary in all circumstances.”⁵¹ This means that pretrial detention is appropriate for only a limited number of purposes: namely, to prevent flight, interference with the proceedings, and the recurrence of crime.⁵²

In evaluating the reasonableness and necessity of pretrial detention, courts must undertake an “individualized determination.”⁵³ Vague pronouncements fail to meet this standard and reference to the severity of the charges is, on its own, insufficient. As stated by the Committee, “[p]retrial detention should not be mandatory for all defendants charged with a particular crime, without regard to individual circumstances.”⁵⁴

The UN Working Group on Arbitrary Detention has echoed the UN Human Rights Committee’s findings on the necessity of individualized assessment, condemning the

⁴⁹ Working Group on Arbitrary Detention, Deliberation No. 9. U.N. Doc. A/HRC/22/44, December 24, 2012, para. 43.

⁵⁰ Human Rights Committee, *Izmet Oselik et al v. Turkey*, U.N. Doc. CCPR/C/125/D/2980/2017, September 23, 2019, para. 9.3.

⁵¹ Human Rights Committee, *Cedeno v. Bolivarian Republic of Venezuela*, U.N. Doc. CCPR/C/106/D/1940/2010, December 4, 2012, para. 7.10.

⁵² Human Rights Committee, *Mikhail Marinich v. Belarus*, U.N. Doc. CCPR/C/99/D/1502/2006, August 19, 2010, para. 10.4.

⁵³ Human Rights Committee, General Comment No. 35, U.N. Doc. CCPR/C/GC/35, December 16, 2014, para. 38.

⁵⁴ See *id.*

practice of non-bailable offenses. With reference to a European Court of Human Rights case where a crime's classification as "serious" precluded the defendant's release on bail, the Working Group deemed "automatic rejection of the applicant's applications for bail, devoid of any judicial control of the particular circumstances of ... detention" arbitrary.⁵⁵ The Working Group has further noted: "[m]andatory pre-trial detention for non-bailable offences deprives a detainee of his or her right to seek non-custodial alternatives to detention, such as bail ... detention [can] only be ordered after a judicial authority has conducted an individualised assessment of whether pre-trial detention in each case is reasonable and necessary."⁵⁶

In the present case, the defendants were not afforded the opportunity for individualized assessment. As explained by Human Rights Watch, "Myanmar's Code of Criminal Procedure defines a 'bailable offense' as an offense shown as bailable in the Second Schedule of the Code of Criminal Procedure or made bailable under any other law. Any other offense is deemed 'non-bailable.'"⁵⁷ Under this schema, Section 505(a) is considered non-bailable, meaning that there was no court hearing on the accused's detention and no individualized evaluation of whether the measure was necessary or reasonable, in violation of the right to be free from arbitrary detention.⁵⁸

C. VIOLATIONS AT TRIAL

Right to a Public Hearing

Article 10 of the UDHR provides that criminal defendants have the right to "a fair and public hearing." Article 14(1) of the ICCPR likewise mandates that criminal proceedings be heard in public. The UN Human Rights Committee has explained that this right requires courts to refrain from excluding the media or members of the public barring "exceptional circumstances."⁵⁹ According to the UN Human Rights Committee, these exceptions are limited to the justifications listed in Article 14(1) of the ICCPR: "morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in

⁵⁵ Working Group on Arbitrary Detention, Opinion No. 24/2015 concerning Gloria Macapagal-Arroyo (the Philippines), U.N. Doc. A/HRC/WGAD/2015/24, November 16, 2015, para. 38, fn. 4.

⁵⁶ Working Group on Arbitrary Detention, Preliminary Findings from its visit to Bhutan (14-24 January 2019), January 24, 2019. Available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24108&LangID=E>.

⁵⁷ Human Rights Watch, "Burma: Letter on Section 66(d) of the Telecommunications Law", May 10, 2017. Available at https://www.hrw.org/news/2017/05/10/burma-letter-section-66d-telecommunications-law#_ftn6.

⁵⁸ While it has been reported that lawyers can argue for bail in some ostensibly non-bailable cases, this kind of ad hoc exception - an exercise that appears to have been largely futile for defense attorneys - is still inconsistent with the right to be free from arbitrary detention.

