

Opinion No. 26/2008 (Myanmar)

Communication addressed to the Government on 16 August 2007

Concerning Messrs. Hkun Htun Oo; Sai Nyunt Lwin; Sai Hla Aung; Htun Nyo; Sai Myo Win Htun; Nyi Nyi Moe; and Hso Ten

The State is not a party to the International Covenant on Civil and Political Rights.

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. In light of the allegations made, the Working Group regrets that the Government of Myanmar has not provided it with observations on the allegations of the source despite several invitations to do so. The Working Group considers that it is nonetheless in a position to render an Opinion on the case.
3. (Same text as paragraph 3 of Opinion No. 17/2008.)
4. The case summarized below was reported to the Working Group on Arbitrary Detention as follows:
 - (a) U Hkun Htun Oo, son of Sao Kyar Zone, aged 63, usually residing at 25/Pyi Road (Mile 9), Ward 5, Mayangone Township, Yangon;
 - (b) U Sai Nyunt Lwin, son of U Ba Khin, aged 52, usually residing at 157 Pyi Road (Mile 9), Ward 5, Mayangone Township, Yangon;
 - (c) U Sai Hla Aung, son of U Kaung Mu, aged 61, usually residing at 175 Hkwanyo Road, Pyidawthar Section, Taunggyi, Shan State;
 - (d) U Htun Nyo, son of U Ba Myaing, aged 57, usually residing at 56 Konemyinthayar Road, Kanthar Ward, Taunggyi, Shan State;
 - (e) U Sai Myo Win Htun, son of U Ba Myint, aged 42, usually residing at Yatanathiri Ward, Taunggyi, Shan State;
 - (f) U Nyi Nyi Moe, son of U Tin Ngwei, aged 36, usually residing at J/237 Thissa Road, Nyaungshei Section, Taunggyi, Shan State; and
 - (g) Hso Ten, son of U Htun Sein, aged 69, usually residing at 3, Ward 1, Myawaddi Road, Lashio, Shan State; all of whom are Myanmar citizens belonging to the Shan ethnicity, were arrested on 8, 9 and 10 February 2005, respectively, for attempting to form a committee called the "Shan State Academics Consultative Council". All but Hso Ten were arrested without a warrant under orders from the State Peace and Development Council (SPDC) by Special Branch officers from the Myanmar Police Force. Hso Ten was arrested without a warrant by Eastern Command Personnel of the Myanmar Armed Forces. Sai Hla Aung was arrested in the Taunggu Township while travelling to Yangon by train. Hkun Htun Oo and Sai Nyunt Lwin were arrested at their homes. The places of arrest of the other persons concerned are not known.
5. Hso Ten is the President of the "Shan State Peace Council" and Head of the "Shan State Army" (SSA), an ethnic armed group which has entered into a ceasefire agreement with the SPDC. Hkun Htun Oo is the chairman of the Shan National League for Democracy (SNLD), a registered political party in Myanmar, and an elected representative of the Thee Baw constituency No. 1. At the time of the establishment of the "Committee Representing People's Parliament" (CRPP), he was the representative for the Shan. He also led the "United Nationalities Alliance" (UNA). Sai Nyunt Lwin is the General Secretary of the SNLD, and Sai Hla Aung one of its members. Nyi Nyi Moe, Sai Myo Win Htun, and Htun Nyo are members of a civil society organization called "Shan Youth New Generation" (SYNG).

6. On 17 February 2005, all individuals concerned were transferred to Central Insein Prison, Yangon, where they were held until 2 November 2005 under the authority of the Department of Correctional Services of the Ministry of Home Affairs. On 18 February 2005 the Supreme Court of Myanmar, by Order No. 37/05, transferred their case to a Special Tribunal convened under the authority of the Northern Yangon District Court and presided by Assistant Divisional Judges U Mya Thein (Chairman) and U Khin Maung Kyi. On the next day, the Ministry of Home Affairs issued an arrest warrant for all of them.

