

# No. 28/2010 (Myanmar)

## Communication addressed to the Government on 16 August 2010

**Concerning: Ko Mya Aye**

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

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the former Commission on Human Rights. The mandate of the Working Group was clarified and extended by Commission resolution 1997/50. The Human Rights Council assumed the Working Group's mandate by its decision 2006/102, extended it for a further three-year period by resolution 6/4 and subsequently by resolution 15/18 for a period of three years. Acting in accordance with its methods of work, the Working Group forwarded to the Government the above-mentioned communication.
2. The Working Group conveys its appreciation to the Government for having provided it with the information concerning the allegations of the source.
3. The Working Group regards deprivation of liberty as arbitrary in the following cases:
  - (a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his sentence or despite an amnesty law applicable to him) (category I);
  - (b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the International Covenant on Civil and Political Rights (category II);
  - (c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III).
4. In the light of the allegations made, the Working Group welcomes the cooperation of the Government. The Working Group transmitted the reply provided by the Government to the source, and has received its comments.
5. The case summarized hereinafter was reported by the source to the Working Group on Arbitrary Detention as follows:
6. Ko Mya Aye, 44, national of Myanmar, a prominent member of the 88 Generation Students Group ("the 88 Generation") a movement calling for dialogue between the military regime and the National League for Democracy and other members of the 88 Generation movement were collectively rounded up and arrested by military authorities on 22nd August 2007. Ko Mya Aye was arrested from his residence.
7. It is not known whether Ko Mya Aye was shown an arrest warrant or informed of the applicable legislation under which he was arrested. Allegedly, he and other members of the 88 Generation were informed that they were being taken away for discussions with the authorities and not questioning or investigation. According to the source, the Government of Myanmar newspaper *New Light of Myanmar*, on the 23 August 2007, reported that the arrest and detention of the 88 Generation

members was for civil unrest aimed at undermining peace and security of the State and disrupting the ongoing National Convention.

8. On 11 November 2008, Ko Mya Aye was sentenced to 65 years and 6 months' imprisonment.

9. According to the source, Ko Mya Aye was initially held incommunicado, after his arrest in August 2007. His family sought the assistance of the International Committee of the Red Cross in locating him and was permitted to visit him in November 2007. Ko Mya Aye has since November 2007 been transferred to Loikaw prison in Kayha division in the south-east of Myanmar. His wife and children live in Rangoon and thus a visit to Ko Mya Aye involved a 551-mile journey. Due to his medical condition, Ko Mya Aye has been held in Taunggyi prison since April 2010 which is located 450 miles from Rangoon.

10. According to the source, the extent to which Ko Mya Aye can avail himself of legal representation is limited and there is no available procedure by which he can fairly or impartially seek to challenge the legality of his detention. He is being held without access to a lawyer. Allegedly, this is because the lawyers from Myanmar who represent activists of democracy within the country are themselves prosecuted and imprisoned. It has been reported that, on 9 November 2008, lawyers U Khin Maung Shein and U Aung Thein, who represented Ko Mya Aye were charged with "contempt of court" and sentenced to four months' imprisonment.

11. There is grave concern regarding allegations that Ko Mya Aye has been subjected to inhuman and degrading treatment and that he has been held in chains which are not taken off even when he has to exercise.

12. An additional concern is Ko Mya Aye's serious medical problems which are associated with heart disease. Ko Mya Aye suffers from angina and his family is concerned that he has not had access to adequate medical facilities or treatment and that he has not been allowed to read newspapers or other material.

13. The source also states that the circumstances of Ko Mya Aye's arrest and detention are in breach of articles 13, 18, 19 and 21 of the Universal Declaration of Human Rights and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

14. The source further states that the Myanmar military authorities' non-observance of the essential international human right norms relating to the arrest, detention and the right to a fair legal process in Ko Mya Aye's case is of utmost gravity and his deprivation of liberty can only be described as arbitrary.

