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Human Rights Council Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its seventy-sixth session, 22-26 August 2016

Opinion No. 33/2016 concerning Shin Gambira (Myanmar)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the 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 1/102 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.

2. In accordance with its methods of work (A/HRC/30/69), on 22 June 2016 the Working Group transmitted a communication to the Government of Myanmar concerning Shin Gambira. The Government has not replied to the communication. The State is not a party to the International Covenant on Civil and Political Rights.

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 or her sentence or despite an amnesty law applicable to him or her) (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);

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(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, that aims towards or can result in ignoring the equality of human beings (category V).

Submissions

Communication from the source

4. Mr. Gambira, also known as Nyi Nyi Lwin, is a citizen of Myanmar, a former Buddhist monk and a former leader of the All-Burma Monks' Alliance.

5. According to the source, in 2007, Mr. Gambira organized anti-government demonstrations that began in August 2007. He was arrested on 4 November 2007 and, in November 2008, sentenced to 68 years in prison, including 12 years of hard labour, on 16 charges including membership of an unlawful association and illegal movement across borders. He was reportedly subjected to torture while in prison, leaving him with various physical and psychological difficulties.

6. In early 2009, five years were taken off his total sentence, reducing it to 63 years. Mr. Gambira was transferred to a labour camp in Sagaing Region. When his mother visited him in early 2009, she reported that he was on hunger strike in protest of the conditions of his confinement. He reportedly suffered from nervous tension, was in generally ill health and was being denied the hospital treatment necessary to treat complications from having been reportedly tortured at Hkamti prison in April 2009. Mr. Gambira stated in an interview that his imprisonment had left him with depression, frequent headaches and failing memory; however, he said he had difficulty finding a doctor willing to treat him, for fear that it would draw government reprisals. He attempted to leave the country for treatment but could not get the necessary paperwork.

7. On 13 January 2012, following a presidential pardon, Mr. Gambira was released. However, he was detained again for short periods of time on 10 February, 6 March and 1 December 2012. In April 2012, his former prisoner status forced him to discontinue his work as a monk and he returned to civilian status. He later moved to Thailand and married an Australian citizen. Since then, they have been forced to return to Myanmar after unsuccessfully exhausting all options to secure an Australian tourist visa in order to renew his passport. Mr. Gambira allegedly continues to hold a valid identity card.

8. On 15 January 2016, Mr. Gambira and his wife crossed the border between Thailand and Myanmar at an official crossing point. They had no problems with either the Myanmar or the Thai immigration officials because both of them were carrying all the correct and necessary documentation. However, the source claims that, since November 2015, a picture of Mr. Gambira has been displayed at the immigration point at Tachileik, Myanmar, indicating prior intent to follow and/or arrest him regardless of legal entry status.

9. Shortly after arriving in Meiktila, Myanmar, the couple noticed that they were being followed by a variety of individuals. They were followed on the street and in the hotel, where a man in plain clothes was stationed outside their room. When challenged directly, the persons who were following them reportedly openly admitted that they were acting on behalf of "the Government".

10. On 19 January 2016 at 11 p.m., Mr. Gambira was arrested by the police without a warrant at his hotel in Mandalay. The source reports that police officials did not show any documentation or identification. Around 20 officers were in attendance, with 3 reportedly filming the arrest. Mr. Gambira and his wife were taken to a police station but after a couple of hours Mr. Gambira's wife was asked to leave as he was to be interrogated. When

she refused, the police made her get into a police truck, took her back to her hotel and asked her to return to the police station at 7 a.m.

11. On 20 January 2016, at around 3 a.m., Mr. Gambira's wife went back to the police station but was not allowed to see him. She came back at 9.30 a.m. with a lawyer and journalists from the BBC, at which point a police officer told them that Mr. Gambira would be going to Maha Aung Myay Court for a hearing at 2 p.m. on charges relating to the Immigration Act. At around 3 p.m., Mr. Gambira was handcuffed, put into a car full of armed military police and taken to the Court.

