

OPINION No 46/2008 (Union of Myanmar)

Communication addressed to the Government on 29 August 2008.

Concerning: Ms Aung San Suu Kyi

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

1. The Working Group on Arbitrary Detention was established by resolution 1991/42 of the former Commission on Human Rights. Its mandate was clarified and extended by Commission's resolution 1997/50. The Human Rights Council assumed the Working Group's mandate by its decision 2006/102 and extended it for a further three-year period by resolution 6/4 of 28 September 2007. Acting in accordance with its methods of work, the Working Group forwarded the above-mentioned communication to the Government.

2. The Working Group regards deprivation of liberty as arbitrary in the following cases:

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

II. 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);

III. 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).

3. The Working Group on Arbitrary Detention has adopted four Opinions relating to Ms. Aung San Suu Kyi, dealing to her previous detentions in 1992, 2002, 2004 and 2007.

4. The additional information on the case of Ms Aung San Suu Kyi summarized below was reported to the Working Group on Arbitrary Detention as follows: Ms Aung San Suu Kyi, General Secretary of the National League for Democracy (NLD) and Nobel Prize Laureate; of 62 years of age, residing in Rangoon, has been, since 30 May 2003, consecutively put under house arrest on an annual basis. Her order of house arrest was lastly renewed on 28 May 2008 by security forces invoking article 10, lit. b), 6f the 1975 State Protection Law (Puithu Hluttaw Law No.3, 1975), which states that "[i]f necessary, the movements of a person against whom action is taken can be restricted for a period of up to one year."¹

5. No warrant or decision was presented to Ms. Aung San Suu Kyi. No reasons were given to her for the extension of her house arrest, and she has not been charged with any offence. In addition the source reports that there is no opportunity for domestic judicial review of her detention. Since her initial term of house arrest began, Ms. Aung San Suu Kyi has only been given minimal access to the outside world. According to the source, United Nations Under-Secretary-General Mr. Ibrahim Gambari has been her only outside visitor, besides her doctor; a

¹ Article 1 describes the State Protection Law as the "Law to Safeguard the State Against the Dangers of Those Desiring to Cause Subversive Acts".

person who delivers food to her; and, on rare occasions, a diplomat. She has no access to relatives or lawyers and her communications and visits are permitted at the Government's sole discretion.

6. The source recalls that during Ms. Suu Kyi's 12 years of detention, the Working Group has adopted four Opinions (Opinion Nos. 8/1992, 2/2002, 9/2004 and 2/2007) declaring her respective deprivations of liberty to be arbitrary as being in contravention of Articles 9, 10, and 19 of the Universal Declaration of Human Rights. The source argues that with the expiration of Ms. Suu's detention on 25 May 2008, the Working Group's Opinion No. 2/ 007 expired as well. The new order of detention issued by the Government of Myanmar on 28 May 2008 has not yet been considered by the Working Group.

7. Ms. Suu Kyi has been the head of the pro-democracy movement in Myanmar. She is General Secretary of the NLD, the leading opposition party, and daughter of General Aung San, Commander of the Burma Independence Army and founder of the Anti-Fascist People's League which led the struggle for the country's independence. Aung San, maximum hero of Burma Independence, was assassinated in 1947. Since 1988, Ms. Suu Kyi has been struggling to bring democracy to Myanmar. Her defiant response to continued detention has made her a world-wide symbol of non-violent resistance to military autocracies. In 1991, she was awarded the Nobel Peace Prize. Despite her frequent arrests, Ms. Suu Kyi continues to speak out against the Government and play an active role in opposition whenever she is able to.

8. The source argues that the latest renewal of the order to place Ms. Suu Kyi under house arrest not solely violates international law but also national domestic laws of Myanmar, since the situation does not meet the terms of the 1975 State Protection Law, and since this Law only allows for annually renewable house arrest orders with the maximum time limit of five years in total. This five year period ended at the end of May 2008.

9. Ms. Suu Kyi is being held under the 1975 State Protection Law which allows the authorities to order the detention or restricted residence without charge or trial of anyone the authorities believe is performing or might perform "any act endangering the sovereignty and security of the State or public peace and tranquility" (see article 7 of this Law). But even according to the authorities themselves, the extended deprivation of liberty of Ms. Suu Kyi does not meet this already very low and subjective threshold. On 23 May 2006, Major General Khin Yi, who serves as the Nation's Police Chief, told a conference of regional police that the release of Ms. Suu Kyi would likely have little effect on the country's political stability and that there would not be rallies and riots if Ms. Suu Kyi were to be released, since public support for her had fallen. Furthermore, as the Working Group previously noted in its Opinion No. 2/2002, Ms. Suu Kyi "is a known advocate of political change exclusively by peaceful means. (...) No controlling body* acting in good faith, would find or believe that she is a potential danger to the State."

10. According to the source, there can be no legal justification for Ms. Suu Kyi's deprivation of liberty under the Union of Myanmar's domestic law, yet if her release does not endanger State-sovereignty or public peace and tranquility.

