

be disruptive of the public order. There is no suggestion that this was the predicament in the instant case. Finally, as a matter of justice and equity, matters of such personal and societal sensitivity which if known publicly would cause ill repute and possible exclusion from society and loss of face for the person and his/her family, caution and balance is required.

25. The Working Group considers that these four persons were subjected to violations of their fundamental rights during their arrests, investigations and trial proceedings and also suffered discrimination on account of their sexual orientation and HIV/AIDS status. Because Egyptian law does not expressly prohibit homosexuality, they were tried for debauchery. The vilification and persecution of persons for their sexuality violate the principles of international human rights law. The right to freedom from discrimination on the basis of sex includes sexual orientation.

26. The Working Group believes that the use of article 9 (c) of the Anti-Prostitution Decree Law No. 10/1961 in these cases to detain people on the basis of their declared HIV status, and to test them without their consent for HIV infection, violates human rights protections to individual privacy and personal autonomy. Furthermore, the detention of persons on the basis of their HIV status violates the principles agreed to in 2001 by Member States in the Declaration of Commitment on HIV/AIDS.

27. The Working Group also considers that the interdiction of all discrimination based on sex, set forth in international human rights law, is to be understood as an interdiction to discriminate someone on the grounds of homosexuality.

28. In light of the above, the Working Group renders the following Opinion:

The detention of Messrs. A, B, C, and D constitutes arbitrary detention according to categories II and III of the categories applied by the Working Group in its consideration of cases. It is in violation of articles 2, 9, and 10 of the Universal Declaration on Human Rights and articles 2, 9, 14, and 26 of the International Covenant on Civil and Political Rights.

29. Consequently, the Working Group requires the immediate release of these persons. It further calls upon the Government to end arbitrary arrests based on HIV status; and to study the possibility of reconsidering the Anti-Prostitution Decree Law and its implementation in practice in order to bring them in conformity with the international human rights obligations undertaken by the Arab Republic of Egypt as a State party to International Covenant on Civil and Political Rights.

Adopted on 25 November 2008

### **Opinion No. 43/2008 (Myanmar)**

**Communication addressed to the Government on 23 July 2008**

**Concerning Messrs. Min Zayar (Aung Myin); Kyaw Min Yu (Ko Jimmy); Min Ko Naing (Paw Oo Tun) and Pyone Cho (Mtay Win Aung)**

**The State is not a party to the International Covenant on Civil and Political Rights.**

1. (Same text as paragraph 1 of Opinion No. 17/2008.)
2. The Working Group conveys its appreciation to the Government for having provided it with information concerning the allegations of the source.
3. (Same text as paragraph 3 of Opinion No. 17/2008.)

4. In the light of the allegations made, the Working Group welcomes the cooperation of the Government. The Working Group transmitted the reply provided by the Government to the source, and has received its comments.

5. The case summarized below was reported by the source to the Working Group on Arbitrary Detention as follows:

(a) Mr. Min Zayar, named at birth Aung Myin, born on 16 June 1958, is a citizen of Myanmar, usually residing at South Dagon Township, Rangoon, and a member of the "88 Generation Students Group" (hereinafter "the 88 Generation"). He was arrested on 21 August 2007 at his home by military officers. Min Zayar was taken to the Insein Prison in Rangoon, where he is detained incommunicado. Min Zayar has severe spinal problems caused by torture during previous incarcerations and he also suffers from acute high blood pressure.

(b) Mr. Kyaw Min Yu, also known as "Ko Jimmy", born on 13 February 1969, a citizen of Myanmar, usually residing at Hlaing Township, Ba Yin Naung Road, Rangoon, is a member of "the 88 Generation" movement. It was reported that he was arrested at his home on 22 August 2007 by military officers. He was taken to the Insein Prison in Rangoon, where he is held in incommunicado detention. Kyaw Min Yu had already been imprisoned between 1989 and 2005 and tortured in the past.

(c) Mr. Min Ko Naing, named at birth as Paw Oo Tun, born on 18 October 1962, citizen of Myanmar, usually addressed at Thingangyun Township, Rangoon, and a member of "the 88 Generation", was arrested on 22 August 2007 at his home by military officers. He is currently being held incommunicado at the Insein Prison in Rangoon. Mr. Min Ko Naing has been awarded several international human rights awards in recognition of his peaceful work for fundamental freedoms. He had been imprisoned before from March 1989 until November 2004 and again between September 2006 and January 2007. He was tortured in the past and held in solitary confinement for most if not all of his previous terms of imprisonment. He was reported on 16 October 2007 to have had to be hospitalized within Insein Prison due to unspecified injuries. There are serious concerns as to his health.