⁵⁹ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 29.

special circumstances where publicity would be prejudicial to the interests of justice.”⁶⁰ Notably, courts cannot restrict access to specific categories of persons.⁶¹

In the present case, the authorities restricted public access without justification. On June 3, police blockades were used to physically obstruct the media from entering the court building and speaking with the accused.⁶² In the courtroom, members of the Special Branch (police intelligence) and Ma Ba Tha group occupied the majority of available seats, meaning that members of the public were unable to observe the proceedings.⁶³ On the same day, four women were turned away from court after security staff requested identification cards:⁶⁴ according to partners, this is not a typical requirement for cases before the Botataung Township Court. The security officers claimed that identification documentation was necessary because the case was a “political matter.”⁶⁵

Entrance to a “political” case should not have necessitated new hurdles for public access given that none of the enumerated exceptions - morals, public order, national security, fairness concerns - were applicable: the proceedings concerned a performance that had already been widely shared on Facebook without any apparent disruption to public order or security. Further, in a country where hundreds of thousands of individuals are stateless, this ad hoc requirement has troubling implications. As such, the denial of the four women’s entry to the courtroom was inconsistent with international standards, as was the obstruction of media access and public access more broadly.

Right to the Presumption of Innocence

The accused were handcuffed throughout the trial, in violation of the presumption of innocence reflected in Article 11 of the UDHR and Article 14(2) of the ICCPR. In some cases, the handcuffs remained on during lunch breaks and when defendants went to the bathroom.⁶⁶

The UN Human Rights Committee has clarified that the presumption of innocence can be breached through conduct suggesting that the accused is guilty. For example, the Committee has stated that “defendants should normally not be shackled or kept in cages during trials or otherwise presented to the court in a manner indicating that they may be

⁶⁰ Id. See also UN Commission on Human Rights, The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, U.N. Doc. E/CN.4/1985/4, September 28, 1984, para. 38.

⁶¹ Id.

⁶² Monitor’s Notes, June 3, 2019.

⁶³ Id.

⁶⁴ Id.

⁶⁵ Id.

⁶⁶ See Monitor’s Notes, June 17, 2019.

dangerous criminals.”⁶⁷ If a defendant is shackled, the state must present some justification for this restriction.⁶⁸

In the present case, there was no explanation of the necessity of handcuffing the accused.⁶⁹ The presentation of the Peacock troupe members to the court in handcuffs thus contravened their right to the presumption of innocence.

Right to Judicial Impartiality

Article 10 of the UDHR and Article 14(1) of the ICCPR reflect the international law requirement of judicial impartiality. As stated by the UN Human Rights Committee: “judges must not allow their judgement to be influenced by personal bias or prejudice, nor harbour preconceptions about the particular case before them, nor act in ways that improperly promote the interests of one of the parties to the detriment of the other. ... [T]he tribunal must also appear impartial to a reasonable observer.”⁷⁰ In *Ashurov v. Tajikistan*, the Committee found a violation of Article 14(1) where the court - as recounted by the complainant - asked leading questions, acted in a “accusatory” manner, and “effectively replaced the passive and unprepared prosecutor.”⁷¹

As in *Ashurov*, the court presiding over the Peacock case exhibited bias by posing questions that appeared geared towards demonstrating the guilt of the accused.

On October 7, 2019, for example, the presiding judge asked one of the defendants: “Texts were inserted to cause the general public to be disrespectful of the Tatmadaw and to cause mutiny?”⁷² Subsequently, on October 21, 2019, the judge posed a series of seemingly rhetorical questions and conclusory statements to the accused. He stated, for example: “The display of the Vinyl poster with a Giant’s head wearing a military uniform was intended to damage the reputation of the Tatmadaw and the soldiers.” He later asked: “The lyrics of the Thangyat you performed were intended to hurt the Tatmadaw and the soldiers?” and “You did not seek permission for the performance from relevant authority?” The language used suggests that the court “harbour[ed] preconceptions” about the accused’s guilt under Section 505(a).

Privilege Against Self Incrimination

⁶⁷ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 30.

