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**Human Rights Council**  
Working Group on Arbitrary Detention

## **Opinions adopted by the Working Group on Arbitrary Detention at its eighty-eighth session, 24–28 August 2020**

### **Opinion No. 37/2020 concerning Zayar Lwin, Paing Phyo Min, Zaw Lin Htut, Kay Khine Htun, Paing Ye Thu and Su Yadana Myint (Myanmar)\***

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights. In its resolution 1997/50, the Commission extended and clarified the mandate of the Working Group. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The Council most recently extended the mandate of the Working Group for a three-year period in its resolution 42/22.
2. In accordance with its methods of work (A/HRC/36/38), on 26 March 2020, the Working Group transmitted to the Government of Myanmar a communication concerning Zayar Lwin, Paing Phyo Min, Zaw Lin Htut, Kay Khine Htun, Paing Ye Thu and Su Yadana Myint. The Government has not replied to the communication. Myanmar is not a party to the International Covenant on Civil and Political Rights.
3. 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 him or her) (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 Covenant (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 on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

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\* Seong-Phil Hong did not participate in the discussion of the present case.

## Submissions

### *Communication from the source*

#### a. Background

4. The source provided the following information on the individuals involved in the present case:

(a) Zayar Lwin is a 29-year-old citizen of Myanmar. He is a leading member of the Confederation of University Student Unions. He usually resides in Yangon;

(b) Paing Phyo Min is a 23-year-old citizen of Myanmar. He is the President of the Dagon University Students' Union and a member of the Confederation of University Student Unions. He usually resides in Yangon;

(c) Zaw Lin Htut is a 22-year-old citizen of Myanmar. He is a photojournalist and a member of the Confederation of University Student Unions. He usually resides in Yangon;

(d) Kay Khine Htun is a 22-year-old citizen of Myanmar. She is a trained nurse and a member of the Confederation of University Student Unions. She usually resides in Yangon;

(e) Paing Ye Thu is a 29-year-old citizen of Myanmar. He is a leading member of the Confederation of University Student Unions. He usually resides in Yangon;

(f) Su Yadana Myint is a 25-year-old citizen of Myanmar. She works as a training assistant at the Institute for Strategy and Policy and is a member of the Yangon Region Youth Affairs Committee and the Confederation of University Student Unions. She usually resides in Dagon Township.

5. According to the source, the six individuals form part of the Peacock Generation group, a satirical poetry troupe engaging in *thangyat*, a traditional performance art form that has historically been used to express political opinions through satire. The source reports that, in 2016, the State Counsellor ended the formal censorship of *thangyat* lyrics, but reintroduced it in 2017. Without approval from the censors, *thangyat* performers are unable to make reservations to perform at venues funded by the Government.

6. The source informs the Working Group that Zayar Lwin, Paing Phyo Min, Zaw Lin Htut, Kay Khine Htun and Paing Ye Thu are performers who took part in an outdoor performance of *thangyat* in Yangon during the Thingyan (New Year) Festival in April 2019. Su Yadana Myint recorded the performances and posted them on social media. The performance lyrics reportedly included calls to remove legislators appointed by the military from the parliament, criticism of the military's involvement in politics and business and an appeal for the International Criminal Court to bring a case against the military. According to the source, the performers wore militaristic clothing, which was a motivating factor in their arrest.

7. The source alleges that, even though they were not specifically named in the performance, members of the military filed numerous criminal insult and "online defamation" suits against the performers and against Su Yadana Myint.

#### b. Arrest and pretrial detention

8. According to the source, Zayar Lwin, Paing Phyo Min, Paing Ye Thu and Su Yadana Myint were arrested on 15 April 2019. They were held and questioned for several hours at a police station and charged with violating section 66 (d) of the Telecommunications Law. They were told to return for a hearing on 5 September 2019. Zayar Lwin, Paing Phyo Min and Paing Ye Thu were also charged under section 505 (a) of the Penal Code, and they were told to return for a hearing on 22 April 2019.

9. Kay Khine Htun was arrested on 19 April 2019 during a shift at the Yangon Children's Hospital. She was eventually released and told to appear at Mayangone Township Court on 22 April 2019 for the first hearing on charges under section 505 (a) of the Penal Code, together with Zaw Lin Htut and the three performers who had been arrested on 15 April 2019.

10. Zaw Lin Htut was arrested between 15 and 22 April 2019, and attended a hearing related to charges under section 505 (a) of the Penal Code on 22 April 2019 in Mayangone Township Court.

11. Su Yadana Myint was arrested again, on 17 May 2019, on separate charges. She was brought to a hearing in Botahtaung Township Court on the same day, along with the five performers, on new charges under section 505 (a) of the Penal Code. The charges were brought against them by another individual in relation to the same Thingyan Festival performances.

12. The source reports that the arrests on 15 April 2019 and the arrest of Kay Khine Htun on 19 April 2019 were carried out by police officers of the Mayangone Township Police Station in Rangoon. The arrest of Su Yadana Myint on 17 May 2019 was carried out by police officers of the Botahtaung Township Police Station in Yangon. The decision to arrest the group members on 15 and 19 April 2019 was made by the Mayangone Township Court in Yangon, and the decision to arrest Su Yadana Myint on 17 May 2019 was made by the Botahtaung Township Court in Yangon.

