

No. 49/2013 (Myanmar)

Communication addressed to the Government on 1 July 2013

Concerning Tun Aung (also known as Nurul Haque)

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

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the former Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. The Human Rights Council assumed the mandate in its decision 2006/102 and extended it for a three-year period in its resolution 15/18 of 30 September 2010. It was extended for a further three years in resolution 24/7 of 26 September 2013. In accordance with its methods of work (A/HRC/16/47, annex, and Corr.1), the Working Group transmitted the above-mentioned communication to the Government.

2. 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 or her sentence or despite an amnesty law applicable to the detainee) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14 and 18 to 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);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law for reasons of discrimination based on birth; national, ethnic or social origin; language; religion; economic condition; political or other opinion; gender; sexual orientation; disability; or other status, which is aimed towards or can result in ignoring the equality of human rights (category V).

Submissions

Communication from the source

3. The case reported to the Working Group on Arbitrary Detention is summarized below.

4. Mr. Tun Aung (hereafter Mr. Aung), also known as Nurul Haque, is a national of Myanmar born in XXXX and of Muslim faith. He is a retired medical doctor, the current chairman of the Maungdaw District Islamic Affairs Council, and a community leader. He normally resides in Maungdaw Town, Rakhine State, Myanmar.

5. On 11 June 2012, Mr. Aung was called to the headquarters of the Border Migration Investigation and Supervision Department (hereafter referred to by its commonly known acronym NaSaKa) for

questioning. A laptop computer, reportedly not his, and two mobile telephones were confiscated. He was then arrested without a warrant and taken into custody by NaSaKa personnel.

6. Immediately following his arrest, Mr. Aung was placed in detention at the NaSaKa Headquarters in Maungdaw. He was later transferred to the army's Western Regional Command Headquarters for further interrogation. According to the source, transfer to a military facility is in violation of section 60 of the Code of Criminal Procedure, requiring that an arrested person be taken without delay to a police station. At a later date, Mr. Aung was transferred to Sittwe Prison, where he remains today.

7. While in detention, Mr. Aung was alleged to have been held incommunicado in the lead-up to his trial. A number of his family members were detained during the same period, making their intervention on his behalf impossible. Mr. Aung is an elderly man who has been in poor health in recent years, having suffered from a pituitary tumour, loss of periphery vision, varicose veins and reduced immunity. Reportedly, the poor prison conditions in which he is being kept and his lack of access to specialist treatment are particular causes of concern.

8. Mr. Aung was accused of posting material on the Internet about violence in the days preceding his arrest, provoking communal violence and not informing NaSaKa of a mourning procession for 10 Muslims who had been killed, despite his knowing about it before it took place. Additionally, a search of his house following his arrest uncovered various items (a walkie-talkie, an old SIM card from Bangladesh and foreign currency) that were reportedly used to bring a criminal case against him. Mr. Aung was charged pursuant to sections 148, 153A and 505 (b) of the Penal Code; section 24 (1) of the Foreign Exchange Regulations Act; section 6 (1) of the Myanmar Wireless Telegraphy Act, No. 17/33 (as amended by Act No. 13/1993); and section 5 (j) of the Emergency Provisions Act, No. 17/50.

9. The charges brought against Mr. Aung are, in the source's view, typical of and consistent with the charges brought in Myanmar in particularly targeted cases under successive military dictatorships, aimed at depriving persons of their rights guaranteed under articles 7, 19 and 20 of the Universal Declaration of Human Rights.

10. The source reports that Mr. Aung's case was transferred to and tried in a court (Sittwe District Court) outside of the jurisdiction where the alleged offences occurred (Maungdaw), contrary to section 177 of the Code of Criminal Procedure, and without evidence of an order having been given under section 178 of the Code to permit the transfer. The justification given for the transfer was that it was necessary because of security conditions in Maungdaw. In the source's view, this justification carries no weight, since at the time of the trial, conditions in Sittwe were as unstable as they were in Maungdaw.

