

# No. 31/2014 (Myanmar)

## Communication addressed to the Government on 25 June 2014

concerning Kyaw Hla Aung

### 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. 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 and Corr.1, annex), 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. Kyaw Hla Aung is a national of Myanmar, a human rights lawyer and a respected Muslim community leader from the Arakanese, or Rohingya, community.

4. The source reports that, on 26 April 2013, the Government of Myanmar launched a highly controversial initiative among the Rohingya Muslim minority community, to conduct a population census. The initiative was controversial as the Rohingya were only allowed to describe themselves as "Bengali", not as "Rohingya". That implied that the ethnic description was of a people in an adjacent country, namely Bangladesh. The population census exercise thus led to unrest and protests amongst the Rohingya minority Muslims.

5. According to the source, the reaction of the Government was to arbitrarily arrest and detain known Rohingya Muslim minority leaders. The source reports that Mr. Kyaw Hla Aung was forced to go into hiding, even though he had been attempting to find a peaceful solution to the controversy over the census by trying to encourage dialogue between the community leaders and the Myanmar authorities. According to the source, Mr. Kyaw Hla Aung, who is 74 years old, had previously served at least 16 years in prison as a consequence of peacefully advocating for human rights.

6. The source reports that Mr. Kyaw Hla Aung was arrested at a temporary shelter in Rakhine State on 15 July 2013 by the Myanmar authorities.

7. The source is unaware whether a warrant was shown for Mr. Kyaw Hla Aung's arrest and is therefore unaware of the legal basis relied upon at the time. Following his arrest, he was reportedly taken to Sittwe Police Station No. 1 in Rakhine State. His first court appearance was before the Sittwe District Court on 31 July 2013. No further information on the proceedings is available.

8. The source reports that Mr. Kyaw Hla Aung was initially charged with contravening the following provisions of the Penal Code: article 148 (rioting whilst armed with a deadly weapon); article 150 (hiring or conniving at the hiring of persons to join an unlawful assembly); and article 332 (voluntarily causing hurt to prevent a public servant from discharging his duty). It is alleged that four other charges have also been laid against him.

9. According to the source, Mr. Kyaw Hla Aung was not permitted access to a lawyer after his initial arrest. Although a lawyer was subsequently appointed to act on his behalf, there has allegedly been a deliberate campaign by the Government to block his access to his lawyer. On 25 October 2013, his lawyer was allegedly prevented from appearing at a court hearing in his defence.

10. Mr. Kyaw Hla Aung is reportedly being held in incommunicado detention but the source believes that he might be in the Sittwe prison. The source reports that his family has been relocated to an Internal Displacement Camp in Rakhine State which is located at a considerable distance from the Sittwe prison. Mr. Kyaw Hla Aung has reportedly not been accorded visitation rights for either his lawyer or his family.

11. The source reports that, in addition to being elderly, Mr. Kyaw Hla Aung has serious gastric and hypertension problems for which he has to take daily medication. It is not known whether he is able to receive either medication or other treatment in detention for his chronic illnesses.

12. The source further reports that the United Nations Special Rapporteur on the human rights situation in Myanmar was able to visit Mr. Kyaw Hla Aung on 13 August 2013. The Special Rapporteur noted that a number of political prisoners remained incarcerated in Myanmar and reportedly called on the National President to ensure that Mr. Kyaw Hla Aung was released in the next release planned for political prisoners by the end of 2013. However, as of May 2014, Mr. Kyaw Hla Aung remains in detention.

13. The source submits that, since his arrest, Mr. Kyaw Hla Aung:

- (a) Has been held incommunicado, without access to a lawyer or his family;
- (b) Has not had access to an independent and impartial judicial tribunal;
- (c) Has not had a fair hearing with the necessary legal assistance by counsel to secure his release;
- (d) Has not been accorded regular prison visits from his family;
- (e) Has allegedly not had access to adequate medical facilities or treatment;
- (f) Has not been afforded an opportunity to complain about the conditions of his detention.

14. The source asserts that, moreover, any lawyer who seeks to defend him in a domestic tribunal would be criminally liable and would be arrested and incarcerated for doing so.

15. The source submits that the arrest and continued detention of Mr. Kyaw Hla Aung are in breach of the following provisions of the Universal Declaration of Human Rights:

- (a) Article 7, on equality before the law, as he has not been allowed access to a lawyer and was not defended by a lawyer at his trial;
- (b) Article 13, on freedom of movement and residence, as his detention prevents him from travelling within the country to meet and associate with other Muslims;
- (c) Article 18, on freedom of thought and conscience, as his arrest and detention are on account of his religious belief in Islam;

(d) Article 19, on freedom of opinion and expression, as his detention prevents him from expressing his views, from promoting human rights and equality in respect of the Rakhine Muslims and from imparting his honest opinion to others;

(e) Article 21, on the right to take part in the government of his country, as his detention prevents him from having an influence on political and human rights matters within Myanmar.