7. All individuals were accused by the Government of the Union of Myanmar of conspiring to secede from the Union following a meeting convened to form the "Shan State Academics Consultative Council". On 21 February 2005, Police Lt.-Col. Khin Htay, Police Captain Aung Myint Than and Police Lieutenant Myint Aung from the Special Branch of the Myanmar People's Police Force filed a complaint and they were indicted on a number of charges based on the following allegations:

At General Hso Ten's invitation, from 4-5 November 2004, Hkun Htun Oo and Sai Nyunt Lwin attended the meeting of the 15th Peace Day Anniversary organised by the SSA in the Sein Kyawt village, Thee Baw District, Northern Shan State. In this meeting, all of them agreed to form the "Shan State Academics Consultative Council". Hkun Htun Oo gave his suggestions and discussed the forming of this council in the meeting. Sai Nyunt Lwin read out the Shan State Nationalities' Peace Letter. Than Myint also attended the meeting. General Hso Ten gave an opening speech at the meeting.

The second meeting was held at General Hso Ten's house in Lashio on 22 December 2004. The third meeting was held at an SSA office in Taunggyi on 7 February 2005, which was Shan State Day. In this meeting, a Shan State Academics Consultative Council statement, the Shan State New Generation statement, and a student youth's statement were distributed.

Hkun Htun Oo and Sai Nyunt Lwin were not present at this third meeting.

8. On 15 March 2005, the SPDC held a press conference explaining the reasons for the arrests carried out. Hkun Htun Oo, Sai Nyunt Lwin, Sai Hla Aung, Htun Nyo, Sai Myo Win Htun, Nyi Nyi Moe, and Hso Ten were charged for high treason pursuant to Section 121, paragraph 1, of the Penal Code of Myanmar (criminal case No. 233/05), for sedition pursuant to Section 124, lit (a), of the Penal Code (criminal cases No. 234/05 and 239/05), and for subversion pursuant to Section 4 of the 1996 Law Protecting the Peaceful and Systematic Transfer of the Responsibility and the Successful Performance of the Functions of the National Convention against Disturbances and Oppositions (the "Anti-Subversion Law") (criminal case No. 235/05/declaration 5/96). They were further charged pursuant to Section 6 of the 1988 Law Relating to Forming of Organisations (criminal case No. 236/05) and the 1962 Printer and Publisher Registration Act (criminal case No. 237/05). Hso Ten was further convicted in two cases related to a separate incident pursuant to the provisions of the Public Property Protection Act (criminal case No. 294/05) for illegal logging and under the Control of Import and Export Temporary Act (criminal case No. 293/05) for illegal exporting of timber.

9. The preliminary hearings before the Tribunal commenced on 27 April 2005 pursuant to Section 337 of the Criminal Procedure Code and concluded on 26 May 2005. The full trial began on 2 June 2005 on the premises of Central Insein Prison. All defendants pleaded not guilty on 6 June 2005. Only six of the 18 witnesses for the defence could be examined as the others had absconded or were otherwise not reachable. Two witnesses who had appeared for the prosecution also could not be summoned for cross-examination. On 2 November 2005, all were sentenced to "transportation for life" terms by the Northern Yangon District Court, which mean a life sentence in a penal colony involving hard labour.

Hkun Htun Oo was sentenced to 93 years of imprisonment to be served at Putao Prison, Kachin State (prisoner No. 0136/C); Sai Nyunt Lwin to 85 years at Kale Prison, Sagaing Division (prisoner No. 7222/C); and Sai Hla Aung, Htun Nyo, Sai Myo Win Htun, and Nyi Nyi Moe to 79 years, at Kyauk Hpyu Prison (Rakhine State), Buthihtaung Prison (Rakhine State), Myingyan Prison (Mandalay Division), and Pakukku Prison (Magwe Division), respectively. Hso Ten was sentenced to 106 years of imprisonment at Khanti Prison (Shan State). One of their co-defendants, U Myint Than (also known as Eh Phyu), who was also arrested on 9 February 2005 and sentenced to 79 years of imprisonment by the Northern Yangon District Court, died in detention at Than Dwe Prison. Another co-defendant, U Sao Tha Ut, member of the SNLD, also received a heavy prison sentence, but was released after the trial after appearing as a witness for the State pursuant to Section 337 of the Criminal Procedure Code. An appeal to the Special Appellate Bench of the Supreme Court in Yangon is pending. It was said that this appeal is the last course of redress under the conventions of the Myanmar legal system.

