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OFFICE OF THE UNITED NATIONS
HIGH COMMISSIONER FOR HUMAN RIGHTS

SPECIAL PROCEDURES OF THE
HUMAN RIGHTS COUNCIL

Mandates of the Special Rapporteur on the situation of human rights in Myanmar; the Special Rapporteur on the independence of judges and lawyers; and the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

REFERENCE: UA G/SO 214/62-11 G/SO 214 (3-3-16) Health (2002-7)
MMR 2/2012

7 May 2012

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 independence of judges and lawyers; and Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health pursuant to General Assembly resolution 60/251 and to Human Rights Council resolutions 19/21, 17/2, and 15/22.

In this connection, we would like to draw the attention of your Excellency's Government to information we have received regarding the alleged violation of due process safeguards in the trial of Mr. Phyo Wai Aung and the alleged denial of access to appropriate specialized medical care. Mr. Phyo Wai Aung was accused of being involved in the bombings during the traditional New Year festival which took place on 15 April 2010, and killed 10 and injured 168.

According to the information received:

The trial of Mr. Phyo Wai Aung started on 30 June 2010 and was allegedly held behind closed doors for the first 14 months in the court of Insein central prison, where the defendant has been held since his arrest. When a lawyer took up this issue with the Supreme Court, Judge Myint Thein ruled in January 2011 that he saw no cause to interfere in the proceedings, noting that the order for the trial to be heard in a closed courtroom was justified because the case was "not an ordinary criminal case but a well-known case".

It is reported that the family of the accused and witnesses were only allowed to attend hearings starting from 5 September 2011, over a year after the trial began.

Nevertheless, the accused's family has reportedly heard only two out of about 40 of the prosecution witnesses' statements.

Furthermore, a number of additional procedural flaws have been reported to have occurred during the trial of Phyto Wai Aung. Instead of calling prosecution witnesses to the court to testify against the accused, the court allegedly received from them "advance" testimonies made in another court, thereby denying the defence lawyers the right to cross-examine them. In addition, these statements were not to be found in the case file.

At the sixth hearing held on 20 February 2012, when the defendant raised concerns of the manner in which the judge responsible for taking this advance testimony had conducted the inquiry and the defence lawyer questioned whether that evidence may have been deliberately withheld, the prosecution claimed that the defence had intentionally insulted the judicial and legal officers involved in the case and asked for legal action to be taken against the two defence lawyers and the defendant. Subsequently, Judge Aung Thein ordered that charges be filed against the lawyers and their client under section 228 of the Penal Code, for intentionally causing an insult to a judicial officer under the Contempt of Courts Act 1926.

On 9 March 2012, the defendant's brother submitted a letter of complaint to the chief justice, president and legislature. In the letter, he reported that the judge refused to hear further testimony from the defendant after six hearings. The brother further indicated that the prosecution took one year and eight months to present over 40 witnesses and has collected about 5000 pages of case file, and that the defendant could not go through all the rebuttals in the prosecution case in only six hearings. Additionally, the charges the defendant face include those that carry the death sentence.

The current judge hearing the case is the fourth judge since the case began. Although both the Criminal Procedure Code and the Courts Manual stipulate that the defence has a right to request that the trial be reheard when new judges take up the case, this has not occurred despite repeated requests by the defence lawyers. According to the latest information received, the court's verdict is to be issued on 8 May 2012.

In addition, Phyto Wai Aung's health has seriously deteriorated. He has been in considerable pain over the past months. He is suffering from a bulbous growth believed to be a tumour in his lower back and an enlarged liver. He requires specialist external treatment that is not available in Insein Prison hospital. Until 18 April 2012, he has been under the care of a prison doctor who does not have the necessary equipment to test for liver disease or scan for tumours. An external doctor visited Phyto Wai Aung on 18 April 2012 and found that he has some

“injury or tumour in his liver”. On 20 February, he spent the majority of the hearing lying face down in a separate room and he is unable to stand or sit for long periods of time given his current health problems. His family has sent appeals to prison authorities to allow him access to an external medical specialist but they have so far gone unheeded. Previously, Phyto Wai Aung contracted Hepatitis B while in prison and was also allegedly a victim of severe torture during his initial interrogation. He has been held in solitary confinement for a majority of his two years in prison.

In light of these allegations, we are seriously concerned about the deteriorating health of Phyto Wai Aung and the alleged lack of appropriate medical care. We are further concerned that the fair trial guarantees, including the rights of defence, of the aforementioned individual may have been violated.

While we do not wish to prejudge the accuracy of these allegations, we wish to seek clarification of the circumstances regarding the case of Mr. Phyto Wai Aung.

