

Opinion No. 4/2010 (Myanmar)

Communication addressed to the Government on 29 May 2009

Concerning: Dr Tin Min Htut and Mr. U Nyi Pu

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

1. (Same text as paragraph 1 of Opinion No. 18/2009)
2. The Working Group regrets that the Government has not replied within the 90-day deadline.
3. (Same text as paragraph 3 of Opinion No. 18/2009)

Communication from the source

4. The case summarized below concerns Dr. Tin Min Htut and Mr. U Nyi Pu, and was reported by the source to the Working Group on Arbitrary Detention as set out in the paragraphs below.
5. Tin Min Htut was arrested without a warrant on 12 August 2008. Dr Htut was born on 4 May 1952, and is a citizen of Myanmar. He is a medical doctor by profession, and was elected MP for Pantanaw.
6. According to the source, he was arrested by Police Major Ye Nyunt, Special Branch; Police Captain Than Soe, Special Branch; Police Captain Aye Naing, External Affairs Department, Special Branch; Sub-Inspector Hla Min; Sub-Inspector Thaug Tan; Sub-Inspector Tin Myo; and Sub-Inspector Win Kyaw.

7. U Nyi Pu was arrested without a warrant at his home on 11 August 2008 by the same police officers. Mr Pu was born on 10 April 1955 and is a citizen of Myanmar. He was elected MP for Gwa Township, Rakhine State.

8. As elected members of Parliament, in July 2008, Dr Htut and Mr Pu organized 92 elected members of Parliament to sign a letter addressed to the United Nations Secretary-General and the Security Council, criticizing the military Government of Myanmar, and also the United Nations itself, alleging that it sides with the military Government. According to the source, after their arrest both men were held at the Aungthapyay Interrogation Camp, an army camp, until the end of September 2008, when they were transferred to the central prison. Neither of them was brought before a judge until February 2009, although section 61 of the Criminal Procedure Code requires that they should have been brought to a judge within 24 hours of arrest.

Section 61 of the Criminal Procedure Code:

No police-officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to [the police station, and from there to the Magistrate's Court].

9. Dr Htut and Mr Pu were sentenced on 13 February 2009 to 27 years of imprisonment by the Yangon West District Court (Special Court). Judge U Tin Htut, a Deputy District Judge, presided. The charges were disturbing public tranquillity and peace pursuant to section 4 of the Anti-Subversion Law (The Law Protecting the Peaceful and Systematic Transfer of State Responsibility and the Successful Performance of the Functions of the National Convention against Disturbances and Opposition) No. 5/96, section 33(a) of the Electronic Transactions Law No. 5/04 and section 505(b) of the Penal Code of Myanmar.

Sections 3 and 4 of the Anti Subversion Law 5/1996 provide:

No one and no organization shall violate either directly or indirectly any of the following prohibitions:

(a) Inciting, demonstrating, delivering speeches, making oral or written statements and disseminating in order to undermine the stability of the State, community peace and tranquillity and prevalence of law and order;

(b) Inciting, delivering speeches, making oral or written statements and disseminating in order to undermine national reconsolidation;

(c) Disturbing, destroying, obstructing, inciting, delivering speeches, making oral or written statements and disseminating in order to undermine, belittle and make people misunderstand the functions being carried out by the National Convention for the emergence of a firm and enduring Constitution;

(d) Carrying out the functions of the National Convention or drafting and disseminating the Constitution of the State without lawful authorization;

(e) Attempting or abetting the violation of any of the prohibitions.

Whoever violates any prohibition contained in section 3 shall, on conviction be punished with imprisonment for a term of a minimum of (5) years to a maximum of (20) years and may also be liable to fine.

Section 33 of the Electronic Transactions Law 5/2004 provides:

Whoever commits any of the following acts by using electronic transactions technology shall, on conviction be punished with imprisonment for a term which may extend from a minimum of 7 years to a maximum of 15 years and may also be liable to a fine:

committing any act detrimental to the security of the State or prevalence of law and order or community peace and tranquillity or national solidarity or national economy or national culture.

Section 505 of the Penal Code provides:

(a) Whoever makes, publishes or circulates any statement, rumour or report, [...]

(b) with intent to cause, or which is likely to cause, fear or alarm to the public or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquillity; [...] shall be punished with imprisonment which may extend to two years, or with fine, or with both.

10. According to the source, the trial took place inside a closed court in the prison. Neither of the accused was allowed access to a lawyer, although they signed a Power of Attorney for a Supreme Court advocate, U Kyaw Hoe, to represent them. U Kyaw Hoe indeed came to the location of the trial to conduct the defence, but was not allowed inside. The source claims that such conduct is in violation of section 2 of the Judiciary Law 2000 of Myanmar, which stipulates that:

The administration of justice shall be based upon the following principles; [...]

(e) Dispensing justice in open court unless otherwise prohibited by law;

(f) Guaranteeing in all cases the right of defence and the right of appeal under the law; ...

11. The source further asserts that the evidence against Dr Htut and Mr Pu was inadequate for a conviction, had the court conducted its hearings independently and according to the legal standards that it is supposed to uphold. The police could not produce the original letter that the defendants were alleged to have prepared and sent, but only a copy taken from the Internet. The source argues that a copy of the letter is not sufficiently strong evidence by itself to be used for a conviction. Such evidence is only admissible as secondary evidence under sections 62-65 of the Evidence Act of Myanmar, but not sufficient proof of an offence in the present case upon which to secure a conviction. These sections provide:

Primary evidence. Primary evidence means the document itself produced for the inspection of the Court...