11. The Working Group transmitted the allegations contained in the communication by the source to the Government. It notes that the Government has not responded transmitting its observations or comments to the allegations of the source. The Working Group considers that it is in a situation to issue an Opinion with the elements put at its disposal.

12. The Working Group considers that Ms. Aung San Suu Kyi continued placement under house arrest is arbitrary and in violation of article 9 of the Universal Declaration of Human

Rights. Even if her release could be said to endanger State sovereignty or public peace and tranquility, however, individuals detained under the State Protection Law may only be kept for five years, renewable on an annual basis, Ms. Suu Kyi's detention commenced in May 2003 and has been extended for each of the past five years. A plain reading of the 1975 State Protection Law clearly shows that such extensions were only permissible until late May 2008 - the point where Ms. Suu Kyi had been under house arrest for five years-. Therefore, the most recent extension on 28 May 2008 amounts to a *prima facie* violation of the Union of Myanmar's own laws.

13. Under article 10 of the 1975 State Protection Law, "in the protection of the State against dangers," the Government, and in particular a Central Board including the Ministers of Defense, Foreign Affairs, and Home & Religious Affairs have "the right to implement the following measures through a restrictive order:... (b) if necessary, the movements of a person against whom action is taken can be restrained for a period of up to one year," Article 14 states that "[t]he Cabinet may grant prior approval to continue the detention or restriction of rights of a person against whom action is taken for a period ... up to three years." In amendments to the State Protection Law, the time limit was subsequently raised to five years. Although Ms. Suu Kyi was initially detained on 30 May 2003, under Article 10(b), the Government has extended her terms of her house arrest prior to their expiration, which has moved the date of expiration of this particular term of house arrest to earlier in the month of May. In particular, her fifth term of house arrest was extended on 25 May 2007, for a period of one year. As a result, her house arrest expired on 24 May 2008. The Government had declared earlier that the General Body had not issued its order restraining Ms.Suu Kyi until 28 November 2003, and that the subsequent extensions applied to that date instead of late May. If that were correct, Ms.Suu Kyi could be kept under house arrest until 27 November 2008.

14. Nevertheless, even if such an argument were made, it would be invalid. The 1975 State Protection Law is unclear as to whether detention begins when a person is arrested or the moment that an order is issued. The act defines "commit", "central board", and "person against whom actions is taken" but not "detain". It would be inconsistent with basic principles of rule of law for a detention to begin only when an order is issued under this law and not when a person's liberty or freedom of movement is restricted. Ms. Suu Kyi's movement has been forcibly restricted since she was taken into "protective custody" on 30 May 2003. Therefore, it is reasonable to conclude that, under the 1975 State Protection Law, Ms. Suu Kyi has been detained since 30 May 2003, and was due to be released, in accordance with domestic law, no later than 30 May 2008. While the State Protection Law is overbroad and vague on several points, it is clear that a person may held for a maximum of five years. The one year extension will keep Ms. Suu Kyi imprisoned well beyond the Government's own five-year mark of 27 November 2008, and thus violates the 1975 State Protection Law.

15. The renewal of Ms.Aung San Suu Kyi's placement under house arrest is arbitrary as it violates the rights and fundamental freedoms established in the Universal Declaration of Human Rights, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and the Standard Minimum Rules for the Treatment of Prisoners, falling under Categories I, II and III of the categories applicable to the cases submitted to the Working Group on Arbitrary Detention.

16. In the light of the foregoing the Working Group expresses the following opinion:

(a) The Working Group confirms its previous Opinions (Opinion Nos. 8/1992, 2/2002, 9/2004 and 2/2007), declaring Ms. Aung San Suu Kyi's placement under house

arrest as arbitrary, being in contravention of Articles 9, 10 and 19 of the Universal Declaration of Human Rights,

(b) The Working Group considers that the further extension of Ms. Aung San Suu Kyi's placement under house arrest by administrative way is arbitrary as it violates the rights and fundamental freedoms, established in articles 9, 10 and 19 of the Universal Declaration of Human Rights and even domestic law, particularly the State Protection Law 1975, which itself contradicts to the basic principles and norms of modern international law. Violations of Ms. Aung San Suu Kyi's liberty fell under categories I, II and III of the categories applicable to the cases submitted to the Working Group of Arbitrary Detention.

(c) The Working Group decides to transmit this Opinion to the Special Adviser of the Secretary-General, Mr. Ibrahim Gannbari, as well as to the Special Rapporteur on the situation of Human Rights in Myanmar, Mr. Tomas Ojea Quintana, for their consideration.

17. Consequent upon this Opinion, the Working Group requests the Government to immediately release, without any condition, Ms. Aung San Suu Kyi from her continued placement under house arrest. It also requests the Government to take practical steps to remedy the situation in order to bring it into conformity with the standards of International Human Rights Law and to study the possibility of an early accession to the International Covenant on Civil and Political Rights and to other core international human rights treaties-

Adopted on 28 November 2008