10. The defendants Hkun Htun Oo, Sai Nyunt Lwin, Sai Hla Aung, Htun Nyo, Sai Myo Win Htun, Nyi Nyi Moe and Hso Ten were convicted in criminal case No. 233/05 for high treason pursuant to Section 121 of the Penal Code, which provides: “Whoever (a) wages war against the Union of Myanmar or any constituent units thereof, (b) or assists any State or person, (c) or incites or conspires with any person within or without the Union to wage war against the Union or any constituent unit thereof, (d) or attempts or otherwise prepares by force of arms or other violent means to overthrow the organs of the Union or of its constituent units established by the Constitution, or takes part or is concerned in or incites or conspires with any person within or without the Union to make or to take part or be concerned in any such attempt shall be guilty of the offence of High Treason”. The Tribunal found all defendants guilty of high treason. According to the findings of the Northern Yangon District Court, Hkun Htun Oo, as chairman of the “Shan State Academics Consultative Council”, gave an opening speech at the Council’s first day of the first meeting on 4 November 2004. Defendant Sai Nyunt Lwin attended that meeting and read out a statement of the “Coalition of Shan Ethnic People”. Hso Ten was the chairman at the second day of the first meeting. The second meeting of the Council was held at his house in Lashio Township and the third meeting was held at a Shan State Army office in Taung Gyi Township with the permission of Hso Ten. According to the Tribunal, based on this evidence, Hso Ten was alleged to be the person leading the meetings of the “Shan State Academics Consultative Council”. The Tribunal was further satisfied that the conduct of the accused was aimed at transforming the “Shan State Academics Consultative Council” into an organization on the national level in order to achieve autonomy and self-determination for a Shan State, thereby exercising the right to equality and the right to secession. The Tribunal concluded that it was the intention of the Council to undermine the Union of Myanmar after having achieved these goals.

11. All persons concerned were also found guilty in criminal case No. 234/05 pursuant to Section 124, lit (a), of the Penal Code for the crime of sedition: “Whoever by words, either spoken and written, or by signs, or by visible representation, or otherwise, bring or attempts to bring into hatred and contempt, or excites or attempts to excite disaffection towards [the Government established by law for the Union or for the constituent units thereof,] shall be punished with transportation for life or a shorter term, to which a fine may be added, or with imprisonment which may extend to three years, to which a fine may be added, or with a fine”. The Tribunal based its convictions on oral and written statements made during the first meeting of the “Shan State Academics Consultative Council”, in which, *inter alia*, the current political situation of Myanmar “characterized by the power struggle between the military Government that currently rules the country and political parties that won the 1990 election” is described as having “caused the country’s troubles and the people’s impoverishment to become greater and greater”. The written statement

distributed at the meeting further read: “The conditions over the last 16 years have become worse and worse, day by day”, and “even though the current situation is not slavery, we could say the impoverished lives of the Burmese people are not much different from the lives of slaves”.

12. Criminal case 239/05 concerning Sai Nyunt Lwin was based on a document entitled “Future Burma” by the United Nationalities Alliance (UNA) and discovered on a computer found in his home, which resulted in another sentence of life imprisonment under Section 124, lit (a), of the Penal Code. The Court described the document’s content as follows:

“(1) The performances of government, whether positive or negative, have a direct effect on the lives of the people in that country. Bad governments govern the country badly and do not provide for the needs of the people. Therefore, the people have a duty to elect a good government, which will promote our dignity and life...

(2) The State Law and Order Restoration Council (SLORC) has reneged the promise that it made before the 1990 election. Moreover, it has been disturbing and controlling the process of drawing up a draft constitution. They held a sham National Convention from 9 January 1993 to 25 January 1996 at Kyatksan Field with six goals, including one that the “The military is to play a leading role in the national politics of Burma”...

