

Mandates of the Special Rapporteur on the situation of human rights in Myanmar; the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur on the situation of human rights defenders

REFERENCE:
UA MMR 7/2017

18 August 2017

Excellency,

We have the honour to address you in our capacity as Special Rapporteur on the situation of human rights in Myanmar; Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and Special Rapporteur on the situation of human rights defenders; and, pursuant to Human Rights Council resolutions 28/23, 34/18 and 34/5.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning **criminal charges for defamation brought against Mr. Swe Win, a journalist, for comments he made on Facebook, as well as for the continuation for over a year of the detention and prosecution of human rights defender Mr. Khine Myo Htun for charges of defamation and incitement against a military official. We reiterate our concerns at the continued application of section 66(d) of Myanmar's Telecommunications Act and sections 505(b) and (c) of the Myanmar Penal Code to prosecute political expression and journalistic activities.**

Mr. **Swe Win** is an investigative journalist and chief editor at Myanmar Now – a non-profit, independent news service in Myanmar. He has been engaged in journalism exposing injustices and human rights violations in Myanmar, including human trafficking, assassinations and labour camps. In 2016, he reported on prison labour camps operated by authorities. As a result of this reporting, the UN Special Rapporteur on the situation of human rights in Myanmar, visited and reported on concerns related to prison labour camps in the country. In 1998, the authorities convicted Mr. Swe Win under section 5(J) of the 1950 Emergency Provisions Act for his activities with the pro-democracy movement in Myanmar and sentenced him to 21 years in prison. The authorities granted him amnesty on 5 July 2005, after he served seven years in prison.

Mr. **Khine Myo Htun** is a renowned environmental human rights defender and political activist, whose work in Rakhine State extends for more than a decade. In 2008 he founded Natural Resources for the People, an organization advocating for the rights of farmers, women, and ethnic leaders in Rakhine State. More recently, he held the position of deputy information officer for the Arakan Liberation Party (ALP). On 25 July 2017, he was arrested following a statement published by the ALP on 24 April 2017, deploring the consequences for Rakhine State's civilian population of the ongoing armed fights between the Myanmar Army and a local military group, and referring to alleged severe

human rights violations including forced labour, forced land relocation, hostage taking, and arbitrary beatings and ill-treatment of combatants by the Myanmar Army. Concerns about the increased number of prosecutions under section 66(d) of the Telecommunications Act were most recently raised on 21 July 2017 by the UN Special Rapporteur on the situation in Myanmar at the end of her official visit to the country.

Concerns about the criminalization of expression in Myanmar have moreover been the subject of previous communications by various UN Special Rapporteurs, including in communications sent on 14 July 2017 (UA MMR 4/2017); 5 November 2015 (UA MMR 11/2015); 3 November 2015 (UA MMR 10/2015), and 23 June 2015 (UA MMR 6/2015). We regret not having received any reply to any of these communications by your Excellency's Government.

Regarding Mr. Khine Myo Htun's arrest and prosecution, a communication expressing concern for the matter was sent on 26 August 2016 (UA MMR 2/2016). While we thank your Excellency's Government for the reply of 6 October 2016, we regret that it failed to provide an answer to the concerns expressed in our letter, claiming that more information would be provided by the Supreme Court of the Union in due time. This information, however, was never made available. According to the information received:

Concerning the case of Mr. Swe Win

Since March 2017, following his investigative journalism article about the extremist Buddhist monk, Wirathu, Mr. Swe Win has allegedly been targeted by Mr. Wirathu's supporters with death threats, criminal complaints and violent assault.

An article by Mr. Swe Win in Myanmar Now published on 27 February 2017, quoted senior Buddhist abbot Sein Dago Wu saying that Mr. Wirathu's comments praising the assassins "transgressed the Parajika rules", which are the guidelines explaining grounds for expulsion from the Buddhist Sangha. In comments made on Facebook, Mr. Swe Win stated that Mr. Wirathu's "monkhood was over" after Mr. Wirathu thanked the assassins of prominent National League for Democracy lawyer Ko Ni, who was assassinated on 29 January 2017 at Yangon International airport.

On 7 March 2017, a supporter of Mr. Wirathu filed a defamation complaint leading into the criminal prosecution of Mr. Swe Win under section 66(d) of the Telecommunications Act for the comments Mr. Swe Win had posted on Facebook.

