

Opinion No. 12/2010 (Myanmar)

Communication addressed to the Government on 1 February 2010

Concerning Ms. Aung San Suu Kyi

The State is 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-days deadline.
3. (Same text as paragraph 3 of Opinion No. 18/2009)
4. The Working Group on Arbitrary Detention has already adopted five Opinions on **Ms. Aung San Suu Kyi** in 1992 (Opinion No. 8/1992, E/CN.4/1993/24, page 43), 2002 (Opinion No. 2/2002, E/CN.4/2003/8/Add.1, page 50), 2004 (Opinion No. 9/2004, E/CN.4/2005/6/Add.1, page 47), 2007 (Opinion No. 2/2007, A/HRC/7/4/Add.1, page 56), and 2008 (Opinion No. 46/2008, A/HRC/13/30/Add.1), declaring her detention to be arbitrary in contravention of Articles 9, 10, and 19 of the Universal Declaration of Human Rights.
5. Additional information on her case summarized hereinafter were reported by the source to the Working Group on Arbitrary Detention as set out in the paragraphs below.
6. On 14 May 2009, Ms. **Aung San Suu Kyi**, while serving a one-year extension of her term of house arrest at her home at Yangon, arrested by police officers, taken to Insein prison in Yangon, and charged with a new offense under Article 22 of the 1975 State Protection Law (*Pyithu Hluttaw* Law No. 3, 1975). Article 1 describes the State Protection Law as the “Law to Safeguard the State Against the Dangers of Those Desiring to Cause Subversive Acts”. Article 22 states, that “any person against whom action is taken, who opposes, resists, or disobeys any order passed under this Law shall be liable to imprisonment for a period of three years to five years, or a fine of up to 5,000 kyats, or both”. Ms. Suu Kyi’s house arrest order was originally issued pursuant to articles 7 and 10 of the 1975 State Protection Law, which allow the Government to order, without charge or trial, the detention or restricted residence of anyone it believes is performing or might perform “any act endangering the sovereignty and security of the state or public peace and tranquillity”.
7. The State Protection Law was adopted in accordance with article 167 of Myanmar’s 1974 Constitution, article 167 states: “(a) Laws may be enacted imposing necessary restriction on the rights and freedoms of citizens to prevent in infringements of the sovereignty and security of the State . . . (b) Such a preventive law shall provide that the restrictive order shall only be made collectively by a body and that the order shall be regularly reviewed and modified as necessary”. The Constitution itself was annulled when the military Government took power in 1988, and further invalidated by the alleged adoption of the new Constitution in the May 2008 referendum.

8. The source recalls that Ms. Suu Kyi was previously arrested in May 2003 and placed under a five-year term of house arrest that was declared to amount to arbitrary detention by the Working Group in its Opinions No. 9/2004 and 2/2007. This term of house arrest was renewed for one year on 28 May 2008, which was declared arbitrary by the Working Group in Opinion No. 46/2008, and expired on 27 May 2009, while Ms. Suu Kyi was under detention at Insein prison. While Ms. Suu Kyi was held there, she was allowed only one brief visit with individuals other than her lawyers, namely three foreign diplomats. Further, when Secretary-General Ban Ki-moon visited Myanmar on 3 and 4 July, he twice asked General Than Shwe to visit Ms. Suu Kyi, and was twice denied.

9. The source reports the factual events that lead to Ms. Suu Kyi's current regime of detention as follows: On the evening of 3 May 2009, an American citizen, Mr. John Yettaw, covertly entered the grounds of Ms. Suu Kyi's home. There were conflicting reports about how Mr. Yettaw gained access to the property. Early reports stated that Mr. Yettaw, a 53-year-old unemployed former military serviceman, swam across Inya Lake, which backs up to Ms. Suu Kyi's house. He reportedly accomplished this swim using homemade flippers and flotation devices. Other reports indicate that Mr. Yettaw told authorities that he "walked through" the lake, possibly along the lakeshore. According to the police complaint, Mr. Yettaw had made a similar swim on 30 November 2008, and left behind a copy of the Book of Mormon after Ms. Suu Kyi refused to see him. Mr. Yettaw later testified that after his November swim, police caught, questioned, and released him.