11. The source submits that the case was tried contrary to article 10 of the Universal Declaration of Human Rights. Mr. Aung was unable to obtain a lawyer or call witnesses in his defence. None of the persons he sought as witnesses was willing to testify owing to the security situation and the state of emergency and resulting curfews that had been imposed throughout the country. The judge reportedly inferred that witnesses did not want to attend because their testimony would conflict with Mr. Aung's defence. All of the witnesses for the prosecution were police or military personnel whose evidence consisted almost entirely of oral depositions. No substantive material evidence was reportedly brought against Mr. Aung.

12. On 21 November 2012, Mr. Aung was convicted and sentenced to 11 years' imprisonment. The source submits that Mr. Aung's conviction was without regard to the facts of the case and was instead the result of instructions from non-judicial agencies.

13. Mr. Aung has reportedly appealed his conviction to the Rakhine State High Court. The High Court upheld the lower court's verdict and conviction under the Foreign Exchange Regulations Act. Other convictions are pending. Mr. Aung's wife submitted a letter concerning the facts of the case to the Presidential Commission of Inquiry established to examine the violence in Rakhine State, and another letter concerning the alleged procedural failures and lack of a fair trial to Sittwe District Court. The source reports that Mr. Aung's wife has not received a reply to either letter.

14. The source submits that Mr. Aung's detention is arbitrary under categories II and III of the Working Group's criteria for the investigation of individual cases, owing to the arbitrary manner of his arrest and detention, the character of the charges brought against him and the unfair and

procedurally incorrect trial he underwent. The source also cites violations of articles 7, 10, 19 and 20 of the Universal Declaration of Human Rights

Response from the Government

15. The Working Group communicated the allegations of the source to the Government of the Republic of the Union of Myanmar, requesting it to provide it with detailed information about the current situation of Mr. Aung and to clarify the legal provisions justifying his continued detention. The Working Group regrets that the Government has not responded within the period established under the Working Group's methods of work or sought an extension of the time limit to submit its response.

16. On the basis of the information available to the Working Group and in accordance with its revised methods of work, it is able to deliver an opinion in this case.

17. At the outset, the Working Group notes that the case of Mr. Aung is one of several that have been brought before United Nations human rights mechanisms in recent months. It reflects the serious violence and human rights abuses perpetrated against ethnic and religious minorities in Myanmar, particularly the recent violence against the Rohingya Muslim minority in Rakhine State.

18. Governments, including their institutions and officials, are obliged to protect all their citizens, irrespective of race, ethnic origin and religion or belief. Institutional structures, particularly the judicial system, must be vibrant, robust and responsive to any challenges to the human rights of individuals and groups within States.

19. A major issue in the matter of Mr. Aung is the role of the army in his arrest and detention. The Working Group maintains its consistently held position that it is unacceptable for military courts and tribunals to hear cases of human rights violations and for the military to assume the role of justice provider, given that such military structures fall far short of international human rights standards. Mr. Aung has been denied his fundamental right to a fair trial conducted by an impartial and independent judicial tribunal. The army in this case is both prosecutor and judge, and has arrest, investigative and trial authority, leaving little room for an impartial trial and outcome.

20. Information available to the Working Group points to a number of procedural and substantive flaws in the case in hand which are in violation of the national laws of Myanmar. They include a violation of section 60 of the Code of Criminal Procedure, which requires that arrested persons be taken immediately to a police station. This requirement was not met in the case of Mr. Aung. The fact that the case was heard outside the jurisdiction where the offence was committed constitutes a further violation. Had this been a security-led decision, it might have been acceptable, but security in Sittwe was and remains unstable. In a climate of violence, and in view of the lack of security, the removal of the trial from the place where the incident/s allegedly occurred constitutes a third procedural flaw. Calling for evidence and witnesses when the area was under curfew for long periods of time and when the violence was ongoing falls below minimum acceptable international standards of fair trial.

