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February 16, 2010

Mr. Malick El Hadji Sow
UN Working Group on Arbitrary Detention
Office of the High Commissioner for Human Rights
United Nations, Geneva
8-14 Avenue de la Paix
1211 Geneva 10
Switzerland

Dear Mr. Malick El Hadji Sow:

Please find the enclosed urgent action petition to the UN Working Group on Arbitrary Detention entitled, "In the Matter of Nyi Nyi Aung v. Government of Burma (Myanmar)." We hereby request that the Working Group examine this petition pursuant to Resolution 1997/50, as affirmed by Resolutions 2000/36, 2003/31, and 6/4, and under its "Urgent Action" Procedure.

This petition is submitted on behalf of and with the authorization of Mr. Aung's fiancé, Wa Wa Kyaw, who is an American citizen who lives in the United States.

We look forward to working with you and the Working Group on this case. Thank you for your prompt attention to the attached petition.

If you need any further information with respect to this matter, please do not hesitate to contact us.

With warm regards,

Jared Genser

Beth Schwanke

Attachment

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PETITION TO:

UNITED NATIONS

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**HUMAN RIGHTS COUNCIL
UNITED NATIONS GENERAL ASSEMBLY**

In the Matter of
Kyaw Zaw Lwin (Nyi Nyi Aung),¹
Citizen of the United States of America

v.

Government of Burma (Myanmar)²

**URGENT ACTION
REQUESTED**

Petition for Relief Pursuant to Resolutions 1997/50, 2000/36, 2003/31, and 6/4³

Submitted By:

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February 16, 2010

¹ We refer to the petitioner throughout as “Nyi Nyi Aung,” the name he uses in both his personal and professional lives.

² The country of Burma’s name was changed to “Myanmar” by the unelected military regime. Burma is the name preferred by the leaders of Burma’s democracy movement, the legitimate winners of the 1990 elections. They do not accept that the unelected military regime has the right to change the official name of the country to suit its own ends. In this Petition, references to Burma relate to what the United Nations refers to as Myanmar.

³ Resolutions 1997/50, 2000/36, and 2003/31 were adopted by the UN Commission on Human Rights extending the mandate of the Working Group on Arbitrary Detention. Resolution 6/4, also extending the mandate of the Working Group on Arbitrary Detention, was adopted by the Human Rights Council which, in accordance with UN General Assembly Resolution 60/251, has “assume[d] . . . all mandates, mechanisms, functions and responsibilities of the Commission on Human Rights” G.A. Res. 60/251, ¶ 6 (Mar. 15, 2006).

BASIS FOR “URGENT ACTION” REQUEST

Nyi Nyi Aung is currently held in Prome (Pyay) Prison in Burma. He was sentenced to five years in prison, including hard labor. The sentences are running concurrently, therefore, he will serve three years in prison. Mr. Aung was found guilty of (1) failing to renounce his Burmese citizenship; (2) failing to declare his currencies at customs; and (3) holding a fraudulent national identity card. As detailed in the petition below, these are sham charges, aimed at silencing Mr. Aung’s democracy activism.

We note with particular concern that the junta transferred Nyi Nyi from Insein Prison in Rangoon to Prome Prison without notifying anyone, including the U.S. Embassy.

The sentence including hard labor has put Mr. Aung’s life at immediate risk. “Human rights organisations have reported the continuous use of forced prison labour in Burma, and it is estimated that as many as 20 percent of prisoners sentenced to ‘prison with hard labour’ die as a consequence of the conditions of their detention . . . thousands of prisoners in these camps are used to build highways, dams, irrigation canals, and to work on special agricultural projects. Prisoners are reportedly being forced to work 12 hours a day without rest, and the sick and weak are not exempted from work . . . The prisoners are viewed as expendable labour and there are countless reports of their torture, beatings and killings.”⁴

The Burmese junta has denied Mr. Aung all family visits. This means that Mr. Aung’s primary source of nutrition has been intentionally cut off. Prisoners in Burma typically receive their meals from food their families provide. The food provided by the prisons is irregular, spoiled, and not nutritionally adequate for survival.