Secondary evidence. Secondary evidence means and includes-- ... (2) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies...

Proof of documents by primary evidence. Documents must be proved by primary evidence except in the cases hereinafter mentioned.

Cases in which secondary evidence relating to documents may be given. Secondary evidence may be given of the existence, condition or contents of a document in the following cases:-- (a) when the original is shown or appears to be in the possession or power-- of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or of any person legally bound to produce it, and when, after the notice mentioned in section

66, such person does not produce it; (b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest; (c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time.

12. The defendants were accused of having distributed the letter via the Internet. According to the source, the police was not able to produce evidence at the trial to demonstrate who had actually posted the letter online. Notwithstanding, both defendants were also convicted under the Electronic Transactions Law.

13. The presiding judge did not provide any reasoning when handing down the guilty verdicts against the two accused. He merely summarized the witness statements and gave the sentences. The lack of reasons and tone of the verdicts indicate that the judge was operating from a presumption of guilt.

14. Dr Htut and Mr Pu are currently being held at Insein Central Prison, Yangon, under the authority of the Department of Corrections, Ministry of Home Affairs. Mr Pu's health has reportedly deteriorated since his detention.

Deliberation

15. The Working Group wishes to express its regrets over the Government's omission to reply within the 90-day deadline, and to note that the Government did not use the opportunity to request an extension of the time limit under section 16 of the Working Group's Methods of Work. The Working Group stated in its two communications that it would appreciate if the Government could provide information about the current situation of Dr Htut and Mr Pu and provide clarification about the legal provisions justifying their continued detention.

16. The Working Group is in a position to provide an Opinion, on the basis of all the information it has obtained, on the detention of Dr Htut and Mr Pu, as one of the measures provided for in section 17.

17. Several provisions of the international instruments that the Working Group relies upon in the examination of the cases brought to its attention, have been violated. The preamble to the Universal Declaration of Human Rights states that human rights should be protected by the rule of law. The fair trial and arbitrary arrest provisions of the Universal Declaration have been violated in the cases of Dr Htut and Mr Pu.

18. The pretrial detention of Dr Htut and Mr Pu, from August 2008 to their trial in February 2009, was in violation of their right to a court hearing. International human rights law requires that a court review the lawfulness of the detention, and that this hearing occur promptly (See article 9 of the Universal Declaration of Human Rights; the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principle 11; and the rule in ICCPR article 9 (3), which in opinion of the Working Group constitutes customary international law).

19. At their trial, Dr Htut and Mr Pu were denied assistance of legal counsel. (See Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, Principles 17 and 18 and the rule in ICCPR article 14 (3) (d) which constitutes customary international law).

20. The evidence relied upon by the court, and the form of the judgment with the limited reasons given, constitute violations of the right to be presumed innocent until proved guilty according to law. The presumption of innocence is guaranteed by article 11 the Universal Declaration of Human Rights and established as one of the fair trial rights of customary

international law as it is also provided for in Article 14 of the ICCPR. Another violation is constituted by holding the trial in private without the justification of absolute necessity (See article 10 of the Universal Declaration of Human Rights which guarantees the right to a fair and public hearing by an independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him).

21. The Working Group notes that the detention and conviction was in response to the exercise of their freedom of opinion, expression and political free speech, and in violation of article 19 of the Universal Declaration of Human Rights. This requires a particularly vigilant review of the application of fair trial guarantees, and even more so, given that the domestic system seems to fail, as in the present case.

22. This also applies to the role of Dr. Htut and Mr. Pu as human rights defenders. They have been detained and convicted for alleged acts of informing the United Nations about human rights violations.

23. Their prison conditions raise further concerns. The Working Group has received information which gives rise to concerns for Mr. Pu's health. The Working Group reminds the Government, in this case as in previous cases (inter alia, Opinion No. 44/2008) that under the United Nations Standard Minimum Rules for the Treatment of Prisoners, the authorities have a duty to provide the services of a qualified medical officer within the prison facilities; to transfer prisoners and detainees who require specialist treatment to specialized institutions or to civil hospitals; and to provide prisoners and detainees with adequate food of nutritional value adequate for health and strength.

24. Consequently, the Working Group renders the following Opinion:

The detention of Dr. Tin Min Htut and Mr. U Nyi Pu is arbitrary, in violation of articles 9, 10, 11 and 19 of the Universal Declaration of Human Rights, and in contradiction of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The detention falls within categories II and III of the categories applicable to the consideration of the cases submitted to the Working Group.

25. The Working Group requests the Government to take the necessary steps to remedy the situation, which are the immediate release of, and an adequate reparation to, Dr Htut and Mr Pu.

26. The Working Group would emphasize that the duty to immediately release Dr. Htut and Mr. Pu will not allow further detention, even if the further actions taken against him should satisfy the international human rights obligations of Myanmar. Furthermore, the duty to provide adequate reparation under article 8 of the Universal Declaration of Human Rights, compare article 9 (5) of the International Covenant on Civil and Political Rights, is based on the arbitrary detention that has taken place and subsequent proceedings or findings in these cannot limit the State's responsibility.

27. The Working Group further requests the Government to seriously consider the possibility of becoming a State party to the International Covenant on Civil and Political Rights.

Adopted on 5 May 2010