13. The source alleges that none of the individuals named above was shown a warrant or other decision by a public authority at the time of arrest. According to the source, they were arrested on charges of violating section 505 (a) of the Penal Code and section 66 (d) of the Telecommunications Law. Both of those offences require the presentation of a warrant. The provisions were applied for alleged criminal insult of the military and defamation over a telecommunications network.

14. According to the source, section 505 of the Penal Code states that:

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

(a) with intent to cause, or which is likely to cause, any officer, soldier, sailor or airman, in the Army, Navy or Air Force to mutiny or otherwise disregard or fail in his duty as such [...] shall be punished with imprisonment which may extend to two years, or with fine, or with both. The source also cites section 66 of the Telecommunications Law, as amended, as follows:

Whoever commits an [act enumerated in 66 (d)] shall, on conviction, be punished with imprisonment for a term not exceeding two years or with a fine not exceeding 1 million kyats or with both.

[...]

(d) extorting, defaming, disturbing or threatening any person by using any telecommunications network.

15. The source submits that both section 505 (a) of the Penal Code and section 66 (d) of the Telecommunications Law have been used to persecute political dissidents in recent years, with increasing frequency. According to the source, in 2019, eight people who were critical of the armed forces were charged under section 505 (a) of the Penal Code. Between April 2016 and June 2017, there were 61 cases brought under section 66 (d) of the Telecommunications Law, at least 7 of which were filed by the military and 6 by the Government. Many of those cases concerned individuals who posted or shared content that criticized the Government or the military. Between 2018 and 2019, 61 people were charged under section 66 (d) of the Telecommunications Law, and 127 individuals are currently being tried for “online defamation”.

16. According to the source, in response to accusations that the language of the Telecommunications Law was overbroad and vague and that it unfairly criminalized the expression of opinion online, the Government amended the Law in 2017. The amendment removed some of the provisions, adjusted the bail conditions and reduced the maximum sentence. However, the source notes that the amended version continues to be incompatible with international legal standards and that the Law is still used to silence critics of the Government and the military.

17. All six individuals spent time in pretrial detention in Mayangone and Botahtaung Townships in Yangon, after being accused of violating section 505 (a) of the Penal Code and/or section 66 (d) of the Telecommunications Law. Two members of the military have made accusations, one in each township, on behalf of the institution as a whole.

18. The six individuals were denied bail and sent to Insein Prison for pretrial detention after their first hearings, on 22 April 2019 for the five performers and on 17 May 2019 for Su Yadana Myint. The source notes that, according to the Code of Criminal Procedure of Myanmar, any person accused of a non-bailable offence may be released on bail if she or he is arrested or detained without a warrant by a police officer. The source reiterates that that was the case for all six individuals, given that none of them was presented with a warrant prior to their arrest and detention.

19. The source notes that, although other persons arrested on the same charges have frequently been released on bail, all six individuals in the present case were denied bail. The source alleges that bail has been routinely denied to persons held under section 66 (d) of the Telecommunications Law when they were accused of defaming Government officials or the military.

c. Convictions and sentences

20. According to the source, the six group members are involved in four cases in which a decision has been made. All six individuals were convicted of violating section 505 (a) of the Penal Code in Botahtaung Township and sentenced to one year in prison with hard labour. The five performers were also convicted of that charge in Mayangone Township and sentenced to one year in prison with hard labour.

21. All six individuals were charged with violating section 66 (d) of the Telecommunications Law in Botahtaung Township, and the four troupe members who were arrested on 15 April 2019 faced additional charges in Mayangone Township. Both of those cases have concluded. In the first case, Paing Phyo Min, Kay Khine Htun and Su Yadana Myint were convicted and sentenced to six months in prison with hard labour. In Mayangone Township, all four members of the group who were arrested on 15 April 2019 were convicted and sentenced to six months in prison with hard labour.

22. The source reports that, collectively, the six individuals will spend 11 years in prison for violating section 505 (a) of the Penal Code and 3.5 years in prison for violating section 66 (d) of the Telecommunications Law. However, not all of the trials have concluded yet. The group members are facing further charges under both of those provisions in Patheingyi Township, although it is not yet clear when the case will be heard.

23. The source informs the Working Group that, on 30 October 2019, the five performers were sentenced to a year in prison under section 66 (d) of the Telecommunications Law for “damaging the reputation” of the armed forces during an artistic performance that was streamed online. Along with Su Yadana Myint, they received a second prison sentence on 19 November 2019 under section 505 (a) of the Penal Code for mocking the military in the same performance. Zayar Lwin, Paing Phyo Min, Kay Khine Htun, Paing Ye Thu and Su Yadana Myint have since received additional sentences under section 66 (d) of the Telecommunications Law. All six individuals remain in detention in Insein Prison.

24. According to the source, defamation is a criminal charge in Myanmar, despite repeated recommendations from the United Nations that it be decriminalized. The source recalls that the Human Rights Committee has stated that imprisonment is never an appropriate penalty for defamation.<sup>1</sup> In the present case, the six individuals have been detained for a prolonged period at great cost to their families, their educations and their livelihoods, even though they present no danger to themselves or to the public and can be relied upon to appear in court when summoned. The source argues that their detention is a disproportionate punishment for breaching the legal provisions that concern self-expression.