(3) The SLORC completely controls and dominates the Solidarity and Development Association and ordered it to campaign for its one-sided 104 fundamental policies to be introduced at the National Convention. ... Such campaigning is very dangerous for the ethnic armed cease-fire groups...

(4) The SPDC is attempting to draft a constitution with 104 fundamental policies that enable the military to continue to administer the government and secure the longevity of the current regime. If this constitution is approved and enacted, Burma will be the country with the worst constitution in the world...

(5) Contrary to the SPDC’s announcement, the Union of Burma that would be formed by the constitution that the SPDC has proposed would be a military state that would be unable to bring about the emergence of a modern developed country.

(6) Because there are seven states and seven divisions in the Union of Burma, a one-party system inadequately represents all the people of Burma, and as a result there is a lack of equality for ethnic groups and a genuine democratic system cannot emerge.

(7) Since 1948, the Burmese population has been experiencing a political crisis due to the weaknesses and shortcomings of the 1947 Constitution. Because of those weaknesses, Burma’s independence was accompanied by ethnic conflicts, ideological wars, the seizing of power by the military and extreme problems of all types for the people of Burma.

(8) The statement made at the Sixth Anniversary of the Chamber of Nationalities declared that the current political, economic, educational, and social conditions in Burma have deteriorated and national unity is shattered. Under such conditions, there is great concern that a general crisis will inevitably occur in future Burma.

(9) There should be a Federal Republic of Burma governed by a genuine democracy which protects human rights, guarantees ethnic equality and self-determination for every ethnic group; and only then, it would ensure that the country will not be ruled by any dictators again.”

13. Khun Htun Oo, Sai Nyunt Lwin, Nyi Nyi Moe, Sai Hla Aung, Htun Nyo, Sai Myo Win Htun and Hso Ten were further sentenced to five years’ imprisonment and hard labour

pursuant to Section 6 of the 1988 Law Relating to Forming of Organizations (criminal case No. 236/05). Section 6 of this Law provides: “Any person found guilty of committing an offence under Section 3, subsection (c), or Section 5 shall be punished with imprisonment for a term that may extend to five years”. Section 3, lit (c), of the said Law reads: “Organisations that are not permitted shall not form or continue to exist and pursue activities”. Section 5 stipulates: “The following organisations shall not be formed, and if already formed shall not function and shall not continue to exist: ... (c) Organisations that attempt, instigate, incite, abet or commit acts that may affect or disrupt the regularity of state machinery”. The Tribunal, *inter alia*, found the defendants guilty of having discussed topics at the third meeting of the “Shan State Academics Consultative Council” and of having issued statements thereafter that disparaged the proper functioning of the State and appeared to have as their purpose the hindrance of the Government from running the State. It had been established for the Northern Yangon District Court that the Council led by the defendants was an association that the State had prohibited and that no activities shall be carried out in accordance with Section 5, lit (c) of the Law Relating to Forming of Organisations. According to the Tribunal, the Council had been established and its foundation violated this provision.

14. In two separate cases (criminal cases Nos. 294/05 and 293/05) Hso Ten was sentenced to life imprisonment under sections 2 and 3 of the 1963 Act for Protection of Property Relevant to the Public, and Section 5.5, paragraphs 1-3 of the Control of Imports and Exports (Temporary) Act of 1947. According to the Tribunal, Hso Ten was guilty under these provisions for his involvement in the illegal logging and exportation of teak to China. Section 2 of the Public Property Protection Act provides: “Property relevant to the public is money or stored good, or utensil or other property owned or transferred to use or kept by: (a) army; (b) revolutionary government or local government authority or Board, corporation, bank, other organisation formed in accordance with an existing law; (c) a cooperative; or (d) the following organisation announced by the revolutionary government in its Gazette: 1. an organisation registered in accordance with the Registration Act for Associations; 2. an organisation registered in accordance with Section 26 of the Burma Company Act; 3. a trustee; 4. other organisations”. Section 3 of this Act stipulates: “Any person who commits theft, or misappropriation, or cheating in regard to property relevant to the public shall be punished with life imprisonment, or a minimum term of ten years of imprisonment; in addition, he or she shall be fined”. The Control of Imports and Exports (Temporary) Act makes certain violations of customs, import and export regulations a criminal offence.

