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Written statement* submitted by the Asian Legal Resource Centre, a non-governmental organization in general consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[10 February 2013]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

Myanmar: The death of Phyo Wai Aung: Myanmar's brutal institutions claim another victim

1. At the twentieth session of the Human Rights Council, the Asian Legal Resource Centre (ALRC) drew the attention of delegates—not for the first time—to the case of Phyo Wai Aung, a young man falsely convicted of involvement in a bombing attack during 2010 that killed 10 people and injured scores. The ALRC made a special appeal for the release of Phyo Wai Aung on grounds of ill health to which the Centre and other human rights defenders had been pointing for the last couple of years. For want of medical treatment and due to torture and other forms of systemic abuse while in custody, cancer was spreading throughout the young man's body. The Government of Myanmar had hitherto ignored these requests. With the concerted effort of concerned persons and groups at home and abroad, including the joint intervention of the Special Rapporteurs on human rights in Myanmar, on the independence of judges and lawyers, and on the right to health, the President of Myanmar on 3 August 2012 issued a clemency order releasing Phyo Wai Aung from custody. The young man was reunited with his family; however, he spent most of his last days in hospital, where the treatment for his condition came too little, too late. When directors of the ALRC visited him in December, he was paralysed from the waist down, since the cancer had spread to his spinal cord. Although he was still optimistic for the future, he passed away on 4 January 2013.

2. Despite the enormous obstacles that he faced, Phyo Wai Aung fought courageously and tirelessly against those who heaped abuses upon him, and for this we who are concerned with the situation of human rights in Myanmar have to thank him. Whereas the types of abuses that he suffered are not remarkable in the context of endemic and systematic torture, arbitrary arrest and detention, and abuses of other basic human rights that go on routinely in the police stations, interrogation centres, military barracks, administration offices and other facilities around Myanmar daily, he was meticulous in his efforts to document and try to account for what was happening to him. Consequently, Phyo Wai Aung to the very end was concerned to clear his name, and fully explore and explain the phenomena that he encountered throughout the two-and-a-half long years that he was interrogated, incarcerated and tried for a crime that he did not commit.

3. In November 2012, Phyo Wai Aung sent what was to be his last letter, ten pages in all, addressing various aspects of the case to the heads of four parliamentary committees concerned with questions of justice and rights, all of which began their work within the last couple of years. He wrote the letter after his application to appeal to the Supreme Court against his conviction—the president's order freed him from prison but did not undo the manifestly false finding of guilt—failed.

4. It is with the contents of Phyo Wai Aung's last letter that this submission by the ALRC is concerned, partly to acknowledge his efforts to restore his dignity and let the truth be known, but primarily because the contents of the letter constitute a brilliant and thoroughgoing critique of the institutions responsible for the criminalisation of innocent people in Myanmar on a day-to-day basis up to today: as the ALRC has discussed in two other submissions made to this session of the Council.

5. The contents of Phyo Wai Aung's final letter can be organised according to the different roles that institutions played in his arrest, detention, torture and imprisonment into two broad categories, as follows.

(a) The brutal and duplicitous role of the police and complicity of the judiciary

The police arrived at Phyo Wai Aung's house in the middle of the night on a pretext, without indicating their identities, and took him away without indicating where they were

going or showing any documentation to authorize arrest: in short, the manner of arrest and detention in the early stages were akin to an abduction rather than an act according to law. The Special Branch police kept Phyo Wai Aung at an unknown location for 11 days throughout which time they tortured him brutally in order to extract a confession. The circumstances of torture have been fully documented elsewhere, and Phyo Wai Aung also testified about the torture in detail in his defence during the trial that followed, although his statement was all but ignored in the verdict that the court issued to convict him of the crime. When taken to give a confession before Judge U Win Swe at the Hlaing Township Court, the judge knew that he had been tortured but cooperated with the police and completely abdicated his responsibility to act in the interests of the citizen. After his confession was given, the then chief of the Myanmar Police Force, Brigadier General Khin Yi, who is now the Minister for Immigration and Population, held a press conference at which he declared the case solved and described Phyo Wai Aung as a terrorist and a murderer. The press conference constituted a finding of guilt before Phyo Wai Aung even went to trial. The absence of material evidence to connect the accused to the crime, the fact that in a crowd of thousands at the event where the bomb blast occurred the police could produce not one eyewitness to say that they saw Phyo Wai Aung at the scene of the crime, the inconsistencies and contradictions in evidence of the police, and multitudinous other basic flaws in the case that in the defendant's own words a high school student of general knowledge could see through did not constitute a problem for Khin Yi.