25. The source informs the Working Group that, although some members of the Peacock Generation group have faced charges for their political activism in the past, the cases detailed above are the first in which any group member has faced charges for a *thangyat* performance; indeed, they are the first instances of any *thangyat* performers in the country having faced such charges since the start of the democratic transition.

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<sup>1</sup> Human Rights Committee, general comment No. 34 (2011) on the freedoms of opinion and expression, para. 47.

26. The source adds that Zayar Lwin and Paing Ye Thu have previously been targeted for their activism. As leading members of the Confederation of University Student Unions, they organized a protest calling for the resignation of members of the parliament appointed by the military, which was held in Yangon on 30 June 2015. Shortly after the protest, the police arrested both of them and a third organizer. They all faced trial for charges under section 18 of the Peaceful Assembly and Peaceful Procession Law and section 505 (b) of the Penal Code. Ultimately, they were released from prison on 8 April 2016 as part of a group of “prisoners of conscience” that received presidential pardons from the State Counsellor. The other four group members have no previous criminal records.

d. Analysis of violations

27. The source submits that the detention of members of the Peacock Generation group is arbitrary under categories II and III.

28. In relation to category II, the source argues that the charges against the six individuals named above constitute a violation of the right to freedom of expression guaranteed by article 19 of the Universal Declaration of Human Rights and article 354 of the Constitution of Myanmar, as well as under the Law Protecting the Privacy and Security of Citizens.

29. According to the source, the language in section 505 (a) of the Penal Code is vague and overbroad. Under the section, the publication or circulation of “any statement, rumour or report” with intent to cause a member of the military to mutiny is criminalized, but it provides no clear definitions of those terms. The lack of definitions has enabled the courts to apply the charge liberally and, in the present case, to use it to criminalize a satirical artistic expression of political opinion.

30. Moreover, *thangyat* performances have allowed individuals to discuss social or political issues for generations. Such performances contribute meaningfully to political participation in the country. By sharing the performances online, the Peacock Generation group aimed to further political discourse in the country; participation in sharing opinions on military behaviour in an online version of a public square is an exercise of individual rights. The prosecution of the Peacock Generation group members for those performances violates their freedom of expression of political opinion through art, which is protected under article 19 of the Universal Declaration of Human Rights.

31. The source notes that, in the present case, the courts have found that the rights of members of the Peacock Generation group should be abridged, because their free speech constituted defamation. They were charged with “criminal intimidation, insult and annoyance” under section 505 (a) of the Penal Code and “online defamation” under section 66 (d) of the Telecommunications Law. In the court proceedings, the prosecution argued that curbing their free expression was valid because their performance harmed the rights and reputations of those bringing the allegations, who were all members of the military. The source notes that, under international law, individuals are not protected from insult or from other forms of criticism, whether it is intentional or not. The reasoning in the court rulings represents a misinterpretation of the international legal standards on defamation.

32. Defamatory speech must present a specific and direct threat, and a direct and immediate connection between the expression and the threat must be established.<sup>2</sup> Restricting the speech of group members does not meet the standard of specificity, because the military officers were not mentioned or referenced individually. Rather, the officers extrapolated a personalized threat from speech that merely criticized the military in general. Moreover, the lyrics of the *thangyat* did not include a targeted threat, given that the calls to action were restricted to urging the International Criminal Court to prosecute the military and urging the military to stop interfering in politics and business. The source states that those are valid expressions of political opinion that are protected under international law. Restrictions on free expression must not impede political debate.<sup>3</sup>

33. The source also submits that, by bringing charges against the group members for the critical nature of the lyrics, the courts established that any criticism of the military’s

<sup>2</sup> Ibid., para. 35.

<sup>3</sup> Ibid., para. 28.

political role could be considered criminal and those who criticize that role could be prosecuted. However, under international law, public figures and institutions, including military officers and the army in general, cannot be shielded from criticism related to their public service.<sup>4</sup>

34. General criticism of the military by the group members does not violate the military officers' individual rights, even if the officers felt personally insulted. State legislators in Myanmar have previously acknowledged that bringing criminal charges over "insults" is not compliant with international law. When the Telecommunications Law was implemented in 2013, it was widely criticized by the international community for the vague and overbroad language in section 66 (d). The courts were specifically criticized for criminalizing "insults", in violation of international standards for defamation. The Telecommunications Law was subsequently amended to remove the term "insulting" from section 66 (d). In practice, however, the amendment has not affected the application of the law. "Insult" has been subsumed under the umbrella of "defamation", and judges do not require individuals making allegations to demonstrate that the contested speech constitutes a direct threat or includes false information. A personal feeling of insult by one army officer is enough to justify an abridgement of all free expression related to the military. The source argues that that constitutes a clear violation of the Universal Declaration of Human Rights.

35. In relation to category III, the source submits that the non-observance of the international norms relating to the right to liberty and security of person, as set out in articles 9 and 10 of the Universal Declaration of Human Rights, is of such gravity as to give the deprivation of liberty of the six individuals an arbitrary character.