⁶⁸ See Human Rights Committee, *Selyun v. Belarus*, U.N. Doc. CCPR/C/115/D/2289/2013, December 9, 2015, para. 7.5; Human Rights Committee, *Mikhail Pustovoit v. Ukraine*, U.N. Doc. CCPR/C/110/D/1405/2005, May 12, 2014, para. 9.3.

⁶⁹ Handcuffing defendants is regular practice at courts in Myanmar.

⁷⁰ Human Rights Committee, General Comment No. 32, U.N. Doc. CCPR/C/GC/32, August 23, 2007, para. 21. See also Human Rights Committee, *Karttunen v. Finland*, U.N. Doc. CCPR/C/46/D/387/1989, November 5, 1992, para. 7.2.

⁷¹ Human Rights Committee, *Ashurov v. Tajikistan*, U.N. Doc. CCPR/C/89/D/1348/2005, March 20, 2007, paras. 2.8, 6.6.

⁷² Monitor’s Notes, October 17, 2019.

Article 14(3)(g) of the ICCPR reflects the right “not to be compelled to testify against [one]self or to confess guilt.”

In the present case, all seven of the defendants declined to testify as witnesses subject to cross-examination. In accordance with Myanmar’s criminal procedure code, they were nonetheless compelled to answer questions posed by the court. The inquiries directly related to the issue of criminal responsibility: the presiding judge asked, for example, who composed the lyrics for the performance, whether the defendants intended to evince disrespect for the army, who posted the video on social media, who was in charge of the group’s Facebook page, and whether the defendants sought permission for the performance.⁷³ The court subsequently relied on these answers in convicting the accused.⁷⁴ The defendants’ privilege against self-incrimination was thereby violated.

D. OTHER FAIRNESS CONCERNS

Right to Freedom of Expression

In addition to violating the Peacock Generation troupe’s right to a fair trial, the proceedings also violated their right to freedom of expression.

First, Section 505(a) of the Burmese Penal Code, under which the defendants were prosecuted, violates the right to freedom of expression on its face. Second, the application of Section 505(a) to the Peacock troupe’s performance violated the accused’s right to freedom of expression. Finally, the imposition of a jail sentence is - in any event - an excessive penalty.

Section 505(a) of Myanmar’s criminal code violates the right to freedom of expression guaranteed by international law

The UDHR provides that “[e]veryone has the right to freedom of opinion and expression,” as does Article 19 of the ICCPR. Section 505(a) of the Burmese Criminal Code restricts freedom of expression beyond the limits established by international human rights law. The UN Human Rights Committee has explained that in accordance with international standards, restrictions on the right to freedom of expression must (i) be prescribed by law (the principle of legality), (ii) serve a legitimate objective, and (iii) be necessary to achieve and proportionate to that objective.⁷⁵ Objectives deemed legitimate by the UN Human Rights Committee include the protection of public morals, national security, and the rights and reputation of individuals.⁷⁶

⁷³ Monitor’s Notes, October 7, 2019; Monitor’s Notes, October 21, 2019; Monitor’s Notes, October 29, 2019.

⁷⁴ Judgment, Botataung Township Court, November 18, 2019, pgs. 6-10, 12.

⁷⁵ See Human Rights Committee, *Kim v. Republic of Korea*, U.N. Doc. CCPR/C/64/D/574/1994, 1999, para. 12.2.

⁷⁶ *Id.*

In order to comply with the principle of legality, legislation must be “formulated with sufficient precision to enable an individual to regulate his or her conduct accordingly ... [and] may not confer unfettered discretion for the restriction of freedom of expression on those charged with its execution.”⁷⁷ The UN Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion (Special Rapporteur on Freedom of Expression) has noted: “the restriction must be provided by laws that are precise, public and transparent; it must avoid providing authorities with unbounded discretion.”⁷⁸

A restriction “violates the test of necessity if the protection could be achieved in other ways that do not restrict freedom of expression.”⁷⁹ The necessity requirement overlaps with the proportionality requirement, as the latter means that a restriction must be the “least intrusive instrument amongst those which might achieve their protective function.”⁸⁰ In this vein, laws cannot be overbroad.⁸¹

Section 505(a) of the Penal Code proscribes the making of any statement “with intent to cause, or which is 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.” While the government has a legitimate interest in protecting public order and - specifically - discipline within the military, the provision is overbroad.