12. He appeared before Ma Har Ailllg Myay Township Court and was charged with entering the country illegally in violation of section 13 (1) of the 1947 Myanmar Immigration (Emergency Provisions) Act. The proceeding court hearing was scheduled for 3 February 2016 and Mr. Gambira was then taken by heavy security to Obo Prison, Mandalay.

13. Mr. Gambira's wife has reportedly been unable to visit him in prison on several occasions. On the first occasion, she was informed that as a foreign citizen she was unable to visit the prison without permission from her embassy. She received permission from the Australian embassy but has since continued to be denied entry. Furthermore, after the incarceration of Mr. Gambira, she was followed and allegedly subjected to surveillance by Myanmar government authorities.

14. The source reports that a lengthy series of hearings has been carried out during Mr. Gambira's time in detention in which witnesses have failed to appear or were unaware of the reasons for which they were called to give testimony in court, files and evidence have gone missing and important witness testimonies have been ignored. Allegedly, police representatives have admitted that they have seen no evidence supporting the charges against Mr. Gambira. The source also indicates that the Government of Myanmar has blocked access to records and evidence regarding the border crossing between Thailand and Myanmar undertaken by Mr. Gambira and his wife.

15. Mr. Gambira was treated in 2014 for post-traumatic stress disorder following his previous periods of detention. He has been diagnosed with schizophrenia and is required to take medication regularly. Medical professionals have expressed concern that detention may cause him more trauma and overwhelming physiological and physical distress, such as extreme terror, insomnia, panic, despair, hopelessness, flashbacks and thoughts of suicide. Despite the submission of relevant medical records to the court, his bail applications have been repeatedly rejected.

16. Late in April 2016, he was reportedly convicted and sentenced to six months in prison with hard labour.

17. The source claims that this new incarceration of Mr. Gambira is in direct violation with articles 13 of the Universal Declaration of Human Rights, which states that "everyone has the right to leave any country, including his own, and to return to his country". It also goes against articles 19 and 20 of the Universal Declaration of Human Rights regarding the freedom of expression, association and peaceful assembly.

18. The source later informed the Working Group that Mr. Gambira had been released from prison on 1 July 2016.

Response from the Government

19. The Working Group regrets that the Government has not responded to the allegations transmitted by the Group on 22 June 2016, as required by paragraph 15 of its methods of work.

20. The Working Group considers it is in the position to render its opinion on the detention of Mr. Gambira in conformity with paragraph 15 of its methods of work.

21. In that regard, the Working Group notes that, in its previous communications with other special procedures of the Human Rights Council, the Government provided the following information related to the present case:

(a) On 12 October 2013, Mr. Gambira left Myanmar for Mae Sai, Thailand, through No. 1 Friendship Bridge in Tachileik with a temporary border pass that allowed a one-week stay. He did not return to Myanmar within the validity time of the temporary border pass, which therefore expired;

(b) On 16 January 2016, he entered Myanmar illegally by crossing Mai Sai River without using the No. 1 Friendship Bridge, which is a designated checkpoint;

(c) He was therefore charged under section 13 (1) of the 1947 Myanmar Immigration (Emergency Provisions) Act, which stipulates that no Myanmar citizen shall enter the country without a Myanmar passport or other identity document issued by the authorities;

(d) The case is being heard at the Ma Har Ailllg Myay Township Court, Mandalay;

(e) On 20 January 2016, Mr. Gambira was transferred to Obo Prison, Mandalay, where the prison doctor has been looking after him and the necessary medical treatments are given regularly under the instruction of the prison doctor. A psychiatrist from the Mandalay Special Psychiatric Hospital visited him on 8 February and gave him a prescription. The psychiatrist is scheduled to visit Mr. Gambira within a month;

(f) On the day of his court appearance, Mr. Gambira was allowed to meet with his wife and the media. Foreigners who wish to visit detainees at prison can submit their requests to the Ministry of Foreign Affairs through their relevant embassies. Those requests are accommodated by the Ministry of Home Affairs.