36. The source observes that none of the six individuals was presented with a warrant at the time of arrest. The failure to present a warrant violates the Code of Criminal Procedure, under which a warrant is required to be presented at the time of arrest in relation to alleged violations of sections 500 and 505 (a) of the Penal Code.

37. Furthermore, it is submitted that the six individuals were unjustifiably denied bail. They spent a significant amount of time in pretrial detention, even though such detention should be a last resort in criminal proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim.<sup>5</sup> There was no basis for any assertion that the group members represented a threat to society or to themselves, or that they would fail to appear when called to court.

38. In addition, the source submits that international standards on pretrial detention emphasize the importance of an expeditious trial and decision.<sup>6</sup> However, the six troupe members each spent nearly a year in pretrial detention in relation to allegations that are considered to be a civil matter under international law. Pretrial detention is justified in Myanmar on the basis that defamation is considered to be a criminal, rather than civil, offence under domestic law. However, special procedures mandate holders and others have opposed the criminalization of defamation and the use of detention in defamation cases.<sup>7</sup> United Nations bodies have also indicated that defamation should only be considered criminal in the most serious cases and that the penalty therefor should never be imprisonment.<sup>8</sup> Furthermore, the failure to proceed to trial expeditiously could have a chilling effect that may unduly restrict the exercise of freedom of expression of the person concerned and others.<sup>9</sup>

39. The source argues that another fair trial violation occurred in Mayangone Township Court on 22 May 2019, when the defendants were handcuffed at the court. Supporters of the Peacock Generation group who attended the trial protested the use of restraints, arguing that it was not justified for non-violent offenders. Members of the police have reportedly

<sup>4</sup> Ibid., para. 38.

<sup>5</sup> United Nations Office of Drugs and Crime (UNODC), *Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice*, p. 120. Available at [www.unodc.org/pdf/criminal\\_justice/Compendium\\_UN\\_Standards\\_and\\_Norms\\_CP\\_and\\_CJ\\_English.pdf](http://www.unodc.org/pdf/criminal_justice/Compendium_UN_Standards_and_Norms_CP_and_CJ_English.pdf).

<sup>6</sup> Human Rights Committee, general comment No. 34, para. 47.

<sup>7</sup> See [www.oas.org/en/iachr/expression/showarticle.asp?artID=87&IID=1](http://www.oas.org/en/iachr/expression/showarticle.asp?artID=87&IID=1).

<sup>8</sup> Human Rights Committee, general comment No. 34, para. 47.

<sup>9</sup> Ibid.

replied that they handcuffed the defendants in accordance with the guidelines in the police handbook. According to the source, the handcuffing of defendants is in violation of the Standard Minimum Rules for the Treatment of Prisoners, in which it is established that handcuffs and other instruments of restraint should only be used as a precaution against escape during a transfer, provided that they are removed when the person appears before a judicial or administrative authority.<sup>10</sup> The five performers were handcuffed before the court, despite the fact that there was no cause to believe that they would injure themselves or others or damage property, which are the only legal exceptions to justify the use of restraints during trial.

40. In addition, the multiple charges and cases against the group members is a clear example of persecution and undermines the efficiency of the courts. Each of the six individuals faces between three and seven separate charges, in various townships, for the same alleged crime. Individual military officers have brought cases against them in each township that the group performed in throughout the Thingyan Festival. For example, Su Yadana Myint faces separate charges under section 66 (d) of the Telecommunications Law in Botahtaung Township, Mayangone Township and Patheingyi Township.

41. The source submits that filing separate defamation charges against the group members in various townships is a strategic move that forces them to spend months – if not years – appearing in courts to debate the *thangyat* performances that took place in April 2019. Some of the group members have been called to court every week. After making the long trip into Yangon from Insein Prison, their hearings have often been postponed, forcing them to waste their time and incur additional legal fees for the day in court.

42. The source notes that the group members initially contested the charges against them and participated in the judicial process, but have since decided not to appeal the decisions because of the recent failure of the judicial process to adhere to international law on protecting fundamental rights. The source concludes that, given the pattern of arrests and convictions under section 505 (a) of the Penal Code and section 66 (d) of the Telecommunications Law, there is no reason to expect that further participation in formal judicial mechanisms will result in remedy, relief or acquittal.

43. The Working Group notes that Su Yadana Myint was the subject of an allegation letter sent by the Working Group and three other special procedures mandate holders on 26 September 2019.<sup>11</sup> The Working Group acknowledges the Government's responses of 28 November 2019 and 2 January 2020.<sup>12</sup> The six individuals were also the subject of an urgent appeal sent by three special procedures mandate holders on 20 April 2020. At the time of the adoption of the present opinion, there had been no response from the Government to the latter communication.

#### *Response from the Government*

44. On 26 March 2020, the Working Group transmitted the source's allegations to the Government under its regular communication procedure, requesting that the Government provide detailed information by 25 May 2020 about the situation of Zayar Lwin, Paing Phyto Min, Zaw Lin Htut, Kay Khine Htun, Paing Ye Thu and Su Yadana Myint. The Working Group also requested the Government to clarify the legal provisions justifying their detention, as well as its compatibility with the obligations of Myanmar under international human rights law. Moreover, the Working Group called upon the Government to ensure the physical and mental integrity of the six individuals.

