

Opinion No. 23/2010 (Myanmar)

Communication addressed to the Government on 10 March 2010

Concerning: Mr. Kyaw Zaw Lwin, a.k.a. Nyi Nyi Aung

The State has not ratified the International Covenant on Civil and Political Rights.

1. (Same text as paragraph 1 of Opinion No. 18/2009)
2. The Working Group notes that the Government has replied to a previous urgent appeal sent on 16 December 2009 but not to the communication dated 10 March 2010 concerning its regular procedure.
3. (Same text as paragraph 3 of Opinion No. 18/2009)
4. The case summarised hereinafter was reported by the source to the Working Group on Arbitrary Detention as follows:
5. Mr. Kyaw Zaw Lwin, a.k.a. Nyi Nyi Aung, an American citizen, was arrested in Rangoon on 3 September 2009, after he disembarked a flight from Bangkok, by Special Branch and military intelligence officers.
6. Kyaw Zaw Lwin was taken to various interrogation centres and later to the Insein Central Prison.
7. On 24 September 2009, the State media carried reports accusing him of involvement in a terrorist plot.
8. Kyaw Zaw Lwin was charged of cheating and forgery under Section 420 of the Penal Code. On 14 October 2009, Presiding Judge U Than Lwin opened the trial in Mingalardon Township Court. According to the source, under Section 468 of the Penal Code, read with Section 463, there must be intent to commit forgery for the purpose of cheating. However, on 5 January 2010, Police Captain Than Soe admitted in Court that the accused at no time produced the supposedly forged card and nor do the Police have any record of his having used a forged card or of any intent to use one, so there was no act or intent to act upon which to lay this charge.
9. Subject was also charged with the commission of acts against Foreign Exchange Regulation Act, 1947, Section 24 (1), on a complaint of the Airport Customs Investigation Unit. The trial started on 30 October 2009 and took place before the Yangon Southern District Court. This foreign exchange charge is, according to the source, also baseless because personnel of Military Affairs Security (MAS) intercepted and took away Kyaw Zaw Lwin even before he had given any declaration forms to Customs. The next day, 4 September, personnel came to take forms from the concerned office and then returned them, completed, to the Airport Customs. The Assistant Director of the Customs Department, U Khin Maung Cho, openly admitted in Court this illegal procedure. He was the fifth Prosecution witness.
10. Lastly, Kyaw Zaw Lwin was charged with the commission of acts against Section 6 (3) of the Residents of Burma Registration Rules, 1951. According to the source, being Kyaw Zaw Lwin an American citizen and a resident in the United States, these ruled do not

apply to him. This third trial was held at a special court in Insein Central Prison, which was in violation of Section 2 (e) of the Judiciary Act 2000. There is no law which permits trials to be conducted inside a special closed court in a jail.

11. The source denounces that Kyaw Zaw Lwin was tortured while in custody. He was assaulted and denied food and sleep. He has also been kept in a tiny space adjacent to dog pens.

12. The source further denounces that the authorities are intent upon using possible judicial sentences passed through Courts as a means to pursue other forms of cruel and inhuman treatment in prisons and other places of custody.

13. The source alleges that the detention of Kyaw Zaw Lwin is arbitrary because it is based on totally unfounded charges and oriented to punish him with cruel and inhuman treatment while in prison. His detention is in violation of Articles 9 and 10 of the Universal Declaration of Human Rights.

14. The Working Group notes that the Government has replied to a previous urgent appeal sent on 16 December 2009 but not to the communication dated 10 March 2010 concerning its regular procedure. The Government has not replied within the 90 days deadline, nor has requested an extension of the delay to respond as stipulated in paragraph 16 of the Working Group's Methods of Work.

15. In its reply to the urgent appeal, the Government reports that this person was arrested under charges of forging an identity card and failing to declare currency at customs. In addition, he was also charged with violating immigration law for not formally renouncing his earlier nationality and for not giving back his Myanmar's identity card to the authorities.

16. The Government added that the legislation of the Union of Myanmar was fully respected in this case. All international standards concerning the arrest and detention of this person were respected, as well as those concerning the gathering and collection of evidence; testimonies of witnesses; legal aid and competent and impartial tribunal. Diplomatic representatives from the United States of America were authorized to assist to the hearings. Thus, the principles contained in articles 9 and 10 of the Universal Declaration of Human Rights were fully respected.

17. The Working Group thanks the Government for its response to the urgent appeal, which was accompanied of annexes concerning the attention to the detainee's health; as well as to several visits to him carried out by his relatives, lawyers and Consular representatives.

18. The Working Group notes that the Government has not explained the reason to hold three different judicial processes for each of the three charges. The three alleged infractions are related to the same person and were discovered at the same time. It has not explained why one of the judicial processes was carried out in closed sessions. It has not informed neither why one of the processes took place before a Special, not an ordinary, Court.

19. The Working Group recalls that everyone is entitled in full equality to a fair and public hearing by and independent and impartial tribunal in the determination of any criminal charge brought against him, as stipulated in Article 10 of the Universal Declaration of Human Rights.

20. A judicial process in closed sessions, before a Special Court, without explicit reasons, on common criminal charges, did not appear consistent with the principles and norms contained in the Universal declaration of Human Rights nor with the international human rights standards. Consequently, the Working Group considers that the detention of

Kyaw Zaw Lwin is arbitrary and corresponds to category III of the categories applied by the Working Group.

21. Consequently, the Working Group asks the Government to remedy the situation, proceeding to the immediate release of this person and to consider the possibility of providing him with adequate reparation.

22. The Working Group further recommends the Government to consider the possibility to become a Party at the International Covenant on Civil and Political Rights.

Adopted on 2 September 2010