15. In a final case (criminal case No. 237/05) Htun Nyo, Sai Hla Aung, Nyi Nyi Moe, Sai Myo Win Htun and Hso Ten were sentenced for illegal publishing in violation of sections 6, 17, 18 and 20 of the Printer and Publisher Registration of 1962. According to the source, Section 6 of this Act provides: “1) Any person who is a printer or publisher must make confession with his signature according to Section 3 and register it to the registration officer with the application form and within the time limitation. 2) No one is allowed to engage in the enterprise of printing or publishing except with the registration testimony card and rules in this card or under the requirements of the law”. Section 17 of the said Act stipulates: “Anyone who engages in the enterprise of printing or publishing without any registration under Section 6 will be punished with one year to seven years of imprisonment or fined 3000 to 30000 Kyat, or both punishments will be given”. Section 18 provides: “Anyone who mentions a fact which is false and which he knows or believes to be false will be punished with six months to five years of imprisonment or fined 2,000 to 20,000 Kyat, or both punishments will be given”. Finally, Section 20 reads as follows: “Anyone who opposes or fails to obey the procedure of this law and order of any authority under this law will be punished with one year to a maximum of seven years of imprisonment or fined 3,000 to 30,000 Kyat, or both punishments will be given”. The Tribunal convicted the

defendants since the three statements published at the third meeting of the “Shan State Academics Consultative Council” and on the 58th Anniversary of “Shan State Day”, respectively, had not been registered according to Section 6, paragraphs 1 and 2 of the Printers and Publishers Registration Act. Accordingly, they were liable to punishment provided for in Section 17 of the Act. Moreover, they failed to follow the procedure of Section 18, and were thus liable to punishment pursuant to Section 20 of the Act.

16. The source alleges a number of procedural flaws attached to the trial. More specifically, it points out that no warrants were produced at the time of the arrests of any of the accused. The Ministry of Home Affairs issued authority for the warrants on 19 February 2005, around 10 days after the arrests had been carried out and the persons concerned had been detained. The source further alleges that three Supreme Court lawyers were granted power of attorney by the families of the detainees to represent their cases. However, they were denied access to the accused and to the Tribunal despite repeated requests. The case was heard by a tribunal outside the scope of jurisdiction *ratione loci* in violation of sections 177, 178 and 526 of the Criminal Procedure Code, which requires authorization by the national President or Chief Justice for transferral of a case outside the area of the usual jurisdiction. In the absence of such authorisation the trial should have been conducted in Shan State where the alleged offences were committed.

17. Furthermore, the trial was conducted apparently without authorization by a two-judge tribunal on prison rather than on court premises as required by Supreme Court Directive Nos. 7/56 and 3/69. The defendants were also denied their right to cross-examine witnesses as stipulated in Section 256 of the Criminal Procedure Code. Two key witnesses for the convictions of all respondents could not be recalled and the Tribunal did not follow the procedure for non-recall as laid down in Supreme Court Directive No. 3/66. Witnesses for the defence of Hso Ten on charges of illegal timber trading were not provided enough time to appear and depose. A summons was issued on 26 July 2005. However, only two days later the Tribunal announced that those who had not appeared in court by that time would not be heard. As witnesses were expected to travel from the far Northeast regions of the country the amount of time given was not reasonable. A request by the defence for the names of the witnesses due to appear be given to the state airline in order to facilitate and expedite their travel from Lashio to Yangon was also denied. For these reasons, only one witness was heard for the defendant. Finally, in violation of the law on evidence as regulated in Section 614 of the Court Manual, photocopies of original documents were used throughout the trial instead of the actual documents themselves.