10. In relation to this occasion, Mr. Yettaw stated that "four or five" policeman saw him crossing the lake en route to Ms. Suu Kyi's house, and took no action against him other than throwing rocks. At the time, security around Inya Lake and the front of Ms. Suu Kyi's home was very tight. At approximately 5 a.m. on 4 May, Mr. Yettaw was discovered at the back of Ms. Suu Kyi's house by Ms. Suu Kyi's two friends and companions, Ms. Khin Khin Win and Ms. Win Ma Ma, a mother and daughter who are members of her party, the National League for Democracy. Mr. Yettaw, who is reportedly diabetic and suffers from asthma, told Ms. Suu Kyi's companions that he was exhausted and hungry, and they gave him food and reported his presence to Ms. Suu Kyi.

11. Ms. Suu Kyi then asked Mr. Yettaw to leave, but he refused, stating that he had leg cramps and was exhausted. Ms. Suu Kyi gave Mr. Yettaw "temporary shelter" in a ground floor room, while she returned to her bedroom upstairs. She later testified that she did not report Mr. Yettaw to the authorities because she did not want to cause either Mr. Yettaw or the guards around her house getting in trouble. Instead, she planned to report Mr. Yettaw's visit to her doctor, Dr. Tin Myo Win, on his next allowed visit on 7 May. Ms. Suu Kyi had reported Mr. Yettaw's previous attempted visit in 2008 through Dr. Myo Win, and had faced no questions from the Government authorities at that time.

12. Prior to 4 May, Ms. Suu Kyi had had no contact with Mr. Yettaw, who testified that he had broken into Ms. Suu Kyi's home because he "had a dream" that Ms. Suu Kyi would be assassinated, and "came to warn her". On a video shot by Mr. Yettaw inside Ms. Suu Kyi's home upon his arrival and later shown at trial, Mr. Yettaw said that he had asked Ms. Suu Kyi for permission to take her picture, and she had refused. He stated in the video, "She looks frightened, and I am sorry about this". Mr. Yettaw remained at Ms. Suu Kyi's home on 4 May. He initially told Ms. Suu Kyi he would leave that evening under the cover of night, but then pleaded to stay another day due to continuing health problems.

13. At approximately 11:45 p.m. on 5 May, Mr. Yettaw left Ms. Suu Kyi's home. At dawn on 6 May, Mr. Yettaw was pulled from Inya Lake by security forces and arrested. Mr. Yettaw left behind a number of items at Ms. Suu Kyi's house, including two black chadors, two black scarves, colored pencils, and sunglasses. When later asked whether she had accepted these items as gifts, Ms. Suu Kyi stated that she did not know if Mr. Yettaw had forgotten to take the items or left them.

14. After Mr. Yettaw was arrested, police visited Ms. Suu Kyi's home, and appeared to accept her explanation of events. However, on 7 May, security officials denied Dr. Myo Win entry to her house when he arrived for a scheduled visit, and he was later taken from his home and arrested on unspecified charges.

15. On the next day, medical assistant Mr. Pyone Moe Ei was allowed to visit Ms. Suu Kyi at her home, and found that she had been unable to eat for three or four days, and was suffering from dehydration and low blood sugar. She was placed on an intravenous drip. Mr. Pyone Moe Ei was denied permission to visit Ms. Suu Kyi on 9 May, and was not allowed entry to her home for a follow-up visit until 11 May.

16. On the morning of 14 May, Ms. Suu Kyi and her two companions were taken from her home by armed convoy to Yangon's Insein Prison. There, all three were charged with breaching the terms of Ms. Suu Kyi's house arrest in violation of article 22 of the 1975 State Protection Law. Ms. Suu Kyi's companions were also charged under Section 109 of the Penal Code for aiding and abetting another in committing a crime.

17. On 11 August 2009, Ms. Suu Kyi was given a three-year term of imprisonment at hard labor, which was subsequently commuted to 18 months of house arrest. Before the trial Ms. Suu Kyi requested that her lead counsel, U Kyi Win, ask another prominent lawyer in Myanmar, Aung Thein, to join her legal team. On 14 May, Mr. Thein, who had previously served as counsel to a number of political activists, applied to the court to represent Ms. Suu Kyi. The following day, Mr. Thein's law license was revoked by the authorities.