(b) The willing perversion of justice by the judiciary

The case brought to trial of Phyo Wai Aung was from start to finish a masquerade. Practically every part of the trial process involved violations of procedures for the purpose of perverting the course of justice. The trial court was moved to a premises inside the central prison in violation of the terms of the Criminal Procedure Code; the court acting on the wishes of the Special Branch denied access to the public, including for a number of hearings even members of the defendant's own family; it denied the defence opportunities to cross-examine witnesses and to present evidence as permitted by law, while allowing the prosecution ample opportunities to present all evidence it wished, including evidence that consisted of patent falsehoods. When the counsel for the defendant sought to challenge falsehoods by the prosecution, the presiding judge (four in total over the course of the trial) repeatedly denied them, and on one occasion instructed the prosecutor to initiate proceedings for contempt of court against defence counsel and the defendant for challenging the official record of the circumstances under which the forced confession was taken by the judge at the Hlaing Township Court. The court also accepted evidence from the prosecution that was inadmissible, including statements taken down by the police during interrogation, while refusing to accept admissible evidence from the defence. It failed to act to enable the defence to obtain documents submitted to court by the police to which the defence was entitled.

6. Despite the changes in political and social conditions in Myanmar over the last couple of years that have led the international community to herald a new period of opening up, and with it new opportunities for the protection and promotion of human rights, Supreme Court Judges Myint Aung and Myint Han saw no reason to accept Phyo Wai Aung's application for an appeal against a conviction obtained through the use of torture, and one bound to a case with so many errors in law and fact as to make the whole episode laughable, were it not for the fact that at stake was the life of a man, a life now lost. As is typical of rejected applications of this sort, their seven-page rejection of the application for a new hearing contains not a shred of reasoning or rationale. In Myanmar today, what passes for reasoning is the meticulous restatement of the position taken by prosecutors and convicting judges in lower courts; in short, a restatement of grounds for conviction, rather than an analysis of the contents of a case that resulted in conviction. In this, as in other aspects of its work, the judiciary in Myanmar is unaffected by the talk of political and

social change. But it is not alone in this regard: the other agencies responsible for the violations of Phyo Wai Aung's rights continue to behave in the same way as well.

7. We should not be surprised by the lack of any systemic change in the judiciary, police, prosecution or administration in Myanmar over the last year or two. Nor should we be naïve enough to think that any type of change will come quickly. Phyo Wai Aung's case alerts us against such sentiments, and in his last letter he also shows no illusions about the type of system that he was up against. But his last letter also represents a commitment to remain determined not only to find a way to clear his own name, but in the process do something about the system that ultimately cost him his life.

8. Accordingly, the Asian Legal Resource Centre is determined to continue to fight for Phyo Wai Aung until such as time not only as his own record is cleared, but until the institutions and individuals responsible for, or complicit in his persecution and death are held to account, and on this occasion of the first Human Rights Council session following his death it calls for the following:

(a) Reopening of the case that led to the criminal conviction of Phyo Wai Aung with a view to establishing his innocence and compensating his family for his loss at the hands of the state.

(b) Investigating of all those officials complicit in the gross human rights abuses that occurred in this case, with a view to the necessary actions being taken against each. In the case of judicial officers and others who abetted the abuse, action should be disciplinary in nature; in the case of the Special Branch police responsible for Phyo Wai Aung's torture, it should be criminal in nature. A special inquiry should also be conducted to establish how much Brigadier General Khin Yi knew about the facts of the case at the time that he conducted the press conference in 2010, and questions should be asked in the meantime about his suitability for the ministerial portfolio that he holds currently.

(c) Involvement of the parliamentary committees to which Phyo Wai Aung sent his last letter in questions of effecting larger institutional change to prevent the continuance of abuses such as those described in this case. Currently, some of those committees have recognized the deeper systemic problems enabling the continued incidence of human rights abuse. More needs to be done domestically and through the international community to build up that discussion with a view to effecting meaningful change.

(d) In all communications with personnel of the judiciary, the Office of Attorney General, the Myanmar Police Force, the Ministry of Home Affairs, the parliament and other relevant institutions, Special Procedures of the Council and other parts of the United Nations system should wherever possible take the opportunity to raise the case of Phyo Wai Aung directly, or raise attendant issues, especially those associated with Myanmar's endemic torture and arbitrary detention, since if it is not possible to change the institutional behaviour of the country's police, judiciary, and administrative agencies then the putative political and social changes that we are observing today will prove to be illusory.