18. The source also alleges that the convicted have not committed any crime pursuant to the domestic laws of Myanmar. As regards criminal case No. 233/05, the source argues that there were not enough elements to warrant the conviction pursuant to Section 121 of the Penal Code for high treason. There was no evidence presented before the Tribunal about waging war against Myanmar or any other evidence related to the elements as stipulated in Section 121 of the Penal Code. The actions of the defendants described in the judgment were merely related to their involvement in a political movement. The source further alleges that the Government has not been established by a constitution as required by Section 121 of the Penal Code, because Myanmar has been without a constitution since 1990. Thus, the defendants could not be convicted of high treason from the outset. Finally, the source points out that the persons concerned attempted only to establish a genuine Union for the country.

19. Regarding case No. 234/05 the source argues that no conviction for sedition pursuant to Section 124, lit (a), of the Penal Code was possible since the provision refers to a “Government established by law”. Furthermore, it is alleged that the defendants were merely exercising their right to freedom of expression. With respect to case No. 239/05 concerning Sai Nyunt Lwin the source alleges that his prosecution is not in line with

Section 124, lit (a), of the Penal Code, since the conviction was based on the contents of a computer found in Sai Nyunt Lwin's house with documents proposing the establishment of a federal union of Myanmar, none of which had at any time been publicized or otherwise used for this purpose. Furthermore, the 1973 Act for Defining Terms provides in Section 22 that when an act or omission is an offence according to two or more laws, the perpetrator shall be punished according to only one of them. Sai Nyunt Lwin, however, was punished for the same action under cases No. 233/05, 234/05, 235/05, 236/05 and 239/05 and received a total of 85 years of imprisonment. This sentencing is also in variance of Section 403 of the Criminal Procedure Code and Section 71 of the Penal Code. The latter provides: "Where anything which is an offence is made up of parts, any of which part is itself an offence, the offender shall not be punished with the punishment of more than one of such offences". Furthermore, to reach multiple convictions for one single illegal act amounts to a violation of the principles established in the 2000 Judiciary Law and the fundamental legal principle of no double jeopardy. Finally, Sai Nyunt Lwin was acting in good faith without criminal intent and lawfully exercising his right to freedom of expression.

20. The conviction for subversion (criminal case No. 235/05) relates to a meeting on 7 February 2005 which Hkun Htun Oo and Sai Nyunt Lwin did not attend. This claim of non-attendance was not countered by the prosecution nor was evidence produced to suggest otherwise, although it is required by Section 3 of the Anti-Subversion Law that the accused as an individual rather than as a member of an organization must have committed or abetted the act of subversion.

21. The source further argues that a conviction in criminal case No. 236/05 pursuant to the 1988 Law Relating to Forming of Organizations was legally not possible, since, amongst other things, the defendants had not yet fully established the "Shan State Academics Consultative Council" at the time related to the charges put against them, and could not, therefore, have applied for registration. Furthermore, the statements made at the incriminated meeting were made within the limitations of their right to freedom of speech.

22. As regards the separate cases concerning Hso Ten (criminal case No. 294/05 and 293/05) the source argues that he could not have violated the pertinent provisions of the Public Property Protection Act, since the disputed teak does not qualify as public property within the meaning of Section 2 of the Act and the charges were related to a licensed business. Moreover, he could not have been charged and convicted for the same action under different criminal laws, namely the Public Property Protection Act on the one hand and the Control of Imports and Exports (Temporary) Act on the other (criminal case No. 293/05). Such conduct is not in line with the rule of law and is further damaging to the fair application of justice. The Tribunal used exactly the same evidence, testimonies and trial proceedings for both convictions although the legal procedure requires that the court ensures that each witness testifies only on one charge at a time and that documentation be kept for each (Court Manual, Section 614). Other procedural flaws concerned the fact that the approval for his arrest under the Public Property Protection Act was not issued by the Ministry of Home Affairs until 1 July 2005, which is almost five months after the accused had already been detained.

23. With respect to criminal case No. 237/05, which led to the conviction of Htun Nyo, Sai Hla Aung, Nyi Nyi Moe, Sai Myo Win Htun, and Hso Ten, for violations of the Printers and Publishers Registration Act of 1962, the source alleges that there was no evidence presented to the Tribunal that registration of distribution of the statement was required under Section 3 of the Act because its distribution was limited. They were not criminally liable under this Act since they had not printed or published any documents.

