

No. 50/2013 (Myanmar)

Communication addressed to the Government on 15 August 2013

Concerning Laphai Gam

The Government replied to the communication on 28 September 2013. 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. The mandate 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, 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);
- (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; or disability or other status, and which aims towards or can result in ignoring the equality of human rights (category V).

Submissions

Communication from the source

3. The case summarized below was reported to the Working Group on Arbitrary Detention as follows.

4. Laphai Gam, a citizen of Myanmar, is an ethnic Kachin of the Christian faith. He was a herdsman in Kachin State. He moved with his wife and four children to the internal displacement camp operated by the Shwe Tset Kachin Baptist Church at Myitkyina after fighting broke out between the Myanmar Army and the so-called Kachin Independence Army in Waing Maw Township.

5. On 12 June 2012, Mr. Gam was arrested by the Myanmar Army while on his way to Tar Law Gyi village to work as a herdsman. The source reports that many other Kachin men living in internal displacement camps were arrested on the same day.

6. According to the source, no charges were fairly or properly put to Mr. Gam at the time of his arrest. Mr. Gam was later tried in court for the alleged breach of article 17 of the Unlawful Associations Act, 1908. He was accused of being associated with the Kachin Independence Army, which is a banned organization in Myanmar.

7. The reason for Mr. Gam's arrest, in the source's view, is that he is an ethnic Kachin. The source alleges that Myanmar authorities indiscriminately target Kachin individuals on suspicion, based on little or no evidence, that such persons must necessarily be in sympathy with the Kachin Independence Army.

8. Mr. Gam's incarceration followed a trial which, in the source's opinion, was carried out in breach of Mr. Gam's fundamental right to a fair trial, as he had no right of access to an independent, impartial judicial tribunal and was not represented by legal counsel. Further, the source states that there is no available legal procedure by which Mr. Gam can fairly or impartially seek to challenge the legality and conditions of his detention.

9. Mr. Gam has remained in detention since the time of his arrest. He was held at a monastery in Tar Law Gyi village before being transferred to Myitkyina prison on 2 July 2012.

10. Mr. Gam has reportedly been kept in virtually incommunicado detention, without regular access to his family or his lawyer. Moreover, he is not permitted to read newspapers or other informational material.

11. Mr. Gam's wife, Lasi Lu, was permitted to visit him following his arrest. She has publicly stated that, when she saw him, he complained of having been tortured.

12. The source adds that Mr. Gam has been subjected to inhuman and degrading treatment and torture while in detention. He was beaten from head to toe with an iron rod and had a bamboo stick rolled up and down his knees. He was forced into same-sex acts with another prisoner while the prison authorities watched. Additionally, as he is Christian, he was forced to stand in a crucifixion position, during which time he was subjected to mocking statements about his Christian faith. The source maintains that Mr. Gam was tortured with the aim of extracting confessions to the charges against him.

13. The source has not received confirmation as to whether Mr. Gam has access to proper medical attention. It conveys its fear that Mr. Gam's physical and mental integrity is at risk.

14. The source submits that the arrest and continued detention of Mr. Gam has restricted his right to freedom of movement and residence, his right to freedom of thought and conscience, his right to freedom of opinion and expression, and his right to take part in the government of his country. As such, the deprivation of his liberty contravenes articles 13, 18, 19 and 21 of the Universal Declaration of Human Rights and should therefore be considered arbitrary pursuant to category II of the arbitrary detention categories defined by the Working Group.

15. In addition, the source argues that Mr. Gam's arrest and detention should be considered arbitrary pursuant to category III of the arbitrary detention 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, adopted by the General Assembly through its resolution 43/173. In particular, principles 1, 3, 4, 6, 7 (para. 3), 10, 11, 13, 15, 17, 18, 19, 20, 21, 24, 25, 27, 28, 29, 32, 33 and 36 have, in the source's view, all been contravened.

16. On 15 August 2013, the Working Group communicated the allegations of the source to the Government of Myanmar, requesting it to provide the Working Group with detailed information about the current situation of Mr. Gam and to clarify the legal provisions justifying his continued detention.

Response from the Government

17. On 28 September 2013, the Government responded to the communication transmitted by the Working Group. The Government confirms that Mr. Gam was arrested by Battalion No. 37 on 14 June 2012 in Tar Law Gyi village, Myitkyina Township, although the Working Group notes that the source stated 12 June 2012 as the date of Mr. Gam's arrest.