45. The Working Group regrets that it did not receive a response from the Government to that communication. The Government did not request an extension of the time limit for its reply, as provided for in the Working Group's methods of work.

<sup>10</sup> UNODC, *Compendium of United Nations Standards and Norms*, p. 10.

<sup>11</sup> The allegation letter is available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24847>.

<sup>12</sup> The Government's responses are available at <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=35023> and <https://spcommreports.ohchr.org/TMResultsBase/DownloadFile?gId=35085>.

46. The Working Group notes with concern that the Government has not availed itself of the opportunity to respond to the allegations made in the present case and in other communications made under the regular communication procedure in recent years.<sup>13</sup> Indeed, the Government has not provided a response to the Working Group's regular communication procedure since 2013.<sup>14</sup> The Working Group urges the Government to engage constructively with it on all allegations relating to the arbitrary deprivation of liberty.

### Discussion

47. In the absence of a response from the Government, the Working Group has decided to render the present opinion, on the basis of all the information submitted, in conformity with paragraph 15 of its methods of work.

48. The Working Group has in its jurisprudence established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

#### i. Category I

49. The source states that the arrests and detention of the six Peacock Generation group members took place between 15 April and 17 May 2019.<sup>15</sup> Zayar Lwin, Paing Phyto Min, Paing Ye Thu and Su Yadana Myint were arrested on 15 April 2019. Kay Khine Htun was arrested on 19 April 2019. Zaw Lin Htut was arrested between 15 and 22 April 2019. Su Yadana Myint was arrested again on separate charges on 17 May 2019.

50. According to the source, all of those arrests took place without a warrant being presented at the time of arrest. There is no suggestion that the arrests took place in flagrante delicto, i.e., while the *thangyat* performances were taking place or immediately thereafter,<sup>16</sup> which might have obviated the need for a warrant. Indeed, some of the six group members were clearly not performing when arrested, such as Kay Khine Htun, who was reportedly arrested during a shift as a nurse at the Yangon Children's Hospital. The source states that the police in Mayangone and Botahtaung Townships did not comply with the Code of Criminal Procedure, under which it is required that a warrant be presented in relation to certain offences, including for the charges brought against the six individuals in the present case.

51. The Working Group considers that the source has established a credible prima facie case that the authorities did not present an arrest warrant at the time of the arrest of the six individuals. The Government did not respond to the Working Group's communication under its regular procedure and has therefore not provided any information or explanation to rebut the source's allegations. The Working Group recalls that, in its findings in previous cases involving Myanmar, the authorities were found to not have presented an arrest warrant at the time of the arrest, suggesting that the source's claims are credible.<sup>17</sup>

52. As the Working Group has previously stated, it is not sufficient that there is a law which authorizes an arrest. The authorities must invoke that legal basis and apply it through

<sup>13</sup> Opinions No. 33/2016, No. 31/2014, No. 24/2014 and No. 6/2014. The Government also did not respond to the Working Group's communications in relation to opinions No. 49/2013, No. 23/2010, No. 12/2010 and No. 4/2010.

<sup>14</sup> The Government submitted a response in relation to opinions No. 56/2013, No. 50/2013, No. 25/2011 and No. 28/2010, as well as to other previous cases.

<sup>15</sup> Although the source did not make this allegation in relation to category I, the Working Group considers that it is appropriately considered under category I.

<sup>16</sup> Opinions No. 9/2018, para. 38; No. 36/2017, para. 85; No. 53/2014, para. 42; No. 46/2012, para. 30; No. 67/2011, para. 30; and No. 61/2011, paras. 48–49; and E/CN.4/2003/8/Add.3, paras. 39 and 72 (a).

<sup>17</sup> See, for example, opinions No. 33/2016, para. 10; No. 56/2013, para. 8 (h); No. 49/2013, para. 5; No. 25/2011, para. 20; and No. 4/2010, paras. 5 and 7.

an arrest warrant.<sup>18</sup> An arrest warrant was not presented at the time of the arrest of the six individuals in the present case, in violation of articles 3, 9 and 10 of the Universal Declaration of Human Rights.<sup>19</sup> As a result, the authorities did not establish a legal basis for the arrest of Zayar Lwin, Paing Phyto Min, Zaw Lin Htut, Kay Khine Htun, Paing Ye Thu and Su Yadana Myint.

53. Accordingly, the Working Group finds that there was no legal basis for the detention of the six individuals named above. Their detention is arbitrary under category I.

ii. Category II

54. The source alleges that the six individuals were deprived of their liberty as a result of their peaceful exercise of their right to freedom of opinion and expression, under article 19 of the Universal Declaration of Human Rights. According to the source, the six individuals used lyrics during *thangyat* performances that called for the removal of legislators appointed by the military, criticized the military's involvement in politics and business and made an appeal for the International Criminal Court to bring a case against the military. The performers wore militaristic clothing during the performances. Although they were not specifically named in the performance, members of the military filed numerous criminal insult and "online defamation" suits against the six individuals.