(d) Mr. Pyone Cho, named at birth Htay Aung, citizen of Myanmar, residing at 82 Sanpyamaung House, Tamwe Township, Rangoon, also a member of "the 88 Generation" movement, was arrested on 22 August 2007 at his home by military officers. He was taken to the Insein Prison in Rangoon, where he is held in incommunicado detention. Pyone Cho has been imprisoned intermittently since 1989 for a total of more than 15 years and was tortured in the past. He developed cataracts during previous detentions, as a result of which he has become almost completely blind. He was put on a diet of rice and salt causing severe malnutrition with the consequence of long-term physical frailty.

6. According to the source, these four persons were arrested and are being detained for being members of "the 88 Generation" students group, a movement campaigning peacefully for national dialogue in Myanmar. They have been working selflessly and peacefully for national reconciliation, the substantiation of democracy and the emergence of a long-term political solution. They were arrested to prevent protests and in order to deter dissent, following a 500 per cent fuel increase implemented on 15 August 2007. Accordingly, their arrest and detention are entirely politically motivated. Their detention is part of a targeted strategy by the authorities against "the 88 Generation" movement as a group.

7. The source adds that the arrest and continued detention of these persons are in breach of several articles of the Universal Declaration of Human Rights: article 13, which guarantees freedom of movement and residence, is violated because their detention is motivated by the desire to prevent them from travelling within the country to meet other 88 Generation members and ordinary citizens; article 18, protecting freedom of thought and

conscience, is breached as their detention is a reaction to their belief in dialogue and democratic values; article 19 on freedom of opinion and expression is encroached upon because their detention is maintained to prevent them from expressing their views, from criticizing authorities and from imparting their opinions to others; article 21, guaranteeing the right to take part in the government of one's country, is breached because their detention is and was to ensure that they had no influence on and could have no role in political matters.

8. All individuals have been held in incommunicado detention. They have had no access to a lawyer and they have not been given any entitlement to the assistance of counsel. They have not been permitted to see their families; the latter were not informed about their whereabouts and have not been able to contact them. In addition, these persons have not enjoyed their right to access to an independent and impartial judicial tribunal. They have not had a prompt hearing represented by counsel to secure their release or had any opportunity to make an application through counsel to challenge the lawfulness of their detention.

9. These persons have not been provided any opportunity to contact or correspond with the outside world. They have not been allowed to read newspapers or other information material. The source adds that these persons have been subjected to inhuman and degrading treatment, that they have not had access to adequate medical facilities or treatment and that they have not been afforded any opportunity to complain about the conditions of their detention.

10. Consequently, the circumstances of their arrests and detention are in wholesale breach of the Universal Declaration of Human Rights, and 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, in particular Principles 1, 4, 6, 10, 11, 12, 13, 15, 16, 17, 18, 19, 24, 25, 28, 32 and 33.

11. The source further reports that Win Shwe, a member of the National League for Democracy who was arrested on 26 September 2007, has died in custody. His death raises similar concerns for other detainees, including the above-mentioned persons.

12. The source concludes that the detention of the above-mentioned four persons is arbitrary, contrary to the precepts of international law and in violation of core human rights norms. They have been detained for the sole purpose of repressing free speech, free conscience and free assembly.

13. In its response to the allegations of the source, the Government provided the following information:

(a) Mr. Min Zayar (Aung Myin); Mr. Kyaw Min Yu (Ko Jimmy); Mr. Min Ko Naing (Paw Oo Tun) and Mr. Pyone Cho (Htay Win Aung) were arrested for destruction of law and order and peace and stability of the community; managing to create civil unrest; delivering statements; distributing defiant letters and exhorting to destruct the works carried out by the National Convention for striving a firm State Constitution; accepting illegal money from abroad; forming unlawful organizations; printing documents and declarations illegally without applying registration; violating the Electronic Communication Law, by posting anti-government information and declarations through the Internet websites; making confrontational attempts toward the Government and communicating with anti-organizations which were declared as terrorist groups;

(b) Actions are being taken against them under the following laws:

- Section 6 of the Law on Forming Organizations;
- Section 17/20 of the 1962 Printers and Publishers Registration Act;