Further, Mr. Aung’s transfer to Prome, 179 miles from Rangoon on poor roads (a little more than a half-day trip each way) means that the U.S. Embassy will have difficulty in conducting consular visits, thereby verifying Mr. Aung’s welfare. As it is, those consular visits were cut back from once every two weeks to once a month after Mr. Aung conducted a hunger strike to protest the conditions of political prisoners in Insein prison.

Accordingly, the Petitioner hereby requests that the Working Group consider this Petition pursuant to the Working Group’s “Urgent Action” procedure.⁵ In addition, the Petitioner requests that this Petition be considered a formal request for an opinion of the Working Group pursuant to Resolution 1997/50 of the Commission on Human Rights as reconfirmed by Resolutions 2000/36, 2003/31, and Human Rights Council Resolution 6/4.

⁴ Carole Reckinger, Burma’s Forced Labor, *New Statesman*, Jun. 9, 2008.

⁵ Report of the Working Group on Arbitrary Detention, E/CN.4/1998/44 (December 19, 1997), Annex 1 at ¶ 22-24.

**QUESTIONNAIRE TO BE COMPLETED BY PERSONS ALLEGING ARBITRARY
ARREST OR DETENTION**

I. Identity

1. *Family name:* Lwin
2. *First name:* Kyaw Zaw⁶
3. *Sex:* Male
4. *Birth date or age (at the time of detention):* October 28, 1969
5. *Nationality/Nationalities:* American (Burmese-born)
6. (a) *Identity document (if any):* U.S. Passport
(b) *Issued by:* U.S. Department of State
(c) *On (date):* December 14, 2006
(d) *No.:* REDACTED
7. *Profession and/or activity (if believed to be relevant to the arrest/detention):*
Independent, non-violent democracy activist.
8. *Address of usual residence:*
1818 Royal Bonnet Circle
Montgomery Village, MD 20886, USA

II. Arrest

1. *Date of arrest:* September 3, 2009
2. *Place of arrest (as detailed as possible):* Mingaladon Airport; Rangoon, Burma. Mr. Aung was arrested as he entered immigration, before reaching customs.
3. *Forces who carried out the arrest or are believed to have carried it out:* Burmese Special Branch
4. *Did they show a warrant or other decision by a public authority?*
Not known.
5. *Authority who issued the warrant or decision:* Not known.
6. *Relevant legislation applied (if known):* N/A.

III. Detention

1. *Date of detention:* September 3, 2009

⁶ Also known as “Nyi Nyi Aung,” *see supra*, note 1.

2. *Duration of detention (if not known, probable duration):* September 3, 2009 to present (approximately 5 months).
3. *Forces holding the detainee under custody:* Prome Prison (also known as Pyay) officials in central Burma.
4. *Places of detention (indicate any transfer and present place of detention):* Mr. Aung was transferred from interrogation center to interrogation center from September 3 through September 20, 2009. Since September 21, 2009 to February 11, 2010, he was continuously detained in Insein Prison, Rangoon, Burma. On February 11, 2010, he was transferred to Prome Prison.
4. *Authorities that ordered the detention:* According to trial testimony, Military Intelligence and Special Branch officers coordinated the efforts leading to Mr. Aung's detention.
5. *Reasons for the detention imputed by the authorities:* During the course of his detention, the Burmese junta charged Mr. Aung with crimes ranging from national security violations to fraud. However, these charges were ultimately dropped. On the final day of his trial, Mr. Aung was charged with (1) forgery of a Burmese national identity card; (2) failing to declare Burmese currency at customs; (3) failing to declare U.S. currency at customs; and (4) failing to renounce his Burmese citizenship upon becoming an American citizen.
6. *Relevant legislation applied (if known):* (1) Mr. Aung was charged under Burma Penal Code, Article 468 for forgery of a Burmese national identity card. Article 468 provides: "Whoever commits forgery, intending that the document forged shall be used for the purpose of cheating, shall be punished with imprisonment . . . and shall also be liable to fine." (2) Mr. Aung was charged under the Foreign Exchange Regulation Act, Section 24 for failing to declare Burmese and U.S. currencies at customs. This is solely a penalty section. We believe that the alleged violations are of Section 9(1): "The President of the Union may, by notification, order that, subject to such exemptions, if any, as may be contained in the notification, no person shall, except with the general or special permission of the Controller and on payment of the fee, if any, prescribed, bring or send into the Union of Burma any gold or silver or any currency notes or bank notes or coin whether Burma or foreign." (3) Mr. Aung was charged under the 1951 Burma Immigration (Detention) Rules, Section 6(3) for failing to renounce his Burmese citizenship.