24. The source explains that the arrests and convictions of the individuals concerned followed a process of convergence between the Government and various ethnic groups in

the country that came to a hold around the years 2003 and 2004. Hkun Htun Oo had been well known for some years for his efforts to broker an agreement between the Government and its armed opponents. During this period the UNA, led by Hkun Htun Oo, refused to participate in the National Convention for the making of a new constitution. Also, the Secretary of the SNLD, Sai Nyunt Lwin, declared that his organisation would not participate in the National Convention unless the 104 basic principles that would empower the armed forces of Myanmar to control the Government are amended. During that time the SPDC banned a publication entitled "Sum Bai Bulletin", which had been edited by Sai Nyunt Lwin. Similarly, on 11 April 2004, the "Restoration Council for the Shan State", which is a political wing of the "Shan State Army", issued a statement equally criticizing the 104 principles. On 6 May 2004, Hkun Htun Oo publicly stated that the SNLD took the same political stance as the "National League for Democracy" and that the SPDC's 104 principles could not be accepted. It was said that the roots of the conflict between the current Government and the ethnic groups concerned goes back to the moment when Myanmar gained independence in 1947. It was the time when the Shan leaders objected against and litigated for amendments to the 1947 Constitution and were, in turn, accused by the military of conspiring to secede from the Union, the source argues.

25. The Working Group, in its consideration of the detailed and credible information before it, and regretting the lack of response from the Government of Myanmar thereto, believes that a number of human rights lapses, amounting to arbitrary detention, may be gleaned from the situation of the seven prisoners as presented by the source.

26. Hkun Htun Oo, Sai Nyunt Lwin, Sai Hla Aung, Htun Nyo, Sai Myo Win Htun, Nyi Nyi Moe and Hso Ten were all arrested in early February 2005 at the orders of varying Government authorities of Myanmar without a warrant. Arrest warrants were only issued against them on 19 February 2005 by the Ministry of Home Affairs.

27. Irregularities of the trial impairing upon the defendants' entitlement, in full equality, to a fair and public hearing by an independent and impartial tribunal at which they enjoy all the guarantees necessary for their defence, as stipulated by articles 10 and 11 of the Universal Declaration of Human Rights, include the following: The decision of the Supreme Court of Myanmar to transfer their cases to a specially established Tribunal puts into question the impartiality and the fairness of the proceedings. The Working Group cannot consider whether the convening of this court outside of its jurisdiction *ratione loci* followed the proper domestic procedure as stipulated in the Criminal Procedure Code of Myanmar, which was disputed by the source. However, the Working Group is competent to consider that, when a trial is conducted in an area far from the places where the offences had allegedly been committed, and key witnesses called by the defence counsels could not be heard due to the short notice of the summons issued by the Special Tribunal and other witnesses could not be cross-examined, their right to defence was not properly observed.

28. Serious doubts over the fairness of the trial of the defendants are further cast by the allegations that the freely chosen defence lawyers were denied access to the accused and to the Special Tribunal. The fact that the trial was conducted on prison rather than court premises also puts into question whether the publicity requirement of articles 10 and 11, paragraph 1, of the Universal Declaration of Human Rights was complied with. Moreover, Government authorities made the charges against the accused public at a press conference on 15 March 2005, which touches upon the right to be presumed innocent until proven guilty. It would also appear to the Working Group that the principle of *ne bis in idem* has not been adhered to with respect to Sai Nyunt Lwin as he was sentenced for the same actions on multiple charges in criminal cases Nos. 233/05, 234/05, 235/05, 236/05 and 239/05.

29. The Working Group considers that these violations of the right to fair trial taken together are of such gravity as to confer upon the imprisonment of all seven convicts an

arbitrary character, particularly in view of the extremely serious charges, including high treason carrying heavy prison sentences. Whether or not the defects of the unfair trial have been corrected upon appeal, which was pending at the time of submission of the cases by the source, the Working Group cannot assess as it has not enjoyed the benefit of the Government's comments on the allegations transmitted.