In contravention of the legality requirement, Section 505(a) is imprecise, making it difficult for individuals to regulate their conduct accordingly. The provision for example, does not explain what type of statement would meet the threshold for likelihood to cause mutiny or failure of duty. Would mere criticism pass the test? Would there have to be some sort of call to revolt? It is unclear how courts would determine “likelihood” to provoke mutiny or disregard of duty in circumstances. Due to this ambiguity, the provision potentially encompasses a wide range of protected speech, conferring “unfettered discretion” on the authorities.

Further, Section 505(a)’s sweeping restrictions are not necessary to achieve or proportional to the objective of preventing military mutiny or negligence. The provision fails to pursue the “least intrusive” route, establishing a potential jail sentence of two years for those who violate the provision. This encroachment is far from necessary to accommodate state interests in public order.

⁷⁷ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 25.

⁷⁸ U.N. General Assembly, Report of the Special Rapporteur on the promotion and protection of freedom of expression, U.N. Doc. A/74/486, October 9, 2019, para 6.

⁷⁹ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 33.

⁸⁰ *Id.* at para. 34.

⁸¹ *Id.*

As such, Section 505(a) is inconsistent with the right to freedom of expression. To note, the UN Special Rapporteur on the situation of human rights in Myanmar⁸² and the U.S. State Department⁸³ have expressed concern about cases brought under Section 505(a).

Section 505(a) was applied to the Peacock Generation in a manner that violated their right to freedom of expression

The application of Section 505(a) to the Peacock Generation's performance violated the troupe's right to freedom of expression, particularly given that the show was situated within a broader public dialogue on political issues.

The UN Human Rights Committee has emphasized the importance of safeguarding political debate and citizenry's capacity to criticize political officials. The Committee, for example, has stated that "[t]he free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential."⁸⁴

According to the Committee, "all public figures, including those exercising the highest political authority such as heads of state and government, are legitimately subject to criticism and political opposition. ... States parties should not prohibit criticism of institutions, such as the army or the administration."⁸⁵ As noted above, restrictions on protected speech, such as criticism of political or military figures, must (i) be prescribed by law, (ii) serve a legitimate objective and (iii) be necessary to achieve and proportionate to that objective.⁸⁶

In *Marques de Morais v. Angola*, the Committee found that the arrest and conviction of a journalist for penning a series of articles denouncing the Angolan president was incompatible with Article 19 of the ICCPR, which protects the right to freedom of expression.⁸⁷ Even assuming that the proceedings possessed the legitimate objective of preserving public order, the restrictions imposed were not necessary or proportional given the "paramount importance, in a democratic society, of the right to freedom of expression."⁸⁸ As stated by the Committee, "the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect."⁸⁹

⁸² U.N. Human Rights Council, "Report of the Special Rapporteur on the situation of human rights in Myanmar" (advanced unedited version), U.N. Doc A/HRC/43/59, March 4, 2020, pgs. 4-5, 20.

⁸³ U.S. State Department, "2019 Country Human Rights Practices Report: Myanmar", March 11, 2020, pg. 16.

⁸⁴ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 13.

⁸⁵ *Id.* at para. 38.

⁸⁶ See Human Rights Committee, *Kim v. Republic of Korea*, U.N. Doc. CCPR/C/64/D/574/1994, 1999, para. 12.2.

⁸⁷ Human Rights Committee, *Marquis de Morais v. Angola*, U.N. Doc. CCPR/C/83/D/1128/2002, March 29, 2005, para. 6.8.

⁸⁸ *Id.*

⁸⁹ *Id.*

Notably, the European Court of Human Rights has concluded that artistic expression should be afforded heightened protection - even in instances where the speech therein could otherwise be restricted.⁹⁰

In the present case, the accused engaged in a satirical performance that raised concerns about the need for constitutional reform, the military's role in the legislature, and the potential of International Criminal Court prosecutions: all subjects of ongoing debate in the country.⁹¹ As in *Marques de Moraes*, although the objective of the trial may have been legitimate, the use of criminal proceedings and custodial sentences was neither necessary nor proportional, particularly when balanced against the "paramount importance" of political discussion. And while the show appears to have offended members of the military, it relied on artistic license - likewise crucial to the social fabric - to make an important point. The troupe's words and actions should thereby have received heightened protection as opposed to being grounds for prosecution.