55. According to the source, the six individuals have been prosecuted, convicted and sentenced solely for the peaceful expression of their political opinions through art, namely, *thangyat* performances. The source states that, for generations, *thangyat* performances have allowed individuals to discuss social and political issues through satire. In the present case, the performances were streamed online as a means of furthering political discourse throughout the country. Indeed, according to the source, it is the first time that any *thangyat* performers in Myanmar have been prosecuted since the start of the democratic transition process.

56. The Working Group considers that the *thangyat* performances by the group, and their dissemination online, falls within the right to freedom of opinion and expression, including artistic expression, protected under article 19 of the Universal Declaration of Human Rights.<sup>20</sup> That right protects expression even when it may shock, offend or disturb,<sup>21</sup> when it may insult an individual or group<sup>22</sup> or criticizes an institution,<sup>23</sup> such as the military in the present case.<sup>24</sup> As the Working Group has previously highlighted, the imprisonment of individuals for allegedly defaming another person is never compatible with the freedom of expression.<sup>25</sup>

<sup>18</sup> Opinions No. 46/2019, para. 51; No. 46/2018, para. 48; No. 36/2018, para. 40; and No. 10/2018, para. 45.

<sup>19</sup> Opinions No. 82/2018, para. 29; No. 68/2018, para. 39; No. 30/2018, para. 39; No. 26/2018, para. 54; No. 10/2018, para. 46; and No. 3/2018, para. 43 (finding that the presentation of an arrest warrant is procedurally inherent in articles 3 and 9 of the Universal Declaration of Human Rights, as well as in principles 2, 4 and 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment).

<sup>20</sup> A conclusion supported by the findings of other United Nations human rights experts. See, for example, A/72/382, paras. 16–25; A/74/342, para. 23; and A/HRC/43/59, para. 18 (referring specifically to the Peacock Generation group). See article 27 (1) of the Universal Declaration of Human Rights, which protects the right to freely participate in the cultural life of the community, and article 15 (1) (a) of the International Covenant on Economic, Social and Cultural Rights, to which Myanmar is a party, which protects the right to take part in cultural life. See also Committee on Economic, Social and Cultural Rights, general comment No. 25 (2020) on science and economic, social and cultural rights, para. 10, in which the Committee noted that culture is an inclusive concept encompassing all manifestations of human existence, and general comment No. 21 (2009) on the right of everyone to take part in cultural life.

<sup>21</sup> See, for example, opinion No. 33/2019.

<sup>22</sup> See, for example, opinions No. 4/2019 and No. 46/2013.

<sup>23</sup> See, for example, opinions No. 35/2012 (royal family) and No. 7/2008 (a government).

<sup>24</sup> Relevant background information on allegations involving the military in Myanmar can be found in the report of the independent international fact-finding mission on Myanmar (A/HRC/39/64).

<sup>25</sup> See, for example, opinions No. 25/2012, para. 60; and No. 35/2008, para. 36.

57. Moreover, the Working Group considers that the group members' use of *thangyat* performances to comment on politics and the role of the military amounted to the legitimate exercise of the right to take part in government under article 21 (1) of the Universal Declaration of Human Rights.

58. There is nothing to suggest that the permissible limitations on the above rights set out in article 29 (2) of the Universal Declaration of Human Rights would affect the findings in the present case. In particular, the Government has not presented any reasons that may have legitimized any restrictions on the above-mentioned rights. The Working Group was not convinced that prosecuting the six individuals was necessary to protect a legitimate interest under that provision, nor that prison sentences were a proportionate response to engaging in artistic performances. There is no evidence to suggest that the troupe's criticism of the military called, directly or indirectly, for violence or could reasonably be considered to threaten morality, public order or the general welfare in a democratic society. Accordingly, the Working Group refers the present case to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the Special Rapporteur in the field of cultural rights.

59. The Working Group concludes that the detention of the six individuals resulted from the peaceful exercise of their right to freedom of opinion and expression and their right to take part in Government, in violation of articles 19 and 21 (1) of the Universal Declaration of Human Rights. Their detention is arbitrary under category II.

60. As the Working Group has previously emphasized, the principle of legality requires that laws be formulated with sufficient precision so that the individual can acquire access to and understand the law and regulate his or her conduct accordingly.<sup>26</sup> The Working Group considers that the language used in section 505 (a) of the Penal Code, under which the publication or circulation of "any statement, rumour or report" with intent to cause a member of the military to mutiny is criminalized, but which provides no clear definitions of those terms, lacks sufficient detail and may, as in the present case, proscribe the peaceful exercise of rights. Similarly, behaviour outlawed in section 66 (d) of the Telecommunications Law, namely, acts that are "disturbing or threatening to any person" is so vague and overbroad that a person could not determine whether his or her conduct would fall within the scope of the offence.<sup>27</sup>

61. The application of vague and overly broad provisions in the present case adds weight to the Working Group's conclusion that the detention of the six individuals falls within category II. The Working Group considers that, in some circumstances, laws may be so vague and overly broad that it is impossible to invoke a legal basis justifying the deprivation of liberty.

### iii. Category III

62. Given its finding that the detention of the six individuals is arbitrary under category II, the Working Group emphasizes that no trial should have taken place and that no further proceedings should be brought against them in future. However, multiple proceedings have already been brought against each individual, some of which have concluded, resulting in their convictions and sentencing. The information submitted by the source discloses violations of their right to a fair trial during those proceedings.