18. Ms. Suu Kyi was permitted a defense team of three lawyers, but was allowed to consult with her counsel only sporadically. Ms. Suu Kyi was charged on 14 May, and was allowed only one hour to visit with her lead attorney on 16 May before the trial began two days later. It does not appear that Ms. Suu Kyi was allowed to meet with counsel between 18 and 25 May. On 25 May, the prosecution abruptly cancelled its remaining witnesses, forcing Ms. Suu Kyi to testify on 26 May without prior discussion with her counsel. The court then denied a defense request to consult with Ms. Suu Kyi privately. Ms. Suu Kyi was not granted another private meeting with counsel until 30 May, after the prosecution's witnesses had concluded testimony and the defense had called its one allowed witness.

19. During the month of June 2009, when Ms. Suu Kyi's legal team appealed the trial court's decision to reject three of the four defense witnesses, Ms. Suu Kyi appears to have been allowed to consult with counsel only three times. On 19 June, Ms. Suu Kyi's birthday, authorities specifically refused to allow counsel to meet with Ms. Suu Kyi. Similarly, when Ms. Suu Kyi's trial resumed in July 2009, she appeared to have been allowed to consult with counsel only twice. Counsel described the necessity of "negotiating" with the Government in order to obtain permission to meet with Ms. Suu Kyi, and permission to meet was again specifically refused at least once.

20. During her trial the judges rejected an application by Ms. Suu Kyi's lawyers for a public trial. The public was denied access to the courtroom, which was under heavy security by armed soldiers. The Government repeatedly barred access to diplomats and journalists seeking to attend the trial. The trial was open on only four occasions for a limited number of hours, and each time, only allowed entry to a small, hand-selected group of diplomats and/or domestic journalists.

21. When the Government briefly opened Ms. Suu Kyi's trial to selected spectators on 20 May, it was Ms. Suu Kyi's first public appearance in over a year. In addition to conducting largely secret proceedings, the Government closely censored media reports of the trial. Domestic journalists were told not to deviate from official reports of the trial proceedings, and on one occasion, officials from the National League for Democracy

received a “formal warning” from authorities of Myanmar for criticism of the trial that was leaked to a blogger in Myanmar.

22. Of the five defense witnesses offered by Ms. Suu Kyi’s legal team, the trial court permitted only two witnesses to testify. The court justified the rejection of the remaining three witnesses on the grounds that their testimony was aimed at “vexation or delay or for defeating the ends of justice”. In contrast, the trial court approved 23 prosecution witnesses, and 14 took the stand. As such conduct was not in accord with the laws of Myanmar, Ms. Suu Kyi’s legal team appealed the witness ban following which the wife of one of her lawyers, a government employee, was abruptly laid off without explanation in an apparent attempt to intimidate Ms. Suu Kyi’s lawyers.

23. On appeal, the Divisional Court ruled to allow the testimony of a second defense witness, legal expert Khin Moe Moe, but maintained the disqualification of prominent journalist and former political prisoner Win Tin and the Vice Chairman of the National League for Democracy, Mr. Tin Oo, who is under house arrest. The highest court of Myanmar upheld the lower courts’ rejection of the remaining two witnesses. At the close of the trial, the lower court denied another defense request to present witness testimony from a fifth witness, a foreign ministry official, judging this testimony as “not important”.

24. The source argues that Ms. Suu Kyi’s current term of house arrest amounts to arbitrary deprivation of liberty.

25. The Working Group regrets that the Government has not replied to its communication in spite of the opportunity to do so.

26. The Working Group notes that Ms. Aung San Suu Kyi was sentenced for violating the terms of her previous term of house arrest which the Working Group has repeatedly found lacking legal basis (Opinions Nos. 9/2004, 2/2007 and 46/2008). Consequently, no charges can flow from the violation of the terms of this previous house arrest order. Further, even if this were not the case, no controlling body, acting in good faith, could find that her actions violated the terms of her house arrest.

27. However, there is no evidence to show that Ms. Suu Kyi or her companions knew Mr. Yettaw or welcomed his visit. To the contrary, all evidence clearly demonstrates that Mr. Yettaw was an uninvited trespasser on Ms. Suu Kyi’s property. Ms. Suu Kyi did not invite Mr. Yettaw to her home, and indeed, did not know Mr. Yettaw at all.