Criminal penalties on the basis of speech are only warranted in the most serious and exceptional circumstances

Six out of the seven accused were convicted under Section 505(a) and sentenced to one year in prison and hard labour. This sanction is inconsistent with the jurisprudence of the UN Human Rights Committee as well as with commentary from UN Special Procedures.

The penalty of imprisonment is a severe form of punishment. The Committee has stated that "the mere fact that forms of expression are considered to be insulting to a public figure is not sufficient to justify the imposition of penalties."⁹² The UN Special Rapporteur on the Promotion and Protection of Freedom of Opinion and Expression has further noted that with respect to speech offenses, only child pornography, incitement to terrorism, public incitement to genocide, and advocacy for national, racial, or religious hatred should ever be criminalized.⁹³ According to the Special Rapporteur, it is never permissible to levy criminal penalties in response to other forms of expression given the "significant chilling effect" that occurs.⁹⁴ The Peacock Generation's performance - traditional political satire regarding constitutional reforms and the role of the military - did not rise to the level of severity that would warrant criminal penalties.

The sanctions levied against the Peacock Troupe are particularly concerning given Section 505(a)'s close resemblance to criminal defamation legislation. The UN Human Rights Committee has concluded that "imprisonment is never an appropriate penalty" for

⁹⁰ See European Court of Human Rights, *Karatas v. Turkey*, App. No. 23168/94, July 8, 1999, para. 52; European Court of Human Rights, *Alinak v. Turkey*, App. No. 40287/98, March 29, 2005, paras. 41-45.

⁹¹ See Monitor's Notes, July 22, 2019; Monitor's Notes, November 4, 2019.

⁹² Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 38.

⁹³ U.N. General Assembly, Promotion and Protection of the Right to Freedom of Opinion and Expression, Sixty Sixth Session, U.N. Doc. A/66/290, August 10, 2011, para. 40.

⁹⁴ *Id.*

defamation offenses.⁹⁵ In the Committee's words: "[s]tates parties should consider the decriminalization of defamation and, in any case, the application of the criminal law should only be countenanced in the most serious of cases."⁹⁶ While Section 505(a) does not explicitly criminalize defamation, it has been applied so as to *de facto* prohibit statements about the military that are perceived as defamatory. Throughout the trial, for example, the complainant and military officers testified that they felt the performance "[was] damaging to the reputation of the military,"⁹⁷ resulted in "damages to the dignity of the military,"⁹⁸ and "defamed" the military.⁹⁹ As established by the Committee, such speech should never have been subject to criminal penalties.

Ulterior motives

Although the authorities would presumably argue that the trial and conviction of the Peacock Generation was geared towards maintaining public order and security (a potentially acceptable legal basis for restricting freedom of expression), the number and nature of the proceedings to which the troupe has been subjected raises concerns about improper motives.

As noted above, the accused were initially charged and prosecuted under Section 505(a). Three months into the trial, after closing arguments, the court informed defense counsel that the accused had additionally been charged under Section 66(d) of the Telecommunications Law for posting videos of the performance online.¹⁰⁰ The Section 66(d) charges, the result of yet another complaint filed by the military, were substantially related to the 505(a) charges.

The majority of witnesses in court, including the criminal complainant, did not view the Peacock Generation show in person but instead saw it on social media. The complainant, Lieutenant Myo Min Oo, testified that he had "witnessed [the satirical performance] on social media through step by step report":¹⁰¹ Major Hlwan Wai, another military officer, attended the performance and reported back to Lieutenant Myo Min Oo, after which the Lieutenant viewed the Facebook video.¹⁰² A second military officer who also notified the Lieutenant of the performance, Major Min Zaw Moe, only learned of it from the troupe's live-streamed Facebook video.¹⁰³ The Lieutenant accordingly specified that "video records of the performance from the social media, lyrics, [and] record photos captured

⁹⁵ Human Rights Committee, General Comment No. 34, U.N. Doc. CCPR/C/GC/34, September 12, 2011, para. 47.

⁹⁶ *Id.*

⁹⁷ Monitor's Notes, August 26, 2019.

⁹⁸ Monitor's Notes, July 22, 2019.