IV. Describe the circumstances of the arrest and/or the detention and indicate precise reasons why you consider the arrest or detention to be arbitrary

I. Statement of Facts

Part A of this Section discusses the Burmese junta's consistent efforts to silence democracy activists and the lack of rule of law in Burma. Part B of this Section presents the case of Burmese-American Nyi Nyi Aung, a democracy activist arrested on September 3, 2009 by Burmese authorities.

A. The Burmese Junta's Suppression of Democracy Activists

According to prior UN Commission on Human Rights, the Burmese government has committed numerous, serious human rights abuses including the ongoing detention of more than one thousand political prisoners.⁷ There is no way for citizens to challenge judicially the actions of the military regime. The judiciary is controlled by the government, and “the military regime frequently directs verdicts in politically sensitive trials of civilians.”⁸ The accused are often denied legal representation, and their trials held in secret.⁹

Political prisoners in particular are charged under “vaguely worded archaic laws that criminalize free expression, peaceful demonstration, and forming organizations.”¹⁰ The government also arrests democracy activists for offences unrelated to their activities, including immigration offences¹¹ and “holding foreign currency without permission.”¹² By using these ambiguous criminal charges to detain activists, the government is able to maintain its claim of holding no political prisoners,¹³ despite reports that there are now over 2,100 such prisoners in Burma, a number that has doubled in the last three years.¹⁴

Once incarcerated, political prisoners—“some of whom do not even receive basic medication”¹⁵—are often kept in solitary confinement¹⁶ as security forces abuse them, even to the point of death.¹⁷ Prisoners who complete their prison sentences nevertheless have no guarantee of release. The Penal Code allows the government to extend a prisoner’s sentence after the expiration of the original sentence, and the government makes regular use of this provision for political prisoners, most notoriously in the case of Nobel Peace Prize laureate Aung San Suu Kyi.¹⁸

B. The Detention of Nyi Nyi Aung

1. Background Information Regarding Nyi Nyi Aung

Nyi Nyi Aung is a Burmese-born American citizen, who, until his detention, lived in the State of Maryland in the United States. He works as an independent, non-violent

⁷ The Commission on Human Rights has expressed grave concern at the continuing violations of human rights in Myanmar including extrajudicial, summary, or arbitrary executions, and enforced disappearances, torture, abuse of women and children by government agents, wide disrespect of the rule of law including politically motivated arbitrary arrests and detentions, abuse of judicial process, and violations directed at minority ethnic groups. See UN Economic and Social Council, Commission on Human Rights (62nd Session, Agenda Item 9), *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World – Situation of Human Rights in Myanmar*, E/CN.4/2006/117, Feb. 27, 2006. See also *Burma: Country Reports on Human Rights Practices 2008*, U.S. Department of State, Bureau of Democracy, Human Rights and Labor, U.S. Department of State, Feb. 25, 2009 (hereinafter State Department Report).

⁸ State Department Report, *supra* note 4.

⁹ See “Country Profile 2004: Myanmar (Burma),” *The Economist*.

¹⁰ Human Rights Watch, *Burma's Forgotten Prisoners*, Sep. 16, 2009, available at

<http://www.hrw.org/en/reports/2009/08/08/burmas-forgotten-prisoners>, accessed Jan. 28, 2010.

