

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:
AL MMR 6/2018

26 December 2018

Excellency,

We have the honour to address you in our capacities 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, pursuant to Human Rights Council resolutions 34/22, 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 Mr. **Aung Ko Htwe**, a human rights defender and former child soldier in the Tatmadaw, who was allegedly convicted for speaking to the media about being a child soldier and for insulting a judicial officer.

Concerns at the use of article 505 of the Penal Code have been raised in a previous communication by Special Procedures sent on 26 August 2016 (ref. no 2/2016). We thank your Excellency's Government for the reply of 6 October 2016, but remain concerned in light of allegations received about the continued use of this provision to target the legitimate exercise of freedom of expression.

According to information received:

On 18 August 2017, Mr. Aung Ko Htwe was arrested and charged under article 505(b) of the Penal Code, which states:

Whoever makes, publishes or circulates any statement, rumour or report,—

...

(b) with intent to cause, or which is likely to cause, fear or alarm to the public or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquility;

The complaint was made against him by Lieutenant Colonel Myo Myint Aung in relation to an interview he gave Radio Free Asia about his experiences as a child soldier in the Tatmadaw. He said he had been forcibly recruited by the Tatmadaw when he was 13 years old and faced forced labour as a child soldier for three years until he deserted.

Mr. Aung Ko Htwe was remanded in custody and his trial commenced in September at Dagon Seikan Township Court. In October, he appeared in court three times, but as the responsible judge was absent, and the assistant judge

conducting the proceedings reportedly did not have the power to rule on his bail application, he remained detained. On 9 November, he was denied bail.

On 31 January 2018, during the trial, Mr. Aung Ko Htwe is alleged to have called the judge a “cow judge”, said that he did not have faith in the court system and that he refused to participate in further proceedings. For this, he was charged and convicted under section 228 of the Penal Code and sentenced to six months’ imprisonment. Section 228 states:

Whoever intentionally offers any insult, or causes any interruption to any public servant, while such public servant is sitting in any state of a judicial proceeding, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

On 27 March 2018, Mr. Aung Ko Htwe was convicted and sentenced to two years’ imprisonment with hard labour in relation to the charge under section 505(b). On the day of his conviction, he is alleged to have stepped on a copy of Myanmar’s constitution in protest of his charges. He was then charged under sections 6 and 7 of the Union Seal Act, and later acquitted of those charges on 30 October 2018.

Mr. Aung Ko Htwe remains imprisoned in Insein prison where he is serving a sentence of two and a half years.

While we do not wish to prejudge the accuracy of these allegations, we wish to express serious concern at the arrest, detention and conviction of Mr. Aung Ko Htwe for statements made to the media about his forcible recruitment as a child soldier. We are concerned that the basis for the conviction is incompatible with international human rights law, as it criminalizes the legitimate exercise of freedom of expression through overbroad and vague wording. We are further concerned that the content of the expression made by Mr. Aung Ko Htwe concerns a matter of public interest, where an open debate should be encouraged.

We also express concern that the actions taken against Mr. Aung Ko Htwe may have a ‘chilling effect’ on the exercise of the right to freedom of expression on the issue of human rights, on the expression of dissenting or critical opinion and on the work of human rights defenders in general.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would therefore be grateful for your observations on the following matters:

1. Please provide any additional information you may have on the above allegations.
2. Please provide information about measures taken to ensure that Mr. Aung Ko Htwe was guaranteed a fair trial in accordance with the standards of international human rights law.
3. Please provide information on the measures taken to ensure that article 505(b) of the Penal Code affords individuals protection in conformity with international standards, in particular with article 19 of the Universal Declaration of Human Rights and the recommendations of the Special Procedures, as also formulated among the UPR recommendations that enjoy the support of Myanmar.
4. Please indicate what measures have been taken to ensure that human rights defenders in Myanmar are able to carry out their peaceful and legitimate work in a safe and enabling environment without fear of threats or acts of intimidation and harassment of any kind.

We would appreciate receiving a response within 60 days. Passed this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

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(s) responsible for the alleged violations.

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

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, we refer to the right to freedom of opinion and expression as set forth in article 19 of the Universal Declaration of Human Rights (UDHR). 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 UPR, in which it stated that it had "accepted in principle" the ratification of the ICCPR (A/HRC/31/13/Add.1, para 7).

We wish to recall that under international human rights standards, any restriction to the right to freedom of expression must be provided by law, and necessary and proportionate for the protection of a legitimate objective. 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 recall a recent report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression which emphasises that freedom of expression plays a central role in the effective functioning of a vibrant democratic political system, recalling States' responsibility to ensure an environment in which a diverse range of political opinions and ideas can be freely and openly expressed and debated (A/HRC/26/30).

We also refer to your Excellency's Government's commitment expressed in November 2015 during the second cycle of the Universal Periodic Review (UPR), 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).

We also wish to refer your Excellency's Government to the fundamental principles set forth in 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, also known as the UN Declaration on Human Rights Defenders. In particular, we would like to refer to articles 1 and 2, which states that everyone has the right, individually and in association with others to promote and to strive for the protection and realization of human rights and that the State has a prime responsibility and duty to protect, promote and implement all human rights. We would also like to draw attention to article 5, 6 and 12. Article 5 and 6 state that everyone has the right to meet or assemble peacefully and to know, seek, receive, and impart information about all human rights. While according to article 12, the state shall take all necessary measures to ensure the protection by the competent authorities of everyone, against any arbitrary action as a consequence of the legitimate exercise of their human rights.