Discussion

22. Although Mr. Gambira was released, the Working Group, in accordance with paragraph 17 (a) of its methods of work, reserves the right to render an opinion as to whether or not the deprivation of liberty had been arbitrary.

23. The Government confirmed that Mr. Gambira had been detained and sentenced to six months' imprisonment with hard labour for "illegally" returning to his country. The Government maintains that Mr. Gambira, a Myanmar citizen, had been prohibited from returning to his country in accordance with domestic law, namely, Section 13 (1) of the 1947 Myanmar Immigration (Emergency Provisions) Act.

24. The Working Group considers that the provisions of the law applied against Mr. Gambira criminalize the exercise the fundamental right of everyone to return to his or her country. In particular, that right is protected by article 13 (2) of the Universal Declaration of Human Rights.

25. In that regard, the Working Group also concurs with the view that "in no case may a person be arbitrarily deprived of the right to enter his or her own country ... [I]t applies to all State action, legislative, administrative and judicial".

26. The Working Group reiterates that the mere conformity with domestic law in itself cannot be used to justify a detention of an individual. In a previous case, the Working

Group reminded the Government of Myanmar that “the assessment of cases before it is made on the touchstone of international human rights norms, not domestic law”.¹

27. The Working Group considers that Mr. Gambira was deprived of liberty for having exercised the right to return to his country, as guaranteed by article 13 of the Universal Declaration of Human Rights. Thus, the deprivation of liberty of Mr. Gambira falls within category II of the categories applicable to the consideration of cases submitted to the Working Group.

28. The alleged violations during the aforementioned previous detentions of Mr. Gambira were addressed in communications dated 21 November 2007 (see A/HRC/7/10/Add.1, paras. 186-189), 28 February 2008 (see A/HRC/10/8/Add.1, paras. 150-157), 28 November 2011 (see A/HRC/19/44, p. 146), 12 December 2012 (see A/HRC/23/51, p. 21) and 2 February 2016 (see A/HRC/32/53).

Disposition

29. In the light of the foregoing, the Working Group renders the following opinion:

The deprivation of liberty of Mr. Gambira was arbitrary, being in contravention of articles 10 and 13 of the Universal Declaration of Human Rights; it falls within category II arbitrary detention categories referred to by the Working Group when considering cases submitted to it.

30. Consequent upon the opinion rendered, the Working Group requests the Government to take the necessary steps to remedy the situation of Mr. Gambira and bring it into conformity with the standards and principles set forth in the Universal Declaration of Human Rights.

31. The Working Group believes that, taking into account all the circumstances of the case, including the release of Mr. Gambira, the adequate remedy would be to accord him an enforceable right to compensation.

Follow-up procedure

32. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on the action taken in follow-up to the recommendations made in the present opinion, including:

- (a) Whether compensation or other reparations have been made to Mr. Gambira;
- (b) Whether an investigation has been conducted into the violation of Mr. Gambira’s rights and, if so, the outcome of the investigation;
- (c) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of the Government with its international obligations in line with the present opinion;
- (d) Whether any other action has been taken to implement the present opinion.

33. Furthermore, the Government is invited to inform the Working Group of any difficulties that it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

34. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion.

¹ See opinion 56/2013 (Myanmar), para. 13.

However, the Working Group reserves the possibility of undertaking its own action in follow-up to the present opinion if new concerns in relation to the case are brought to its attention. Such follow-up procedures will enable the Working Group to keep the Human Rights Council informed of the progress made in implementing its recommendations, and any failure to take action.

35. The Working Group recalls that the Human Rights Council has called for all States to cooperate with the Working Group, to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.²

[Adopted on 25 August 2016]

² See Human Rights Council resolution 24/7, para. 3.