¹¹ Tomas Ojea Quintana, *Report of the Special Rapporteur on the situation of human rights in Myanmar* (hereinafter *Report of the Special Rapporteur*), A/HRC/10/19, Mar. 11, 2009, par. 24.

¹² Human Rights Watch, *Burma's Forgotten Prisoners*.

¹³ State Department Report, *supra* note 4.

¹⁴ Human Rights Watch, *Burma's Forgotten Prisoners*.

¹⁵ *Report of the Special Rapporteur*, par. 36.

¹⁶ *Id.*, par. 32.

¹⁷ See State Department Report, *supra* note 7.

¹⁸ *Id.*

democracy activist and has been affiliated with the Burmese pro-democracy movement for all of his adult life.¹⁹

This is the second time the junta arrested and tortured Mr. Aung. In March 1988, Mr. Aung was detained and badly tortured in Insein prison for his pro-democracy activities. To this day, he suffers from a weakened right hip and knee (re-aggravated by his current mistreatment). After his release, Mr. Aung remained one of the leading organizers of the country-wide demonstrations against the junta that culminated in the military's violent crackdown on August 8, 1988.

Mr. Aung fled to Thailand following the military crackdown. He co-founded the Burmese Students Social Affairs Committee to provide humanitarian and medical assistance to Burmese students and illegal immigrants in Thailand. The organization was funded by the Jesuit Refugee Service. In September 1991, Thai authorities arrested Mr. Aung for his role in protesting the Thai government's repatriation of Burmese refugees. Although the 38 students who staged the protest were recognized as refugees by the U.N. High Commissioner for Refugees (UNHCR) and all had documentation to remain in Thailand legally, the Thai authorities charged each member of the group with being an illegal immigrant. The students were released in May 1992 after nine months in a special detention center. Mr. Aung then assisted in a public health survey project sponsored by the Harvard School of Public Health, which investigated the health conditions of exiled Burmese students in Thailand. He was also elected general-secretary of the Overseas National Students Organization of Burma (ONSOB), an exile group working for human rights and democracy in Burma.

In October 1993, Mr. Aung resettled in the United States as a political refugee. He was ultimately naturalized on May 16, 2002. Upon arriving in the United States, Mr. Aung pursued his education at Montgomery College (Maryland) and Purdue University (Indiana). After receiving his B.S. in computer science from Purdue, he worked in the field of GPS technology, and, later, as an IT technician for the U.S. Patent and Trademark Office.

Mr. Aung continued to work for democracy and human rights in Burma, initially working as a researcher with Refugees International and for *Burma Debate*, a pro-democracy magazine. Over the past decade, he worked with organizations promoting democracy in Burma in the United States, Thailand, and within the country itself; including the National Coalition Government of the Union of Burma (NCGUB), Burma Fund, Open Society Institute (OSI), Democratic Development Fund for Burma (DDFB), Forum for Democracy in Burma (FDB), Network for Democracy and Development (NDD), Generation Wave, and 88 Generation Students. However, Mr. Aung identifies himself as an independent activist and is not affiliated with any one of these organizations.

In this context and as a U.S. citizen, Mr. Aung made five visits to Burma in recent years (including the most recent visit on September 3); each time entering the country on his official U.S. passport with a valid entry visa granted by a Burmese embassy. On prior trips, he worked with a number of non-violent groups inside the country to help them organize their opposition to the junta. Additionally, he worked with student leaders along the Thai-Burmese border to organize workshops on conflict resolution.

¹⁹ Unless otherwise noted, all information in this Section is from interviews with Wa Wa Kyaw, Nyi Nyi Aung's fiancé.