⁹⁹ Monitor's Notes, June 3, 2019.

¹⁰⁰ Monitor's Notes, November 4, 2019.

¹⁰¹ Monitor's Notes, June 3, 2019.

¹⁰² Monitor's Notes, June 17, 2019; Monitor's Notes, July 22, 2019. As noted above, the Major was unable to produce the phone he allegedly used to record the performance.

¹⁰³ Monitor's Notes, August 19, 2019.

from their self-broadcast videos” were part of his criminal complaint.¹⁰⁴ As noted above, the presiding judge questioned the defendants about who posted the video on social media and who was responsible for the group’s social media presence.

As such, the original trial already entailed the presentation of evidence regarding the dissemination of the performance on social media - the basis for the charges under Section 66(d). There was no reason to wait until the conclusion of the 505(a) proceedings to subject the accused to yet another set of hearings: essentially, a second trial. The staggered nature of the proceedings is thus indicative of harassment, aimed at sending a message to the troupe and other would-be dissenters.

Moreover, Peacock Generation members are facing/have faced criminal charges at multiple courts throughout Myanmar due to a spate of complaints filed by military officers. Five out of the seven defendants who stood trial in Botataung Township were also found liable by the Mayangon Township court under Section 505(a) of the Penal Code for an analogous performance in the latter township. With respect to Section 66(d), three members of the troupe were convicted by the Botataung Township court, while four members of the troupe were convicted by the Mayangon Township court: in both instances for the offense of posting performances on social media. Most recently, the Maubin Township court convicted three members of the troupe for violating Section 505(a). Separate complaints have been filed by the military against the Peacock Generation in several other townships, again for similar performances. Those proceedings are pending.

This sequential criminalization of the troupe’s performances evinces a coordinated effort to chill speech and prevent the Peacock Generation troupe from further participation in the civic space.

¹⁰⁴ Monitor’s Notes June 3, 2019.

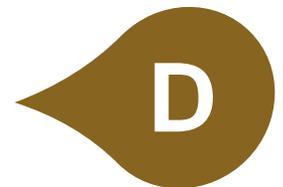
CONCLUSION AND GRADE



At this critical juncture in Myanmar's democratic transition, increasing attention must be paid to the government's respect - or lack thereof - for human rights. The trial of the Peacock Generation is just one of many attempts to penalize those speaking out against the Burmese authorities.

Specifically, the plight of the Peacock Generation highlights how Section 505(a) of the Penal Code and Section 66(d) of the Telecommunications Law can be used interchangeably, part of an arsenal of weapons the authorities deploy to suppress speech. These laws should be reviewed and amended.

GRADE:





GRADING METHODOLOGY

Experts should assign a grade of A, B, C, D, or F to the trial reflecting their view of whether and the extent to which the trial complied with relevant international human rights law, taking into account, *inter alia*:

- The severity of the violation(s) that occurred;
- Whether the violation(s) affected the outcome of the trial;
- Whether the charges were brought in whole or in part for improper motives, including political motives, economic motives, discrimination, such as on the basis of “race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,”¹⁰⁵ and retaliation for human rights advocacy (even if the defendant was ultimately acquitted);
- The extent of the harm related to the charges (including but not limited to whether the defendant was unjustly convicted and, if so, the sentence imposed; whether the defendant was kept in unjustified pretrial detention, even if the defendant was ultimately acquitted at trial; whether the defendant was mistreated in connection with the charges or trial; and/or the extent to which the defendant’s reputation was harmed by virtue of the bringing of charges); and
- The compatibility of the law and procedure pursuant to which the defendant was prosecuted with international human rights law.

Grading Levels

- A: A trial that, based on the monitoring, appeared to comply with international standards.
- B: A trial that appeared to generally comply with relevant human rights standards excepting minor violations, and where the violation(s) had no effect on the outcome and did not result in significant harm.
- C: A trial that did not meet international standards, but where the violation(s) had no effect on the outcome and did not result in significant harm.
- D: A trial characterized by one or more violations of international standards that affected the outcome and/or resulted in significant harm.
- F: A trial that entailed a gross violation of international standards that affected the outcome and/or resulted in significant harm.

¹⁰⁵ ICCPR, Article 26.