In respect of the alleged violation of the defendant’s procedural safeguards, we wish to stress that “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him” under article 10 of the Universal Declaration of Human Rights (UDHR). Furthermore, “[t]he principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected” in accordance with principle 6 of the Basic Principles on the Independence of the Judiciary (endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985). Moreover, principle 2 of the aforementioned instrument states that “[t]he judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason”, and the courts shall use established legal procedures in accordance with principle 5.

We wish to recall that a fundamental element of a fair trial include the defendant’s right to defence and the right for his or her lawyer to cross-examine the witnesses called against him or her. In this respect, we wish to refer to principle 21 of the Basic Principles on the Role of Lawyers (adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990), according to which “[i]t is the duty of the competent authorities to ensure lawyers access to appropriate information, files and documents in their possession or control in sufficient time to enable lawyers to provide effective legal assistance to their clients.”

With regard to the charges brought against the defendant’s lawyers, we wish to bring to the attention of your Excellency’s Government that “[l]awyers shall not be identified with their clients or their clients’ causes as a result of discharging their

functions pursuant to principle 18 of the aforementioned instrument, and that they “shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority” under principle 20. Moreover, principle 27 requires that “[c]harges or complaints made against lawyers in their professional capacity shall be processed expeditiously and fairly under appropriate procedures ...”

We would like to stress that each Government has the obligation to protect the right to physical and mental integrity of all persons as reflected in international legal instruments. The right to health is set forth *inter alia* in Article 25 (I) of the Universal Declaration of Human Rights and Article 12 of the International Covenant on Economic, Social and Cultural Rights, which specifically provides for the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. This includes an obligation to ensure that health facilities, goods and services are accessible to everyone – especially the most vulnerable or marginalized sections of the population, including those held in detention – without discrimination.

Furthermore, we should like to appeal to your Excellency’s Government to seek clarification of the circumstances with a view to ensuring that the right to health and the right to physical and mental integrity of Phyowai Aung is protected. We wish to draw to your Excellency’s Government’s attention to the Standard Minimum Rules for the Treatment of Prisoners, approved by the Economic and Social Council by its resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977, in particular rules 22, 25 and 26. Rule 22(2) provides that, “Sick prisoners who require specialist treatment shall be transferred to specialized institutions or to civil hospitals. Where hospital facilities are provided in an institution, their equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners, and there shall be a staff of suitable trained officers. Furthermore, Rule 25(I) provides that, “The medical officer shall have the care of the physical and mental health of the prisoners and should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed. “

We also wish to refer your Excellency’s Government to General Comment No. 14 of the Committee on Economic, Social and Cultural Rights, which holds that, “States are under the obligation to *respect* the right to health by, *inter alia*, refraining from denying or limiting equal access for all persons, including prisoners or detainees, minorities, asylum seekers and illegal immigrants, to preventive, curative and palliative health services...” (para.34).

Furthermore, we would also like to refer your Excellency’s Government to the Basic Principles for the Treatment of Prisoners, adopted and proclaimed by General Assembly resolution 45/111, according to which “Prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation” (Principle 9).

We therefore urge your Excellency's Government to take all necessary measures to ensure that the aforementioned individual receives a fair trial in accordance with international standards, and we would request that your Excellency's Government take the necessary measures to postpone the issuance of the verdict to allow the defendant's lawyers to adequately prepare their client's defence. Given the concerns about the defendants' health and the lack of adequate medical assistance in Insein detention centre, we further urge your Excellency's Government to take all appropriate measures to ensure the defendant's access to specialized medical care.

Moreover, 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. Since we are expected to report on these cases to the Human Rights Council, we would be grateful for your cooperation and your observations on the following matters, when relevant to the case under consideration:

1. Are the facts alleged in the summary accurate?
2. Please indicate whether any hearing during the trial of Mr. Phyo Wai Aung was held in camera and explain the reasons why. In this regard, kindly indicate when and under which circumstances the defendant's family and lawyers have had access to him.
3. Please explain the reasons why advance testimonies have been resorted to against the defendant, to what extent the defence lawyers have been provided with the appropriate information to prepare their client's defence, and have had the opportunity to cross-examine the prosecution witnesses. Kindly indicate to what extent this complies with the aforementioned international standards, as set forth inter alia in article 10 of the UDHR, and the Basic Principles on the Independence of the Judiciary.
4. Please provide information on the circumstances and charges brought against the defendant and his lawyers at the sixth hearing held on 20 February 2012, and explain to what extent this complies with the Basic Principles on the Role of Lawyers.
5. Please provide information on the measures taken to ensure the enjoyment of the right to the highest attainable standard of health by Mr. Phyo Wai Aung.

We would appreciate a response within sixty days. We undertake to ensure that your Excellency's Government's response to each of these questions is accurately reflected in the reports we will submit to the Human Rights Council for its consideration.

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

Tomás Ojea Quintana
Special Rapporteur on the situation of human rights in Myanmar

Gabriela Knaul
Special Rapporteur on the independence of judges and lawyers

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