On 19 March 2017, another supporter of Mr. Wirathu filed a related complaint under section 295 of the Penal Code against Mr. Swe Win, claiming that he

insulted Buddhism during a press conference on 8 March 2017 when Mr. Swe Win reportedly responded to a question about the Facebook post, saying “They say [my post] is defamatory, but does [U Wirathu] have the dignity to be defamed? He is endlessly cursing across the country. Does this person have dignity?” Section 295 criminalizes insulting religion. The complaint was dismissed in late April 2017 by the Kyauktada Township Court in Yangon on the basis that a complaint under section 295 in this case should come directly from Mr. Wirathu.

Mr. Swe Win reportedly received further threats related to his reporting on Mr. Wirathu. On 14 March 2017, three assailants reportedly threatened verbally and attempted to physically assault Mr. Swe Win in Yangon. Mr. Swe Win subsequently filed a complaint with the local police station.

On 5 April 2017, the Ministry of Religious Affairs and Culture issued a letter stating that Mr. Swe Win had not violated any law with regard to his comments about Mr. Wirathu, but was “carrying out his job as a journalist”.

On 30 July 2017, Mr. Swe Win was arrested by police at Yangon International airport where he was about to board a scheduled flight to Bangkok, Thailand. He was taken to Mingalardon police station and detained overnight at Insein Prison. The Myanmar Police applied to a court in Mandalay for a warrant to transfer him to Mandalay. He was transferred to Oboe Prison in Mandalay on 31 July, where he was released on bail later that same day. He continues to face criminal defamation charges under section 66(d) of the Telecommunications Law for comments he made on Facebook in February about Mr. Wirathu.

Section 66(d) of the Telecommunications Act provides for a maximum prison sentence of up to three years for anyone convicted of “extorting, coercing, restraining wrongfully, defaming, disturbing, causing undue influence or threatening to any person by using any Telecommunications Network”.

It has been reported that while the provision was barely used under the previous administration when it was passed in 2013, there has been an increased number of cases brought under the new administration. Sixty cases have been reported under the current administration, with additional complaints pending approval for prosecution. The provision has been used against a number of journalists for their reporting, especially on government and military activities. Mr. Swe Win is the fifth journalist arrested and detained in Myanmar since June 2017.

In July 2017, the Ministry of Transportation and Communication presented draft amendments of the law to the Parliament. The amendments include an explicit provision allowing bail for suspects, preventing third parties from filing cases, and

removing the phrases “coercing, restraining wrongfully” and “causing undue influence” from the text of article 66(d).

Follow-up to the case of Khine Myo Htun

Mr. Khine Myo Htun has spent over a year in detention pending his trial for charges of defamation and incitement against a high-ranking military official of the Rakhine Regional Operations Command of the Myanmar Army. The charges relate to a written statement issued on 24 April 2016 by the Arakan Liberation Party, to which Khine Myo Htun is a member, claiming that the Myanmar Army had engaged in severe human rights violations, including forced labour, forced land relocation, hostage taking, and arbitrary beatings and ill-treatment of combatants.

Mr. Khine Myo Htun’s trial has been repeatedly delayed due to the absence of the plaintiff and other prosecution witnesses, and he has been denied requests for bail by the Sittwe Township and District courts, as well as by the Rakhine State High Court. Reportedly, the last hearings of the case took place on 26 July and 5 August 2017, when he was cross-examined by the prosecution, and where he allegedly requested release on bail again. If convicted, Mr. Khine Myo Htun could face up to four years of imprisonment and a fine.

We express concern at the criminal charges brought against Mr. Swe Win and Mr. Khine Myo Htun, as well as the continued detention of the latter, which are made possible due to the continued existence of criminal defamation under the laws of Myanmar, in violation of international human rights standards. Similarly, we express concern at the increased use of criminal defamation charges against political expression, journalistic activities, and human rights defenders. In this connection, we also express concern that the amendments proposed to section 66(d) of the Telecommunications Act do not go far enough in order to bring the provision into line with Myanmar’s obligations under international human rights standards. Section 66(d) raises two immediate concerns. The provision creates criminal punishment for defamation which poses a serious threat to freedom of expression in Myanmar. Not only may criminal defamation laws prevent the speaker from expression through physical incapacitation, but criminal defamation may have a severe chilling effect on future expression. Additionally, even if the proposed amendments would be approved, section 66(d) would still criminalize expression on the basis of its effect in “disturbing” others, which constitutes an overly vague and arbitrary standard. Laws that restrict expressive activity on the basis of vague and arbitrary standards pose a substantial risk of arbitrary and discriminatory enforcement. Accordingly, section 66(d) will have a direct and negative impact on freedom of expression, access to information and the free exchange of ideas in Myanmar.