15. The above allegations were communicated to the Government of Myanmar on 16 August 2010 and clarifications sought. The Working Group received the Government's response on 6 October 2010 and is presented below.

16. The Government in its response states that Ko Mya Aye is indeed detained on a number of counts including, under section 228 of the Contempt of Court Act, of setting up the 88 Generation Student Association (which it considers illegal) as well as disseminating rumours relating to economic, social and political information through Internet and e-mail on four charges under section 33 (A) of the Electronic Transactions Act. He was sentenced to a prison term and transferred from Insein prison to Loikaw prison on 17 November 2007.

17. During his detention in Loikaw prison he received medical care on a number of occasions, including access to specialist and outside medical treatment. He was transferred to Taunggyi prison on 2 April 2010 in order to receive proper medical care for his heart disease and latest medical records indicate that his heart condition is not serious and he has not suffered heart failure.

18. The Government further states that Ko Mya Aye's family members were allowed to visit him and they came to meet him for a total of 10 times at Loikaw prison and 4 times at Taunggyi prison.

19. Finally, the Government declares that Ko Mya Aye is also allowed to read newspapers and other material provided to him by his family and prison officers. He enjoys a smooth relationship with prison officials and is allowed to exercise. The Government denies that Ko Mya Aye is held in chains.

20. In accordance with the working methods of the Working Group, the above response of the Government of Myanmar was transmitted to the source and received its comments, summarized below.

21. The source reiterates that Ko Mya Aye is a prisoner of conscience and was detained (contrary to all internationally recognized norms and standards) for being a member of the peaceful campaign for national dialogue in Myanmar. He has in fact been detained for the sole purpose of repressing free speech, free conscience and free assembly and because of his membership of the 88 Generation. His detention was (and remains) entirely politically motivated and in their view, plainly arbitrary.

22. The source further argues that the Government's response does not provide any denial of the facts of Ko Mya Aye's case (in respect of the original detention). There is no rebuttal of the factual or legal allegations against the Government and no evidence whatsoever in support of the detention (save in respect of the conditions of the actual imprisonment). The source's view is that the Government's response does not give any evidence to contradict the case for arbitrary arrest and detention made by Ko Mya Aye.

23. The source states that the Government purports to rely on its domestic law for the conviction of Ko Mya Aye without going into details of whether these laws are in consonance with international human rights law. It is averred that the mere recital of the conviction does not amount to a defence to the allegations against the Government. The Working Group has previously held that while a "detention may be regarded as being in conformity with national legislation", this does not mean it is "in keeping with the relevant standards set forth in the Universal Declaration of Human Rights" (see opinion No. 1/1998, para. 13 (b)). A domestic provision of law purportedly authorizing a violation of basic human rights cannot legitimize otherwise internationally indefensible action. In the opinion of the source, the fact that Ko Mya Aye was charged with supposed offences under Myanmar Law (and even if that were acceptable as a matter of Myanmar Law) cannot, and will not, render lawful detention that is unlawful and arbitrary as a matter of fundamental human rights norms.

24. In terms of the alleged offences by Ko Mya Aye, the Government's response does not set out the details thereof. The source repeats that they are contrary to substantive rights in the Universal Declaration of Human Rights. The Government has not contradicted the fact that the actions of Ko Mya Aye were at all material times been non-violent, wholly peaceful and only ever in accordance with and in exercise of rights guaranteed by the Universal Declaration. For instance, calling for dialogue between the National League for Democracy and the military regime, collecting signatures for a petition, dressing in white and asking others to dress in white clothes, initiating a prayer campaign in which people of all religions were asked to pray for a peaceful resolution to Burma's political problems and encouraging citizens to write letters explaining their plight to the military authorities.

25. Conversely, the source affirms that uncontradicted and extensively documented conduct of the Government has, at all material times and in all material respects, been oppressive, brutal, contrary to international humanitarian law and designed to silence any peaceful opposition to the military regime. As the Working Group has previously held: "peaceful expression of opposition to any regime cannot give rise to arbitrary arrest. Freedom of thought and expression are both protected by articles 18 and 19 of the Universal Declaration of Human Rights" (see opinion No. 25/2000, para. 12).