28. Ms. Suu Kyi and her companions had no communications with Mr. Yettaw, let alone by phone or letter, until he breached security at the property and was no longer an “outside party”. Ms. Suu Kyi and her companions took all reasonable steps to minimize their contact with him. As Ms. Suu Kyi and her companions were presumably incapable of physically forcing Mr. Yettaw to leave the grounds, their only “choice” to avoid communicating further with Mr. Yettaw would have been to alert the guards around Ms. Suu Kyi’s house. Ms. Suu Kyi elected not to do so, fearing that both Mr. Yettaw and the guards would face punishment. Rather, Ms. Suu Kyi had planned to alert the Government to the security breach through her doctor’s regular visit, as she did when Mr. Yettaw attempted to visit in November 2008.

29. Because Ms. Suu Kyi faced no inquiry or arrest based on this previous attempted visit, she had reason to believe that this method of reporting was acceptable to the Government.

30. Furthermore, Ms. Suu Kyi and her companions had no way of preventing Mr. Yettaw from breaching security at her home as this is under exclusive control of the Government. Indeed, among other charges, Mr. Yettaw was charged with “illegally entering a restricted zone”. Reinforcing the exclusive control the Government had around Ms. Suu Kyi’s home, National Police Chief, Mr. Khin Yee, announced that 20 security

officials had been given either three-month prison sentences or demoted and transferred from their positions after Mr. Yettaw's unannounced visit.

31. The Working Group further notes that Ms. Suu Kyi's trial was conducted in violation of a number of international norms relating to the right to a fair trial as contained in article 10 of the Universal Declaration of Human Rights, Principles 15, 17(2), 18 and 19 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and article 37 of the Standard Minimum Rules for the Treatment of Prisoners. She was not judged by "an independent and impartial tribunal" as enshrined in article 10 of the Universal Declaration of Human Rights.

32. The former Special Rapporteur on the situation of human rights in Myanmar stated: "The administration of justice is greatly marked by constraints which are inconsistent with judicial independence and characteristic of a military dictatorship . . . In reality . . . the judiciary is far from independent" (E/CN.4/2000/38, para. 22). The current Special Rapporteur on Myanmar writes that "under the current functioning, the judiciary is not independent and is under the direct control of the Government and the military" (A/63/341, para. 103).

33. Since Ms. Suu Kyi was refused the right to present witnesses in her defence in a largely closed trial and to communicate with her legal counsel, she has been denied a fair and public hearing. She has been denied access to medical care in contravention of principle 24 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and articles 24 and 25 of the Standard Minimum Rules for the Treatment of Prisoners. The Government has permitted Ms. Suu Kyi only sporadic visits from medical professionals during the past six years, despite Ms. Suu Kyi's need to address a number of serious health ailments.

34. The Working Group deems it necessary to recall that the Universal Declaration of Human Rights guarantees the right not to be arbitrarily detained, as well as the rights to due process and a fair trial, and to freedom of opinion, expression and assembly. None of these have been complied with.

35. In addition, the Working Group notes that a lawyer of the defence team for Ms. Aung San Suu Kyi and her co-accused had his licence revoked by the authorities. She was allowed to consult with her defence lawyers only sporadically. Most of the trial was conducted behind closed doors. The media was prevented from speaking to the defence lawyers. Only two of the five witnesses called by the defence were permitted to testify.

36. Ms. Aung San Suu Kyi was not informed of the reasons for her arrest; had no effective remedy to challenge her detention; no records were given to her; she was never informed of her rights; she has been denied communication with the outside world; and is being detained because of her political views.

37. In light of the foregoing, the Working Group renders the following opinion:

The continuation of the deprivation of liberty of Ms. Aung San Suu Kyi is arbitrary, being in contravention of articles 9, 10, 19 and 20 of the Universal Declaration of Human Rights and falls within categories I, II and III of the categories applicable to the consideration of cases submitted to the Working Group.

38. The Working Group again requests the Government of the Union of Myanmar to implement its previous recommendations and to remedy the situation of Ms. Aung San Suu Kyi in order to bring it into conformity with the norms and principles set forth in the Universal Declaration of Human Rights and to consider ratifying the International Covenant on Civil and Political Rights.

Adopted on 7 May 2010