63. The source argues that the six individuals were unjustifiably denied bail and that pretrial detention should be a last resort in criminal proceedings. According to the source, there was no basis for any assertion that the group members represented a threat to society or that they would fail to appear when called to court. The source notes that other persons arrested on the same charges have frequently been released on bail, whereas the six individuals in the present case were remanded in pretrial detention. The source further submits that, although offences under section 505 (a) of the Penal Code are non-bailable, the six individuals were still entitled to bail because they were arrested without a warrant.

<sup>26</sup> Opinion No. 41/2017, paras. 98–101. See also opinion No. 62/2018, paras. 57–59.

<sup>27</sup> See opinion No. 56/2013, para. 11, in which the similar provision under section 505 (b) of the Penal Code was referred to as vague and in violation of the principle of legality. See also Human Rights Council resolution 40/29, para. 9.

According to the source, the Code of Criminal Procedure provides that any person accused of a non-bailable offence may be released on bail if he or she is arrested or detained without a warrant by a police officer.

64. The Working Group recalls that pretrial detention should be the exception rather than the rule.<sup>28</sup> International human rights norms, including principles 38 and 39 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, provide that a person detained on a criminal charge is entitled to a trial within a reasonable amount of time or to release pending trial. A decision whether to detain an individual prior to trial must be based on an individualized assessment of whether the detention is lawful, reasonable and necessary. In making that assessment, the courts must consider whether alternatives to detention, such as bail, are appropriate.<sup>29</sup>

65. The Government has not provided any indication that alternatives to pretrial detention were considered and has not explained why bail was denied. There is no indication that the six individuals presented a flight risk, nor that there was any risk that they would interfere with the evidence or pose any danger to the community. The six individuals were held on charges relating to the alleged defamation of members of the military, not for violent offences, and, as noted earlier, were detained for the exercise of their legitimate rights under international human rights law. Although two of them had previous convictions for organizing a protest – for which they were subsequently pardoned – the other four had no previous criminal records. Notably, the denial of bail was a marked departure from the previous decisions made by some of the arresting officers to release defendants on a promise to appear at their first hearings, with no apparent concern that they presented any risk while at liberty. Given the circumstances, the Working Group considers that holding the six individuals in pretrial detention in the absence of any reasoned and adequate explanation was unnecessary and disproportionate and was inconsistent with their right to the presumption of innocence under article 11 (1) of the Universal Declaration of Human Rights.<sup>30</sup>

66. In reaching that conclusion, the Working Group takes note of the source's submission that the charges under section 505 (a) of the Penal Code are non-bailable. In its jurisprudence, the Working Group has consistently confirmed that mandatory pretrial detention for non-bailable offences violates a State's obligations under international human rights law.<sup>31</sup> In particular, detention for non-bailable offences deprives a detainee of the right to seek non-custodial alternatives to detention, such as bail. In addition, the imposition of pretrial detention for certain non-bailable offences reverses the presumption of innocence, so that those charged with such offences are automatically detained without a balanced consideration of their individual circumstances, including the risk that they may abscond, interfere with evidence or commit an offence. The Working Group urges the Government to amend its legislation to remove all non-bailable offences.

67. In addition, the Working Group considers that the six individuals were not afforded the right to be tried within a reasonable time frame, given that they spent a significant period in pretrial detention. Drawing from their dates of arrest in April and May 2019 and their convictions in October and November 2019, it appears that the period was approximately six months in duration. As the Working Group has previously confirmed, the reasonableness of any delay in bringing a case to trial must be assessed, taking into account the circumstances of each case, the complexity of the case, the conduct of the accused and the manner in which the matter was handled by the authorities.<sup>32</sup> The delay in bringing the six individuals to trial was unacceptably long in the particular circumstances of the present case, especially given that there was no evidence that alternatives to detention had been considered. Moreover, as noted above, it is clear that the six individuals should never have been detained for the peaceful exercise of their rights under international human rights law,

<sup>28</sup> A/HRC/19/57, paras. 48–58. See also opinions No. 66/2011, para. 39; and No. 37/2007, para. 45.

<sup>29</sup> United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court (A/HRC/30/37, annex), guideline 15.

<sup>30</sup> See also opinions No. 68/2019, paras. 94–96; No. 3/2019, para. 57; and No. 66/2011, para. 42.

<sup>31</sup> Opinions No. 24/2020, No. 21/2020, No. 19/2020, No. 8/2020, No. 68/2019, No. 64/2019, No. 14/2019, No. 75/2018, No. 61/2018, No. 53/2018, No. 16/2018, No. 1/2018, No. 24/2015 and No. 57/2014; and A/HRC/42/39/Add.1, sect. IV.A.1.

<sup>32</sup> See, for example, opinions No. 16/2020, No. 15/2020, No. 8/2020 and No. 1/2020.

so even a relatively short delay in trying them was unacceptable.<sup>33</sup> The Working Group therefore considers that the failure to ensure expeditious proceedings violated articles 9 and 10 of the Universal Declaration of Human Rights and principle 38 of the Body of Principles.