Most recently, in June 2009, as part of the Free Burma's Political Prisoners Now! campaign, Mr. Aung traveled to New York with a delegation of family members of political prisoners. Mr. Aung's mother, Daw San San Tin (5-year prison term), and two cousins, Thet Thet Aung (65-year prison term) and Chit Ko Lin (7-year prison term), are imprisoned for their involvement in the 2007 Saffron Revolution. They were arrested together in a raid on his mother's home on October 19, 2007. Another cousin, Noe Noe, aka Nwe Hnin Yi, is serving a seven-year prison sentence. As part of the delegation, Mr. Aung helped deliver a petition to the U.N. Special Advisor Ibrahim Gambari with some 680,000 signatures calling for the release of all political prisoners in Burma.

The state-run *New Light of Myanmar* repeatedly accused Mr. Aung of pro-democracy activities or "terrorist activities" as it regularly labels them. In 2007, as part of an announcement from the State Peace and Development Council Information Committee, the newspaper stated that Mr. Aung met other pro-democracy activists and "discussed about causing public uprising where he handed them about 50 stickers bearing the sign 'Where there are students there must be student union.'"²⁰ In 2006, the *New Light of Myanmar* linked Mr. Aung as assisting the '88 generation students with funding.²¹

2. Nyi Nyi Aung's Arrest

Special Branch officers arrested Mr. Aung on September 3, 2009, at the immigration checkpoint in Mingaladon Airport in Rangoon, Burma.²² Mr. Aung attempted to enter the country with a valid U.S. Passport and Burmese entry visa to visit his mother, who has cancer. The junta imprisoned his mother for her pro-democracy activities during the Saffron Revolution and is denying her medical treatment.

3. The Likely Reason for Nyi Nyi Aung's Arrest

Nyi Nyi Aung was arrested to stifle his pro-democracy activities. Mr. Aung was able to make four previous trips to Burma during recent years using his U.S. Passport and valid entry visas, despite his pro-democracy activities. On the September 3, 2009 trip, we believe that the junta at last realized that Nyi Nyi Aung, the Burmese democracy activist it accused of fomenting unrest in the *New Light of Myanmar*, was Kyaw Zaw Lwin, the American, and seized the opportunity to silence him.²³

Mr. Aung has always gone by the name Nyi Nyi Aung in both his private and professional lives.²⁴ However, his legal name, and the name that appears on his passport, is Kyaw Zaw Lwin. Wa Wa Kyaw, Mr. Aung's fiancé, believes that the Burmese authorities failed to realize that Nyi Nyi Aung and Kyaw Zaw Lwin were the same person until the media attention surrounding Mr. Aung's June 2009 delivery of the petition to the UN on behalf of political prisoners included Mr. Aung's legal name.²⁵

²⁰ *New Light of Myanmar* "State Peace and Development Council Information Committee Announcement No. 1/2007 Nay Pyi Taw," Sept. 9, 2007.

²¹ *New Light of Myanmar*, "Stability of the State, community peace and tranquility, and prevalence of law and order necessary for national development," Nov. 3, 2006.

²² American on Hunger Strike in Burmese Prison, *Mizzima*, Dec. 8, 2009.

²³ See also, Glenn Kessler, Little Word from U.S. on Nyi Nyi Aung, Jailed in Burma, Wash. Post., Dec. 24, 2009, at A7.

²⁴ "Nyi Nyi" is a childhood nickname that he used throughout his life, and "Aung" is his father's first name.

²⁵ See, e.g., Call to Free Political Prisoners, *The Straits Times*, Jun. 17, 2009.

As discussed *supra* in Section I.B.1, Mr. Aung's pro-democracy activities created problems for the junta beginning with the 1988 student uprisings. Mr. Aung's consistent activities on behalf of democracy and human rights in Burma, including, most recently with the presentation of a petition to the United Nations calling for the release of all political prisoners in Burma, made him a key target for the junta to eliminate.

4. Burma's Maltreatment of Nyi Nyi Aung During his Detention

After his arrest on September 3, 2009, Mr. Aung was transported between, and tortured in, various interrogation centers. He was denied food, sleep, and medical treatment for a week. He was also repeatedly and severely beaten.²⁶ On September 21, 2009, Mr. Aung was transferred to Insein prison, where he remained until his recent conviction and sentencing.

