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REFERENCE:

[G/SO 218/2]

3 February 2014

Dear Mr. Gabbero,

I would like to refer to the sixty-eighth session of the Working Group on Arbitrary Detention, during which the Working Group adopted several Opinions on cases of detention submitted to it.

In accordance with paragraph 18 of the Working Group's methods of work, I am sending to you, attached herewith, the text of Opinion No. 56/2013 (Myanmar) regarding a case submitted by you.

This Opinion will be reflected in the Working Group's annual report to the Human Rights Council.

Yours sincerely,

Miguel de la Lama
Secretary

Working Group on Arbitrary Detention

Mr. Hugo Gabbero
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Opinions adopted by the Working Group on Arbitrary Detention at its sixty-eighth session, 13-22 November 2013

No. 56/2013 (Myanmar)

Communication addressed to the Government on 10 September 2013

Concerning Ko Htin Kyaw

The Government replied to the communication on 8 November 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. Ko Htin Kyaw is a national of Myanmar. He is the leader of the Movement for Democracy Current Force, a community-based organization which represents grass-roots communities against land grabbing and other human rights violations.

4. According to the information received by the source, on 30 July 2013, Mr. Htin Kyaw staged a peaceful protest outside the North Okkalapa court to denounce the seizure of part of the land of three community members, U Lu Aye, Ma Sein Htwe and Ko Myint Naing, by a businessman named U Eaik Linn. The three community members also took part in the protest. The protesters wanted to express their frustration peacefully at the Government, which had not forced the businessman in question to return the land, despite an acknowledgement from the authorities of the illegality of this land seizure and the existence of considerable evidence to support the claim. The protesters reportedly speculated whether the man had connections to government figures.

5. On 2 August 2013, three days after the demonstration, the four protesters were summoned to the police station of North Okkalapa Township, Yangon. The source reports that upon reporting to the police station, they were charged under section 505 of the penal code for "insulting the State". They were immediately brought before a court, which sanctioned their arrest and sent them to Insein prison. They were not given any opportunity to contact a lawyer and were refused bail. If found guilty, Htin Kyaw and the three community members would face up to three years' imprisonment.

6. The source submits that the arrest and detention of the three community members and Mr. Htin Kyaw is arbitrary, as it is aimed at sanctioning their peaceful human rights activities and their exercise of the right to freedom of peaceful assembly and freedom of expression, in contravention of articles 9, 19 and 20 of the Universal Declaration of Human Rights. It also violates the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (Declaration on Human Rights Defenders), in particular its articles 1, 6 (a) and 12.2.

Response from the Government

7. The Working Group transmitted the above allegations from the source to the Government of Myanmar in accordance with its revised methods of work on 10 September 2013, requesting it to provide the Working Group with detailed information about the current situation of Mr. Htin Kyaw and to clarify the legal provisions justifying his continued detention.

8. The Government, in its response of 8 November 2013, stated the following:

(a) The Movement for Democracy Current Force, founded by Htin Kyaw with the aim of decreasing consumer prices and conducting constant activities for democracy is an unregistered

organization and is never in compliance with the existing Act on the Right to Peaceful Assembly and Peaceful Procession of Myanmar;

(b) Htin Kyaw was charged under section (18) of the Act on the Right to Peaceful Assembly and Peaceful Procession by the North Okkalapa Township police station commander, Police Major Myint Aye, with holding of an unauthorized press conference, together with others, at Ottaya Hall in North Okkalapa Township on 11 February 2013 and was brought before the North Okkalapa Township court on 5 August 2013;

(c) U Eaik Linn tendered for the land of 5.5 acres in Thamine, Insein Township, which he was awarded. He provided compensation to illegal occupants of the land to vacate the land. However, some of them refused to move out and they were accordingly forced to leave by a court warrant of arrest;

(d) At the abovementioned unauthorized press conference, Htin Kyaw and his associates accused U Eaik Linn of having collaborated with the authorities in destroying the homes of, arresting, suing and jailing poor people;

(e) In response to the accusation, U Eaik Linn brought a lawsuit before the North Okkalapa Township court against Htin Kyaw and his associates for defamation on 14 March 2013 and the case was filed under section 500 of the penal code;

(f) On 30 July 2013, the day of the court hearing, a group of 30 people led by Ko Htin Kyaw, U Lu Aye, Daw Sein Htwe and Ko Myint Naing gathered in front of the court and chanted slogans aimed at the arrest of U Eaik Linn by the Minister for Home Affairs. Some leaflets bearing a statement of the Movement for Democracy Current Force were also distributed;