26. The source states that some of the purported facts as stated by the Government are inaccurate. Ko Mya Aye has been held in Loikaw and Taunggyi prisons at considerable distance from Rangoon where his family resides and any visits which are permitted are arduous and hard and undertaken by a public bus service. It is repeated that Ko Mya Aye is deliberately being held in distant prisons in order to discourage any family visits.

27. The source believes that Ko Mya Aye has not been seen by a cardiologist and no prognosis has therefore been made. The source also insists that these factual matters are irrelevant to the legal issue of whether the imprisonment is in the first instance arbitrary and unlawful as the Government has, in its view, not presented any evidence to support its position.

28. Based on the above account of the background and ongoing detention of Ko Mya Aye, some important issues arise. The Government in its response only partially addresses the allegations leaving a number of questions unanswered. For instance, the source in its submissions alludes to the absence of an arrest warrant; the Government does not deny this. The Government refers to section 228 of the Contempt of Court Act as one of the reasons for detaining Ko Mya Aye but does not say what manner of contempt of court was he guilty of, and exact duration of detention on this

count out of the 65 years and 6 months' sentence. Furthermore, why were the family of Ko Mya Aye not informed promptly of his arrest and detention?

29. The Government's response also accepts that charges apply due to the exercise by Ko Mya Aye of his fundamental human rights to speech, freedom of expression, association and assembly as well as the right to political participation. It does not accuse Ko Mya Aye of any violent behaviour (see paragraph 19 above where the Government acknowledges good relationship of Ko Mya Aye with prison officials).

30. Coming to the actual trial and detention of Ko Mya Aye, the Working Group notes with concern that the international human rights norms relating to a fair and impartial trial have not been fulfilled. This includes access to legal counsel of one's choice, as well as the right of this counsel to present the case without fear or favour. The Government's response has not engaged at any length with this question raised by source.

31. The Working Group notes that the Government does not deny that Ko Mya Aye is detained hundreds of miles away from home thus inhibiting frequent visits of his family. For a person suffering from a heart ailment, frequent visits from family are hugely important to maintain stable health but this is not possible because of vast distances as described by source. In this regard, the Working Group recalls the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

32. Finally, the Working Group notes with concern that, during the past years, it has been called upon to render opinions on many similar cases from Myanmar including: opinions No. 8/1992; No. 2/2002; No. 16/2004; No. 9/2004; No. 11/2005; No. 4/2006; No. 7/2008; No. 12/2008; No. 26/2008; No. 43/2008; No. 44/2008; No. 46/2008. A common thread running through these cases is the arrest and detention of persons on similar charges as the case in hand and where the detainees had attempted to exercise their human rights to free speech, expression, association and assembly and participate in the movement for democracy. The Working Group therefore does not see the present case as an isolated one and urges the Government of Myanmar to seriously investigate the practice and reconsider its vague, overly general and broad charges for arrest and detention.

33. In the light of the information made available to it and analysis thereof, the Working Group believes itself to be in a position to render an opinion as follows:

That the deprivation of liberty of Ko Mya Aye is arbitrary and in breach of articles 13, 18, 19 and 21 of the Universal Declaration of Human Rights falling within categories II and III of the categories applicable to the consideration of cases submitted to the Working Group on Arbitrary Detention.

34. Consequent upon the opinion rendered, the Working Group requests the Government of Myanmar to release Ko Mya Aye forthwith, bringing it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights.

35. In view of the adverse affect of this wrongful arrest and detention on the health of Ko Mya Aye, the Working Group requests the Government ensure adequate medical care and appropriate reparation.

36. The Working Group continues to urge and invite the Government of Myanmar to ratify the International Covenant on Civil and Political Rights.

[Adopted on 22 November 2010]