- Section 32 (B) of the Television and Video Law;
- Section 17 (1) of the 1908 Unlawful Associations Law;
- Section 130-B of the Penal Code;
- Section 4 of the Law Protecting the Peaceful and Systematic Transfer of the Responsibility and the Successful Performance of the Functions of the National Convention against Disturbances and Oppositions;
- Section 124-A of the Penal Code;
- Section 33 (A) of the Electronic Communication Law;
- Section 24 (1) of the Foreign Exchange Regulation Act;

(c) The Government further informs that legal proceedings are under way to prosecute Mr. Min Zayar, Mr. Kyaw Min Yu, Mr. Min Ko Naing and Mr. Pyone Cho as well as to those who are in connection with the members of “the 88 Generation Students” movement.

14. In its comments to the Government’s observations, the source reiterates that the detention of the above-mentioned persons is unlawful and arbitrary. It states that the purported charges were put forward by the Government between 27 August and 2 September 2008, over a year after the arrest of the four above-mentioned persons on 21/22 August 2007. Since having been formally charged, their regime of detention has also changed. Their whereabouts after their arrests have become known and family visits are permitted from time to time. All four have also had some access to legal representation, albeit improperly limited and controlled by Government authorities.

15. On or around 24 October 2008, the military-appointed judge charged Mr. Min Ko Niang and Mr. Pyone Cho with contempt of court for requesting their family members to be permitted to attend the trial. Mr. Min Ko Naing and Mr. Pyone Cho have been sentenced by the Northern District Court conducting the trial on the premises of Insein Prison to imprisonment of six months for contempt of court in response to their verbal appeal to the judge for free and fair justice. The source informs that the defence lawyers were themselves arrested and detained in connection with their activities as counsel for the defendants.

16. On 31 October 2008, Mr. Min Ko Naing and Mr. Pyone Cho were transferred to Maubin Prison in the Irrawaddy Delta region. Their principal cases were then heard by a Special Maubin District Court in the absence of defence counsel, and were each sentenced to 65 years of imprisonment on five counts of the 21-count indictment on 15 November 2008.

17. On 11 November 2008, the Rangoon District Court sentenced Mr. Min Zayar and Mr. Kyaw Min Yu on five counts of the indictment to 65 years imprisonment each with hard labour. They were sentenced to 15 years each for four counts under Section 33 (A) of the Electronic Communications Law and five years for one count under Section 6 of the Law on Forming Organizations. The trial was conducted behind closed doors on the premises of the Insein Prison by a biased court without legal representation. The source anticipates that they will be given additional sentences when convicted of the remaining 16 counts of the indictment. It reports that 12 other members of the “88 Generation” movement were also sentenced to 65 years of imprisonment at the same time with the same remaining charges lodged against them.

18. The source concludes that the charges brought against the defendants result purely from the non-violent exercise of their right and freedoms guaranteed by the Universal Declaration of Human Rights. They are solely connected to them calling for dialogue between the National League for Democracy and the military Government of Myanmar;

collecting signatures for a petition; dressing in white and asking others to dress in white clothes; initiating a prayer campaign in which people of all religions were asked to pray for a peaceful resolution to Myanmar's political problems; and encouraging citizens to write letters explaining their plight to the military authorities.

19. Mr. Min Zayar; Mr. Pyone Cho and Mr. Min Ko Naing were already the subject of a joint urgent appeal sent by the Chairperson-Rapporteur of the Working Group on Arbitrary Detention, together with other Special Procedures mandate holders of the Human Rights Council, on 6 October 2006, to which the Government of Myanmar responded on 8 December 2006. Another urgent appeal sent on 28 August 2007 by the Chairperson-Rapporteur of the Working Group and other Special Rapporteurs, concerning Mr. Min Ko Naing, has remained unanswered by the Government.

20. The Working Group on Arbitrary Detention believes that it is in a position to provide its opinion on the deprivation of liberty of Messrs. Min Zayar; Kyaw Min Yu; Min Ko Naing and Pyone Cho, taking into consideration all information received from the source and the Government.

21. The Working Group would like to bring to the attention of the Government the provisions of article 19 of the Universal Declaration of Human Rights which establishes that "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers". The Working Group would also like to stress the fundamental character of the right to freedom of association, as recognized in article 20, paragraph 1, of the Universal Declaration of Human Rights, which provides that "Everyone has the right to freedom of peaceful assembly and association". Article 21, paragraph 1, of the Universal Declaration of Human Rights provides: "Everyone has the right to take part in the government of his country, directly or through freely chosen representatives".