(g) Due to such acts which created a negative effect on the peace and tranquillity of the State, Police Captain Nyi Nyi Lwin, Head of Myoma police station of North Okkalapa Township, charged Htin Kyaw and the other three under section 505 (b) of the penal code with "making statements conducting to public mischief" and they were accordingly brought before the North Okkalapa Township Court;

(h) After the court hearing, an arrest warrant was issued. The four were consequently arrested and sent to Insein prison on 2 August 2013;

(i) Appeal for granting bail for them was denied by the court because, according to section 505 (b) of the penal code, bail cannot be granted to anyone who is charged under section 505 (b);

(j) Htin Kyaw and the other three were charged under section 18 of the Act on the Right to Peaceful Assembly and Peaceful Procession and under section 500 of the penal code with defamation and section 505 (b) of the penal code with "making statements conducting to public mischief", respectively;

(k) The court hearings of such cases are heard at the North Okkalapa Township court with detainees remanded in custody;

(l) The court hearings are in open court and open to the public.

Further comments from the source

9. In accordance with its revised methods of work, the response of the Government was communicated to the source for its further comments.

10. The source in its response reported that a Yangon court sentenced Mr. Htin Kyaw, the leader of the Movement for Democracy Current Force, to six months in prison under the Act on the Right to Peaceful Assembly and Peaceful Procession, in relation to the protest against land grabbing.

11. The source reiterates that Mr. Htin Kyaw's deprivation of liberty results from the exercise of the rights and freedoms guaranteed by articles 19 and 20 of the Universal Declaration of Human Rights. Mr. Htin Kyaw has been detained under article 505(b) of the penal code, a piece of legislation that the Special Rapporteur on the situation of human

rights in Myanmar described as “problematic”. The Special Rapporteur has repeatedly urged the Government of Myanmar to amend it as it contravenes the principle of legality (i.e. “it contains broad, vague and sweeping formulae”) and international human rights law.

Discussion

12. The Government, in its response, does not deny that Mr. Htin Kyaw was arrested, detained and sentenced to six months imprisonment under the Act on the Right to Peaceful Assembly and Peaceful Procession, and article 505 (b) of the penal code. The Government confirms that this article 505 (b) does not provide any opportunity for bail of the arrested person.

13. The Working Group reminds the Government of Myanmar that the assessment of cases before it is made on the touchstone of international human rights norms, not domestic law. In this instance, the Act on the Right to Peaceful Assembly and Peaceful Procession and article 505 (b) of the penal code fall below the standards of international human rights law, offending in particular, articles 9, 19 and 20 of the Universal Declaration of Human Rights.

14. In its response, the Government accepts that Mr. Htin Kyaw is the founder of the Movement for Democracy Current Force, which aims to decrease consumer prices and to conduct constant activities for democracy.

15. In keeping with its manifesto, the founder of the Movement for Democracy Current Force engaged in a peaceful protest against the eviction of some people from their lands. The Government does not challenge the peacefulness of this protest, where Mr. Htin Kyaw and others were exercising their right to freedom of opinion and expression and to freedom of association.

16. Mr. Htin Kyaw acted on behalf of and in support of vulnerable people, exercising their right not to be forcefully evicted from their land. The Declaration on Human Rights Defenders, in addition to the Universal Declaration of Human Rights, calls for protection of those supporting others to exercise their rights – in this instance the right not to be evicted from their land.

Disposition

17. In the light of the foregoing, the Working Group on Arbitrary Detention renders the following Opinion:

18. The deprivation of liberty of Mr. Htin Kyaw is arbitrary, being in contravention of articles 9, 19 and 20 of the Universal Declaration of Human Rights and falls under category II of the categories applicable to the consideration of the cases submitted to the Working Group.

19. Consequent upon the opinion rendered, the Working Group requests the Government of Myanmar to release Mr. Htin Kyaw forthwith and bring his situation into conformity with the requirements of international human rights instruments. Furthermore, in view of the adverse effects of this wrongful arrest and detention on Mr. Htin Kyaw and his family, the Working Group requests that the Government ensure the provision of appropriate reparation to Mr. Htin Kyaw.

20. The Working Group invites the Government of Myanmar to provide information additionally on the current situation of the three community members who were arrested and detained with Mr. Htin Kyaw, namely, U Lu Aye, Ma Sein Htwe and Ko Myint Naing, and to clarify the legal provisions justifying their continued detention.

[Adopted on 21 November 2013]