16. The source submits that the circumstances of the arrest and detention of Mr. Kyaw Hla Aung are in breach of article 10 of the Universal Declaration of Human Rights and 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, in particular Principles 1, 3, 4, 6, 7 (3), 10, 11, 13, 15, 17, 18, 19, 20, 21, 24, 25, 27, 28, 29, 32, 33 and 36.

17. In the light of the foregoing, the source submits that Mr. Kyaw Hla Aung's deprivation of liberty may be considered arbitrary under categories II and III of the legal categories referred to by the Working Group when considering cases submitted to it.

#### *Response from the Government*

18. On 25 June 2014, 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. Kyaw Hla Aung and to clarify the legal provisions regarding his arrest and continued detention.

19. However, the Government has chosen not to respond despite its burden to rebut the allegations. Even though the Government has failed to respond, the Working Group considers that it is in a position to render its Opinion, in accordance with paragraph 16 of its methods of work.

#### *Discussion*

20. As the Working Group stated in its recent Opinion No. 24/2014 (Myanmar), it is a well-documented fact that for many years there have been, and continue to be, deep social tensions in Myanmar between minority communities and the majority group, especially the Government, which is fully supported by the National Army. That conflict has resulted in fighting and various human rights abuses as established in numerous documents submitted to the Human Rights Council (see A/HRC/RES/25/26), including previous Opinions of the Working Group (see A/64/334, A/67/333 and A/HRC/WG.6/10/MMR/2). One of the minority communities which are victims of the abuses is the Rohingya Muslim community, of which Mr. Kyaw Hla Aung is a leader who stands for the defence of the rights of his community. In paragraph 10 of its resolution 68/242, the United Nations General Assembly reiterated its serious concern about the situation (see A/RES/68/242).

21. The Working Group herein restates its position on the burden of proof (see Opinion No. 41/2013 (Libya), paras. 27-28). The absence of a response from the Government is therefore interpreted as agreement with the statement of facts provided in the submission from the source, including in some instances the acceptance of previously unsubstantiated facts as now being established. The facts as alleged by the source are thus not disputed and the Working Group will make its legal assessment on that basis.

22. The information from the source is further corroborated by previous actions and statements by the special procedures of the Human Rights Council, including in some instances specific references to Mr. Kyaw Hla Aung (see A/HRC/PRST/23/1; A/68/397, paras. 8 and 91 (g); and JUA/MMR/13/2013).

23. The Working Group notes that, following his arrest, Mr. Kyaw Hla Aung was detained for some 17 days (15 to 31 July 2013) before being brought before a judge in court, and was neither notified of the allegations against him nor charged. In addition, there has been no information at all since that time on whether or not he has yet been tried. That situation is in violation of the right to a fair trial, which is well established in international law. The seriousness of the violation is such that the situation falls within category III of the categories of arbitrary detention referred to by the Working Group when considering cases submitted to it.

24. Furthermore the Working Group holds the view that the health condition of Mr. Kyaw Hla Aung associated with his age aggravates the abuse of rights in his case. It may amount to cruel, inhuman and degrading treatment, therefore warranting appropriate action, as the prohibition of such treatment is a *jus cogens* norm.<sup>1</sup>

25. The Working Group also considers that the status of Mr. Kyaw Hla Aung as a human rights defender is in no doubt, both through his personal history as presented in the application and also as acknowledged in the previous statement of the special procedures (see para. 22); and that that status was the reason for his selection for arrest and detention in reaction to the protest by his minority community. Such abuse falls within category II of the categories of arbitrary detention referred to by the Working Group when considering cases submitted to it.

**Disposition**

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

The deprivation of liberty of Mr. Kyaw Hla Aung is arbitrary, being in contravention of articles 9, 10, 19 and 20 of the Universal Declaration of Human Rights. It falls within categories II and III of the arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

27. Consequent upon the opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation. Such remedy shall include the immediate release of Mr. Kyaw Hla Aung, and adequate compensation to be awarded to him.

28. Furthermore, and in accordance with paragraph 33 (a) of its revised methods of work, the Working Group considers it appropriate to refer the allegation of cruel, inhuman and degrading treatment to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment for appropriate action.

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

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

[Adopted on 28 August 2014]

<sup>1</sup>See: *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 422, para. 99.