21. The arrest and detention of Mr. Aung, a well-respected, retired medical doctor and a moderately-inclined Muslim community leader who supported the Government in dispelling violence by calming the Muslim community, also bear strong marks of religious discrimination. Numerous other members of the Muslim community have also been arrested and detained, as confirmed by credible sources, including the Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana, in his various statements and reports.

22. In the report he presented on 24 October 2013 to the General Assembly at its sixty-eighth session, Mr. Ojea stated that "Rakhine State continues to experience a profound crisis. There is little evidence that the Government has taken steps to tackle the underlying causes of the communal violence or has put in place the policies that are necessary to forge a peaceful, harmonious and prosperous future for the state" (A/68/397, para. 46).

23. Moreover, the Special Rapporteur was informed during his latest visit to Rakhine State that, since the violence began in June, a total of 1,189 people had been detained, including 260 Buddhists and 882 Rohingya Muslims. No state officials had been arrested in connection with the violence and its aftermath. In view of the consistent and credible reports of widespread and systematic human rights violations carried out by security forces that the Special Rapporteur had received, he remained concerned that the perpetrators of such violations had not been held to

account. That culture of impunity was particularly troubling given the vulnerability and marginalization of the members of the Rohingya community owing to their lack of legal status in the country (A/68/397, para. 47).

24. The Working Group notes that the lack of legal status of the Rohingya Muslim communities restricts their movement within the country, thus violating international human rights standards and discriminating against them on the grounds of religious identity.

25. The Special Rapporteur reiterated in his report:

The State has not fulfilled its obligation to properly investigate allegations, dating from June 2012, of extrajudicial killings, rape and sexual violence; arbitrary detention and torture and ill-treatment in detention; deaths in detention; and denial of due process and fair trial rights. It also has not held those responsible to account. He calls upon the international community, including the Human Rights Council, to remain seized of this matter and to consider further steps until Myanmar has fulfilled its obligations under international human rights law. (A/68/397, para. 48)

26. The Special Rapporteur confirmed that the local Muslim leaders in Sittwe remained under threat of arbitrary arrest following a recent verification exercise (*ibid.*, para.54). The trial of seven local Muslim leaders, including Mr. Aung, was ongoing at the time of Mr. Ojea's visit, during which he met with Mr. Aung and other detainees.

27. The Special Rapporteur:

believes that many Muslim men and boys have been arbitrarily detained following village "sweeps" conducted by security personnel after the violence in June and October 2012. Defendants have subsequently been denied legal representation, tried in closed trials with no access to the public, including family members, not received adequate interpretation of court proceedings, not received clear information on the charges against them (and requested to submit witness lists even so), have been tried in mass trials of more than 70 persons and have been chained together during trial proceedings. Following his latest visit to Buthidaung, in August 2013, the Special Rapporteur was informed that, between 21 and 23 August, the court there had sentenced a total of 78 Rohingyas to prison terms ranging from seven years to life. He is seriously concerned that these detentions and convictions are arbitrary and unjust, and urges the Government to investigate and take the necessary remedial action. (A/68/397, para. 55)

Disposition

28. In the light of the foregoing, the Working Group on Arbitrary Detention renders the following opinion:

The deprivation of liberty of Mr. Aung is arbitrary, being in contravention of articles 7, 19 and 20 of the Universal Declaration of Human Rights and falling within category II of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it. Further, Mr. Aung's arrest and detention are also considered arbitrary pursuant to category III of the categories defined by the Working Group, as they are in breach of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, annexed to General Assembly resolution 43/173 of 9 December 1988, particularly principles 13, 15, 17, 18 and 36. Finally, the Working Group finds that Mr. Aung's arrest and detention fall under category V of the categories applicable to the cases submitted to the Working Group.

29. Consequent upon the opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation, which include the immediate release of Mr. Aung and the provision of adequate reparation to him.

30. The Working Group encourages the Government of Myanmar to ratify the International Covenant on Civil and Political Rights.

[Adopted on 19 November 2013]