Although Mr. Aung is an American citizen, the junta has repeatedly and illegally denies him his right to U.S. Embassy consular access.²⁷ Mr. Aung did not have access to the U.S. Embassy during the first 17 days of his detention in September (September 3 through September 20, 2009).²⁸ He again was denied access to the U.S. Embassy from December 3 through December 27, 2009.²⁹ And finally, he was denied access to the U.S. Embassy from December 29, 2009 through January 22, 2010.³⁰ Insein Prison officials told U.S. Embassy Consul Colin Furst on January 23, 2010, that despite U.S. government protests, consular access would now be limited to once a month.³¹ This regular denial of consular access, despite numerous official protests by the U.S. Embassy in Rangoon, is a flagrant violation of Article 36(1)(b) of the Vienna Convention on Consular Relations.³²

The junta forced Mr. Aung into military dog cell confinement from December 7, 2009 through January 8, 2010 as punishment for his hunger strike initiated on behalf of political prisoners in Burma from December 6 through December 15, 2009.³³ This meant that Mr. Aung was in solitary confinement in an 8 x 10 square-foot kennel intended for military dogs for four weeks.³⁴ He suffered severe sleep deprivation due to the constant barking of the

²⁶ Human Rights Watch, Elaine Pearson, South Asian Nightmare, *The Baltimore Sun*, Oct. 2, 2009.

²⁷ The junta also failed to inform the U.S. Embassy of Nyi Nyi Aung's arrest until 17 days after his detention in violation of the Vienna Convention on Consular Relations. Article 36(1)(a) states: "The competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this subparagraph." This failure is also a violation of Principle 16(2) of the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment.

²⁸ Glenn Kessler, Little Word from U.S. on Nyi Nyi Aung, Jailed in Burma, Wash. Post., Dec. 24, 2009, at A7.

²⁹ Email from U.S. Embassy Vice Consul Hayward Alto to Wa Wa Kyaw, Dec. 28, 2009; Email from U.S. Embassy Consul Colin Furst to Wa Wa Kyaw, Dec. 3, 2009.

³⁰ Email from U.S. Embassy Consul Colin Furst to Wa Wa Kyaw, Subject: "No visit so far." Jan. 13, 2010; Email from U.S. Embassy Consul Colin Furst to Wa Wa Kyaw, Jan. 23, 2010.

³¹ Email from U.S. Embassy Consul Colin Furst to Wa Wa Kyaw, Jan. 23, 2010.

³² Article 36(1)(b) states: "Consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation.

³³ Glenn Kessler, Little Word from U.S. on Nyi Nyi Aung, Jailed in Burma, Wash. Post., Dec. 24, 2009, at A7; Email from U.S. Embassy Consul Colin Furst to Wa Wa Kyaw, Jan. 8, 2010.

³⁴ Detained Burmese-American Thrown into Dog-Cell, Mizzima, Dec. 21, 2009.

trained military attack dogs kept across from his cell. There was no light, bedding, or a bathroom in his dog cell.³⁵

The Burmese Ministry of Home Affairs recently ordered prison officials to prevent Mr. Aung's family from visiting him in prison. His family has not been allowed to see him since January 11.³⁶ In Burma, prior to sentencing, family visits to prison are allowed weekly.³⁷ After sentencing, family visits are allowed twice monthly.³⁸ The fact that the Ministry of Home Affairs is involved in Mr. Aung's case, and that he is being punished with denial of family visits is further evidence that the junta sees Mr. Aung as a political prisoner and not a criminal. It is particularly concerning because minimal food is provided to prisoners in Burma and most rely on family visits for the provision of extra food. Denying Mr. Aung family visits is a violation of Principle 19 of the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, which provides: "A detained or imprisoned person shall have the right to be visited by and to correspond with, in particular, members of his family and shall be given adequate opportunity to communicate with the outside world, subject to reasonable conditions and restrictions as specified by law or lawful regulations."