In this relation, we would like to recall that freedom of opinion and freedom of expression are essential to the formation and continuation of a free and open society. In particular, we would like to refer your Excellency's Government to article 19 of the Universal Declaration of Human Rights, which provides 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". This right is also guaranteed in article 19 of the International Covenant on Civil and Political Rights (ICCPR). We welcome in this regard your Excellency's Government's statement during the second cycle of the Universal Periodic Review, in which it stated that it had "accepted in principle" the ratification of the ICCPR (A/HRC/31/13/Add.1, para 7).

We recall that under international human rights standards, as highlighted in the report of the previous Special Rapporteur on the right to freedom of expression, criminal sanctions, in particular imprisonment for libel and defamation are not deemed proportional with an effective exercise of the right to freedom of expression (E/CN.4/2000/63). In this regard, we also refer to the principle enunciated in Human Rights Council Resolution 12/16, which calls on states to refrain from imposing restrictions on the discussion of government policies and political debate; reporting on human rights and government activities; and expression of opinion and dissent.

We also refer to your Excellency's Government's commitment expressed in November 2015 during the second cycle of the Universal Periodic Review, in which your Excellency's Government accepted recommendations to ensure that freedom of expression be protected, and in particular that those who legitimately exercise their rights to freedom of expression and peaceful assembly be not subject to reprisals (see recommendations 143.88, 143.98 and 143.99, A/HRC/31/13).

Finally, we would also like to highlight the fundamental principles set forth in articles 1 and 2 of the UN Declaration on Human Rights Defenders, which provide for the right to promote and to strive for the protection and realization of human rights and fundamental freedoms. We would similarly like to recall that article 6 (b) and c) of the Declaration provides that everyone has the right to freely publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms, and to study, discuss, form and hold opinions on the observance of these rights.

The full texts of the human rights instruments and standards recalled above are available on www.ohchr.org or can be provided upon request.

In view of the urgency of the matter, we would appreciate a response on the initial steps taken by your Excellency's Government to safeguard the rights of the above-mentioned persons in compliance with international instruments.

It is our responsibility under the mandate bestowed upon us by the Human Rights Council, to seek to clarify all cases brought to my attention. We would therefore be grateful for your observations and the following questions:

- 1) Please provide any additional information you may have on the above allegations.
- 2) Please provide information about measures taken to ensure that Mr. Swe Win is guaranteed a fair trial in accordance with the standards of international human rights law.
- 3) Please provide information about the state of the criminal procedures against Mr. Khine Myo Htun, as well as on the legal basis for denying his release on bail. Similarly, please provide information on the measures taken to ensure the respect of due-process guarantees in his case.
- 4) Please provide information on how section 66(d) of the Telecommunications Act, affords individuals protection in conformity with international standards, in particular with article 19.
- 5) Please provide information on the protections that are afforded to journalists and human rights defenders with respect to accusations of criminal defamation under laws such as section 66(d) of the Telecommunications Act.

While awaiting a reply, we urge that all necessary interim measures be taken to halt the alleged violations and prevent their re-occurrence and in the event that the investigations support or suggest the allegations to be correct, to ensure the accountability of any person responsible of the alleged violations.

We intend to publicly express our concerns in the near future as, in our view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. We also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that we have been in contact with your Excellency's Government's to clarify the issue/s in question.

Your Excellency's Government's response will be made available in a report to be presented to the Human Rights Council for its consideration.

Please accept, Excellency, the assurances of our highest consideration.

Yanghee Lee
Special Rapporteur on the situation of human rights in Myanmar

David Kaye
Special Rapporteur on the promotion and protection of the right to freedom of opinion
and expression

Michel Forst
Special Rapporteur on the situation of human rights defenders