68. Furthermore, the source alleges that the right to a fair trial was violated in the present case because the defendants were handcuffed by the police at court, when there was no justification for the use of such restraints. In the absence of an explanation from the Government as to why restraints were used during the trial, the Working Group finds that the handcuffing of the six individuals represented a further violation, namely, of their right to the presumption of innocence under article 11 (1) of the Universal Declaration of Human Rights. As the Working Group has previously stated, criminal defendants should not be presented to the court in a manner indicating that they may be dangerous criminals, because it undermines the presumption of innocence.<sup>34</sup>

69. The Working Group expresses its concern that the multiple cases brought against each of the six defendants may have involved convictions for the same *thangyat* performance in courts in various townships. It is not clear from the information provided by the source whether the multiple prosecutions under section 505 (a) of the Penal Code and section 66 (d) of the Telecommunications Law relate to different performances. Given that the source made no submission on the issue of double jeopardy, the Working Group is unable to reach a conclusion on that question. However, in the light of the fact that there are further cases pending against the group members, the Working Group urges the Government to ensure that none of them has been or will be convicted and sentenced twice for the same act. That would amount to a violation of the principle of double jeopardy and the right to a fair trial guaranteed under article 10 of the Universal Declaration of Human Rights.<sup>35</sup>

70. The Working Group concludes that those violations of the right to a fair trial were of such gravity as to give the detention of the six individuals an arbitrary character under category III.

#### iv. Category V

71. The Working Group considers that the six individuals were detained on discriminatory grounds, namely, for their political or other opinion. As noted above, the group members used *thangyat* performances to comment on politics and the role of the military and were detained for doing so. As a result, their detention falls within category V.

72. The Working Group calls upon the Government to immediately and unconditionally release the six individuals who have now been in detention since they were denied bail in April and May 2019. Given the serious violations of the rights of the six individuals, the Working Group refers the present case to the Special Rapporteur on the situation of human rights in Myanmar.

73. The Working Group would welcome the opportunity to work constructively with the Government to address the arbitrary deprivation of liberty. On 2 October 2019, the Working Group reiterated its previous request to the Government to undertake a country visit, and it will continue to seek a positive response. Given that the third review cycle of Myanmar in the context of the universal periodic review mechanism of the Human Rights Council is due to take place in January 2021, now is an opportune time for the Government to strengthen its cooperation with the special procedures mechanisms of the Council.

#### Disposition

74. In the light of the foregoing, the Working Group renders the following opinion:

The deprivation of liberty of Zayar Lwin, Paing Phyo Min, Zaw Lin Htut, Kay Khine Htun, Paing Ye Thu and Su Yadana Myint, being in contravention of articles

<sup>33</sup> Opinion No. 46/2019, para. 63 (the Working Group was not convinced that there was a category II violation and was unable to find that a 16-month delay before the trial was unreasonable).

<sup>34</sup> See, for example, opinions No. 83/2019, para. 73; No. 36/2018, para. 55; No. 79/2017, para. 62; No. 40/2016, para. 41; and No. 5/2010, para. 30.

<sup>35</sup> A/HRC/43/59, para. 18 (discussing the multiple cases brought against the Peacock Generation group).

2, 3, 7, 9, 10, 11, 19 and 21 (1) of the Universal Declaration of Human Rights, is arbitrary and falls within categories I, II, III and V.

75. The Working Group requests the Government of Myanmar to take the steps necessary to remedy the situation of the six individuals named above without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights. The Working Group encourages the Government to accede to the International Covenant on Civil and Political Rights.

76. The Working Group considers that, taking into account the circumstances of the case, the appropriate remedy would be to release the six individuals immediately and accord them an enforceable right to compensation and other reparations, in accordance with international law. In the current context of the global coronavirus disease (COVID-19) pandemic and the threat that it poses in places of detention, the Working Group calls upon the Government to take urgent action to ensure their immediate release.

77. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary detention of the six individuals and to take appropriate measures against those responsible for the violation of their rights.

78. The Working Group requests that the Government bring its laws, in particular section 505 (a) of the Penal Code and section 66 (d) of the Telecommunications Law, into conformity with the recommendations made in the present opinion and with the obligations of Myanmar under international human rights law.

79. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to: (a) the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression; (b) the Special Rapporteur in the field of cultural rights; and (c) the Special Rapporteur on the situation of human rights in Myanmar, for appropriate action.

80. The Working Group requests the Government to disseminate the present opinion through all available means and as widely as possible.

#### **Follow-up procedure**

81. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

- (a) Whether the six individuals named above have been released and, if so, on what date;
- (b) Whether compensation or other reparations have been made to them;
- (c) Whether an investigation has been conducted into the violation of their rights and, if so, the outcome of the investigation;
- (d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Myanmar with its international obligations in line with the present opinion;
- (e) Whether any other action has been taken to implement the present opinion.

82. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example through a visit by the Working Group.

83. The Working Group requests the source and the Government to provide the above-mentioned information within six months of the date of transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

84. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and has requested that they take into account its views and, where necessary, take appropriate steps to remedy the situation of persons

arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.<sup>36</sup>

*[Adopted on 24 August 2020]*

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<sup>36</sup> Human Rights Council resolution 42/22, paras. 3 and 7.