Mr. Aung was held in solitary confinement from January 12, 2010 to February 11, 2010.³⁹ This means that with the exception of the two-day period from January 9 to 11, 2010, he has been held in various forms of solitary confinement since his confinement in a military dog cell on December 7, 2009. Prison officials placed a metal shelf in his cell to block out all light.⁴⁰

No information is known about Mr. Aung's conditions in Prome Prison.

II. Analysis of the Arbitrary Nature of Nyi Nyi Aung's Detention

For the reasons stated below, the arrest and detention of Nyi Nyi Aung violate the rights and fundamental freedoms established in the Universal Declaration of Human Rights⁴¹ and the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment.⁴² The Burmese junta's detention of Nyi Nyi Aung falls within Category II of the Working Group's classification of cases because it can be imputed that the junta detained him based on the peaceable exercise of his fundamental right to freedom of expression in

³⁵ See, e.g., political prisoner Zarganar's interview with *Mizzima* in 2007 regarding his military dog cell confinement, "A military dog cell is a special cell for prisoners who commit crimes in prison: beating each other or committing murder in prison, drug use, sodomy, etc. These criminals are shackled and sent there for further punishment. They are put in isolation and solitary confinement. There are about 30 Alsatians guarding this type of cell, so it is called a military dog cell.

The measurement of the cell is about 8'x10'. You cannot see outside. There is no proper ventilation and sometimes it's too cold. I was made to sleep on a wooden board. I could not have a bath for the first two days. The food is terrible, as are the living conditions. There is no proper toilet. I had only a dining plate for both urination and excreta. I could use this plate only once for the whole day as it was filled after a single use. I had to spend seven or eight days there. I got pneumonia."

³⁶ Email from U.S. Embassy Consul Colin Furst to Wa Wa Kyaw, Jan. 23, 2010.

³⁷ Email from U.S. Embassy Consul Colin Furst to Wa Wa Kyaw, Jan. 23, 2010.

³⁸ Email from U.S. Embassy Consul Colin Furst to Wa Wa Kyaw, Jan. 23, 2010.

³⁹ Nyi Nyi Aung in Solitary Confinement a Second Time, *Mizzima*, Jan. 20, 2010.

⁴⁰ Email from U.S. Embassy Consul Colin Furst to Wa Wa Kyaw, Jan. 23, 2010.

⁴¹ G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948) ("UDHR").

⁴² Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. Res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988) ("Body of Principles").

connection with his democracy advocacy. The Burmese junta's detention of Nyi Nyi Aung additionally falls within Category III of the Working Group's classification of cases because he was denied a fair trial.

A. Burma's Detention of Nyi Nyi Aung Resulted from the Exercise of His Fundamental Right to Freedom of Expression and Should Qualify as a Category II Detention

Nyi Nyi Aung's case falls within Category II of the Working Group's classification of cases because it can be imputed that the Burmese junta detained him based on the peaceable exercise of his fundamental right to freedom of expression in connection with his democracy advocacy. In particular, the junta's detention of Mr. Aung violates Article 19 of the Universal Declaration of Human Rights (UDHR), which provides that, "[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers."

The criminal charges against Mr. Aung are a pretext for silencing his democracy activities. As reviewed below, the junta has charged Mr. Aung with a shifting array of charges since his arrest. The junta's regular revision of the charges against him underscores the pretextual nature of the charges. In addition, three of the charges against Mr. Aung are demonstrably false. The fourth charge against Mr. Aung should not legally apply to Mr. Aung, and further, is a blatant example of selective prosecution. Therefore, we believe that the Working Group should conclude that Burma's detention of Mr. Aung resulted from his exercise of his fundamental right to freedom of expression and is a Category II arbitrary detention.

1. The Burmese Junta's Shifting Array of Charges Against Nyi Nyi Aung Underscores Their Pretextual Nature

The junta's regular revision of charges against Mr. Aung throughout his detention, and even during his trial, only serves to emphasize the pretextual nature of the charges against him.