30. The Working Group cannot sit in judgement as a "super-cassation court" over decisions taken by domestic criminal courts with respect to questions of guilt or whether factual evidence has been correctly assessed. It can, therefore, not entertain the allegations of the source that Hso Ten did not commit the crimes of illegal logging and exportation of lumber, or whether the actions of the defendants did not fulfil all elements of crime established by different provisions of the criminal laws of Myanmar. Nevertheless, the Working Group can consider whether the provisions making a particular action or omission a crime are in line with applicable international human rights law. It can also examine whether the incriminated actions are protected by a freedom right enumerated above under its Category II applicable to the consideration of cases before it and should therefore not be punishable.

31. The Working Group considers that there are sufficient indications that the list of charges against the accused and resultant actions of the Government of Myanmar represent a reaction to the peaceful exercise of the fundamental human rights to freedom of opinion, expression, association, and to take part in the government of one's country, directly or through freely chosen representatives, as guaranteed by articles 19, 20 and 21 of the Universal Declaration of Human Rights.

32. It transpires from the information provided by the source that all seven persons concerned were in the process of forming a political organisation with its constituency mainly lying within the Shan ethnic group. However, this process was also undertaken with a desire to motivate democratic movement within the country as a whole with Hkun Htun Oo being the chairman of the Shan branch of the National League for Democracy, the political party of Aung San Suu Kyi, which won the general elections in 1990. Even if the ultimate goal of this political movement was to obtain self-autonomy and self-determination for a "Shan State" within the Union of Myanmar, or to secede from the Union, the Working Group considers that if such goals are pursued in a peaceful manner through democratic means such activities are protected by the rights already mentioned. Nothing in the incriminated statements read out during the three meetings of the "Shan State Academics Consultative Council" or discovered on Sai Nyunt Lwin's computer would indicate that this was not the case.

33. Further, the fact that the "Shan State Army" entered into a ceasefire agreement with the Government of Myanmar through the State Peace and Development Council, and the context of the constitutional development since the country's independence in 1947 described above by the source, militates in favour of the understanding that Hso Ten, together with the other members of the group, were pursuing political goals through a political rather than military process. The proximity of the arrest of all seven defendants carried out in February 2005, following three meetings of the political movement in November and December 2004 and February 2005, decisively supports the conclusion that the arrests and trials leading to harsh prison sentences were conducted as a reaction to their political engagements rather than involvement in armed activities, if any.

34. Having established that the activities of the seven defendants fall within the ambit of the right to freedom of opinion, expression, association and participation in one's country's Government, the long-term criminal sentences imposed upon them as a reaction thereto are outside acceptable limitations of these fundamental rights. Criminal provisions that make it an offence to "bring or attempt to bring into hatred and contempt, or excite or attempt to excite disaffection" towards the Government of the day; or to found an organization, and

punish its members, only because it may “affect or disrupt the regularity of state machinery”; or to knowingly “mention a fact which is false”; or to establish an enterprise of printing and publishing without prior registration, are too vague, overbroad and over-restrictive in view of the fundamental importance of the free —and peaceful— exchange of (political) ideas for a society as guaranteed by the rights to freedom of speech, association and political activity. The Working Group concludes that the imprisonment of the seven defendants also amounts to arbitrary detention in terms of Category II.

35. In light of the above analysis of the information before it, the Working Group renders the following Opinion:

The deprivation of liberty of Messrs. Hkun Htun Oo, Sai Nyunt Lwin, Sai Hla Aung, Htun Nyo, Sai Myo Win Htun, Nyi Nyi Moe and Hso Ten is arbitrary, contravening articles 9, 10, 11, 19, 20 and 21 of the Universal Declaration of Human Rights and falling within categories II and III of the categories applicable to the consideration of cases submitted to the Working Group on Arbitrary Detention.

36. Consequent upon the Opinion rendered, the Working Group requests the Government of Myanmar to take the necessary steps to remedy the situation of the above-mentioned persons and to bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights. The Working Group continues to invite the Government of Myanmar to consider ratifying the International Covenant on Civil and Political Rights.

Adopted on 12 September 2009