22. The Working Group considers that nothing in the original submission indicates that the entirely non-violent activities of these four members of the "88 Generation" movement described by the source would not be protected articles 19, 20 and 21 of the Universal Declaration of Human Rights, all of which are at the core of political rights in a free and democratic society based on the rule of law. The Working Group has no reason to doubt that the harsh prison sentences all four defendants have received are in reprisal for their peaceful political activities and membership in opposition movements.

23. The Government, in its response, satisfies itself merely with referring to existing domestic laws that have allegedly been violated by the defendants, without supporting this assertion by genuine facts. It stated that the four individuals "were arrested for destruction of law and order and peace and stability of the community; managing to create civil unrest; delivering statements; distributing defiant letters and exhorting to destruct the works carried out by the National Convention for striving a firm State Constitution; ... forming unlawful organizations; printing documents and declarations illegally without applying registration; violating the Electronic Law by posting anti-Government information and declarations through the Internet websites; [and] making confrontational attempts toward the Government". The sanctioning, let alone criminal sanctioning, of any of these activities, can never stand the test against the rights and freedoms as contained in the Universal Declaration of Human Rights. No one has to ask for permission for exercising, alone or collectively, orally or in print, his or her right to freedom of expression, even if the views expressed are not those of the Government of the day. As the Working Group has previously held in its Opinion No. 25/2000 (Union of Myanmar): "Peaceful expression of opposition to any regime cannot give rise to arbitrary arrest" (E/CN.4/2001/14/Add.1, para. 12).

24. Moreover, the Government mentions that these persons were arrested for communicating with “anti-organizations which were declared as terrorist groups”; and that they accepted “illegal money from abroad”, without indicating which “anti-organizations” are meant or by which authority they were declared as terrorist groups or what the source of the funding is and why it is illegal to accept such financial resources. This means that the arrest and detention of these persons can simply be qualified as being politically motivated for their membership in the “88 Generation” movement, targeting their attempts to promote democracy in the country. The Working Group notes that all defendants were arrested at the same time on 21 and 22 August 2007. The Working Group concludes that the arrest, detention and imprisonment of Messrs. Min Zayar; Kyaw Min Yu; Min Ko Naing and Pyone Cho is arbitrary in terms of Category II of the categories applied for its consideration of the cases submitted to it, without having to deal with the question for which specific counts each of them have eventually been convicted.

25. The Working Group would further like to draw the attention of the Government the following provisions of the Universal Declaration of Human Rights:

(a) Article 10, which guarantees the right of the above-mentioned persons to fair proceedings before an independent and impartial tribunal; and

(b) Article 11, paragraph 1, which stipulates that “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense”.

26. All of the defendants were by military officers without any arrest warrant. All of them were held incommunicado without access to, even knowledge of, their families and lawyers for prolonged periods of time. None of them had the opportunity to make an application to challenge the lawfulness of their detention. They were charged and brought before courts only after more than a year of detention without trial. Their trials were closed and conducted inside the Insein Prison compound or at a special court in Maubin in the absence of their defence counsels. Such violations are already of such gravity as to confer upon their detention and imprisonment an arbitrary character. The violations of the right to a fair trial, however, assume a grotesque character when considering that the defendants’ lawyers were also arrested and detained in connection with their activities as defence counsel and that they were charged and sentenced for contempt of court merely for requesting their families to be allowed to attend their trial and for asking for free and fair justice in court.

27. In the light of the foregoing the Working Group renders the following Opinion:

The detention of Messrs. Min Zayar (Aung Myin); Kyaw Min Yu (Ko Jimmy); Min Ko Naing (Paw Oo Tun) and Pyone Cho (Mtay Win Aung) is arbitrary, being in contravention of articles 9, 10, 11, 19, 20, and 21 of the Universal Declaration of Human Rights and falling within categories II and III of the categories applicable to the consideration of cases submitted to the Working Group.

28. Consequent upon the Opinion rendered the Working Group requests the Government to take the necessary steps to remedy the situation of the above-mentioned persons in order to bring it into conformity with the provisions and principles enshrined in the Universal Declaration of Human Rights. Under the circumstances of the case, the Working Group considers that their prompt release would be the only appropriate remedy. The Working Group further recommends that the Government consider the possibility to become a State party at the International Covenant on Civil and Political Rights.

Adopted on 25 November 2008