18. According to the Government, the "investigation ... conducted by a responsible team from the Northern Command found that Laphai Gam was a sergeant from the Kachin Independence Army. A case was filed against him at the Myitkyina Township Court under section 17(1) of the Unlawful Associations Act."

19. The Government also states that "in addition to this it was found that Laphai Gam was also responsible for a car bomb explosion incident in Myitkyina on 3 December 2011 for which he was sent before the Myitkyina District Court to face charges under section 3 of the Explosive Substances Act. The court is still hearing the case."

20. The Government informs the Working Group that "interrogation also found out that Laphai Gam was involved in a bomb plot at the Namtmyinkha bridge in Winemaw Township on June 2011. The Winemaw Township has been hearing the case under section 4 of the Explosive Substances Act."

21. The Government maintains that "no restriction is imposed on Laphai Gam in retaining lawyers. He has unrestricted access to lawyers, namely, U Gyi Ma Khar, U Bawm Mile and U Taint Yein. Laphai Gam is in good health and has not required medical treatment in the prison. The prison doctor is available on a daily basis and provid[es] medical treatment to detainees as necessary. Laphai Gam has unrestricted access to newspapers and journals. He can also watch television like other prisoners. He can receive visitors fortnightly."

Further comments from the source

22. In accordance with its methods of work, the response of the Government was sent to the source for comment.

23. The source states that the Government's reply does not offer a satisfactory response to the source's assertion that Mr. Gam has been arbitrarily detained because he is an ethnic Kachin and that he has been targeted because he belongs to the Christian minority.

24. Mr. Gam's case was allegedly built on his "confessions", extracted under torture. The Government in its response does not dispute that the evidential basis of the case against Mr. Gam was built on information extracted from him, which he surrendered as a result of torture. The source argues that it is clear under international law that evidence obtained as a result of torture is not admissible evidence in law.

25. The Government asserts that "investigations" were conducted "by a responsible team", without referring to any evidence disclosed to the "responsible team". In this respect, the source argues that the Government does not factually dispute that the "responsible team" subjected Mr. Gam to torture.

26. No evidence is put forward by the Government in support of the contention that Mr. Gam was a "sergeant from the Kachin Independence Army". The source submits that "while the Working Group will not substitute itself for a domestic fact-finder, it cannot allow the mere assertion that something is so, to be sufficient for the Working Group to conclude it is incapable of rendering a view as to the evidence. At a minimum, given the Working Group's procedures and approach to cases, a state must at least put forward some evidence, beyond an unsubstantiated assertion, to benefit from the Working Group's presumption that it will not weigh evidence and render determinations on disputed facts." The source argues that, in this case, literally no evidence has been presented to support the assertion that Mr. Gam was a sergeant in the Kachin Independence Army. The source maintains that Mr. Gam was and remains a herdsman and, at the time of his arrest, he was attempting to undertake work as a herdsman. In the source's view, the sentence of imprisonment which was imposed on Mr. Gam was wrong in law and the detention which was imposed is arbitrary.

27. As to the contention of the Government that there are two further cases ongoing against Mr. Gam, the source repeats its earlier submission that there is no evidence in support of those allegations. Mr. Gam has been held in prison since the date of his arrest, 12 June 2012. Sixteen months have elapsed since he was first arrested. The source submits that this delay is deliberate, to extend the imprisonment of Mr. Gam.

28. The Government asserts that Mr. Gam has access to his lawyers, listed as U Gyi Ma Khar, U Bawm Mile and U Taint Yein. The source maintains that asserting such access to lawyers however does not address the contention that Mr. Gam does not have access to systems of law which recognize international principles of justice. Any court of law, to comply with the least requirement of law, must act on evidence. In the instant case, there is simply no evidence against Mr. Gam.

29. As regards the international standards on fair trial, the source submits that the Government makes no case at all as regards fair trial process; it is completely silent on this issue and does not assert that it was fair. It is thus a matter of inferential logic that the trial process was unfair.

Discussion

30. Mr. Gam's case raises a number of issues of domestic and international human rights law. At the outset, the Working Group welcomes the response of the Government of Myanmar to its communication, as well as the further comments from the source on the Government's response.

31. The response of the Government, however, only partially responds to the allegations put forward by the source and does not address some of the most critical issues arising from the arrest and detention of Mr. Gam. Some factual matters presented in the initial communication from the source that have a bearing on whether the detention is arbitrary are not disputed by the Government, casting doubt on the veracity of its position that Mr. Gam was not arbitrarily detained.

32. It is a well-documented fact that for many years there has been, and continues to be, a deep ethnic tension among the minority communities vis-à-vis the majority group in Myanmar, which has resulted in fighting and arbitrary arrests, detention and other human rights abuses.

33. Mr. Gam belongs to the minority Kachin ethnic group, and Army operations have resulted in numerous arrests of ethnic Kachins. Such operations are also alleged to have led to torture of ethnic Kachins to extract confessions. The case in hand is an example: Mr. Gam's wife, after visiting him, publicly asserted that Mr. Gam had complained of being tortured. In this regard, the Special Rapporteur on the situation of human rights in Myanmar presented a statement at the sixty-eighth session of the General Assembly, on 24 October 2013, in which he expressed his concern at the continued fighting in parts of Kachin and Northern Shan State and the suffering those conflicts had brought to the people of Myanmar.¹

34. In another statement, published on 21 August 2013, the Special Rapporteur states that "over the years there have been serious allegations of human rights abuses against villagers from Kachin".² He also mentions his concern at the continuing practice of torture in places of detention. Such being the prevalent situation, the Government would be expected to submit a robust rebuttal to the source's allegation of torture to clarify the situation. To the contrary, the Government has ignored this serious allegation.

35. Linked to the above is a further set of human rights that are alleged to have been violated, but those allegations remain unchallenged by the Government. These include restrictions on freedom of movement and residence, freedom of thought, conscience and religion, freedom of opinion and expression. As a member of the ethnic minority group (Kachin) and a minority faith group (Christian), Mr. Gam is in a vulnerable position as an internally displaced person, which places upon the Government the legal obligation to extend him protection. Instead, Mr. Gam has been charged with being a member of the banned Kachin Independence Army.

36. A major issue in the matter of Mr. Gam is the role of the Army in his arrest and detention. The Working Group maintains its consistently held position that military courts and tribunals and military assuming the role of justice provider is unacceptable, as these fall far below the requirements of international human rights standards.

37. In its response, the Government does not refute the fact that the arrest was carried out by a unit of the Army and that investigation and trials are being undertaken under the command of that institution. Mr. Gam has therefore been denied his fundamental right to a fair trial and for such trial to be conducted by an impartial and independent judicial tribunal. The Army in this case is prosecutor and judge, and has arrest, investigative and trial authority, leaving little room for an impartial trial and outcome.

38. The Working Group has stated in numerous cases that its competence is to analyse whether the person in question had the right to fair and impartial legal proceedings before an independent court, not to substitute itself for a national court in making findings of fact based on disputed evidence.³ Nevertheless, the Working Group has also repeatedly made clear that the duty is on the State to contest or deny allegations made by petitioners - otherwise such silence in response to the assertion of material claims by the petitioner will be viewed as an implicit acknowledgement by the State that it is not disputing these claims.⁴

39. The Working Group further notes with concern the alleged acts of torture and ill-treatment committed against Mr. Gam during his detention and that his confessions were extracted under torture. The Working Group finds that such pervasive use of torture to extract evidence nullifies the possibility to fulfil the guarantee of the right to a fair trial.

40. In the case in hand, the information made available to the Working Group leads to the conclusion that a number of fundamental human rights violations have occurred, to which it does not find any robust denial in the response of the Government.

Disposition

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

The deprivation of liberty of Mr. Gam is arbitrary, being in contravention of articles 13, 18, 19 and 21 of the Universal Declaration of Human Rights; it falls within category II of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

The Working Group further determines that Mr. Gam's arrest and detention is also considered arbitrary pursuant to category III of the categories defined by the Working Group, as it is in breach of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment as enshrined in General Assembly resolution 43/173 of 9 December 1988.

Finally, the Working Group finds Mr. Gam's arrest and detention to fall under category V of the categories referred to by the Working Group when considering cases submitted to it.

42. 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. Gam and adequate reparation to him.

43. In accordance with article 33 (a) of its revised methods of work, the Working Group considers it appropriate to refer the allegations of torture to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment for appropriate action.

44. The Working Group reminds the Government that its national laws should comply with all obligations under international law, in particular international human rights law.

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

[Adopted on 19 November 2013]

¹Available from

<https://papersmart.unmeetings.org/media2/703350/statement-by-tomas-ojea-quintana-item-69c.pdf>

²Available from www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13649&.

³See, for example, opinion No. 69/2012 (Cuba), concerning Alan Gross, para. 40

⁴See, for example, opinion No. 2/2003 (China), concerning Yang Jianli, paras. 16-18.