Initially, Mr. Aung was charged with violations of the State Protection Law and Emergency Provisions Act. According to the state-run *New Light of Myanmar*: "While staying in the USA, Nyi Nyi Aung organized absconders including Khin Ohmar of Network for Democracy and Development (NDD), Dr Naing Aung of Forum for Democracy in Burma (FDB) and Zaw Zaw and actively took part in protests against Myanmar Government. In addition, holding the American citizenship card, he entered Myanmar for eight times with social visa from November of 2005 to September of 2009 and met with members of the '88' new generation students Min Ko Naing, Htay Kywe, Min Zeya, Arnt Bwe Kyaw, Hla Myo Naung, Than Tint and Aung Thu. Putting them in contact with activists abroad to stage anti-government protests, he played an active part in exchanging information, providing financial assistance and breeding hardcores."⁴³

⁴³ Nyi Nyi Aung (a) Kyaw Zaw Lwin who plotted internal riots and sabotage arrested
Conspiracies of internal and external anti-government groups to instigate uprising and launch terrorist attacks in
2009 exposed, *New Light of Myanmar*, Sept. 23, 2009.

On October 3, 2009, all of the original charges under the State Protection Law and Emergency Provisions Act against Mr. Aung were inexplicably dropped.⁴⁴ In an abrupt change of course, the junta charged Mr. Aung with violations of Burma Penal Code Articles 420⁴⁵ (fraud) and 468⁴⁶ (forgery) related to his alleged possession and use of a Burmese national identity card in the name “San Naing.”⁴⁷ On January 1, the junta dropped the Article 420 fraud charge, again without explanation.⁴⁸

On November 6, 2009, the government charged Mr. Aung with violations of the Foreign Exchange Regulation Act under Section 24.⁴⁹ The junta alleged that Mr. Aung failed to declare U.S. dollars and Burmese kyat upon his entry into the country.⁵⁰

On December 29, 2009 (after the prosecution concluded the initial phase of its case), the government charged Mr. Aung with a violation of Section 6(3) of the 1951 Burma Immigration (Detention) Rules.⁵¹ This charge is related to Mr. Aung’s failure to renounce his Burmese citizenship when he became an American citizen.

We note with interest that the original charges, and the lengthy article in the state-run *New Light of Myanmar*, made no mention of a fraudulent identity card, currency violations, or the failure to renounce his Burmese citizenship.⁵²

The shifting nature of the charges against Mr. Aung underscores their pretextual nature.

2. The Currency and Forgery Charges Against Nyi Nyi Aung Are False

The junta’s charges against Mr. Aung for failing to declare his currencies at customs and forging a national identity card are false and a pretext for imprisoning Mr. Aung.

The customs violations charges against Mr. Aung are patently false. Mr. Aung was arrested at immigration, before he entered customs. Therefore, he had no opportunity to declare any U.S. dollars or Burmese kyat that he carried and cannot legally be found guilty of failing to declare his currency at customs.

⁴⁴ Email from U.S. Embassy Vice Consul Hayward Alto to Wa Wa Kyaw, Oct. 5, 2009.

⁴⁵ Article 420 provides: “Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable security, or anything which is signed or sealed and which is capable of being converted into a valuable security, shall be punished with imprisonment . . . and shall also be liable to fine.”

⁴⁶ Article 468 provides: “Whoever commits forgery, intending that the document forged shall be used for the purpose of cheating, shall be punished with imprisonment . . . and shall also be liable to fine.”

⁴⁷ Email from U.S. Embassy Vice Consul Hayward Alto to Wa Wa Kyaw, Oct. 5, 2009.

⁴⁸ Email from U.S. Embassy Vice Consul Hayward Alto to Wa Wa Kyaw, Jan. 1, 2010.

⁴⁹ Email from U.S. Embassy Consul Colin Furst to Wa Wa Kyaw, Nov. 10, 2009.

⁵⁰ Nyi Nyi was charged under the Foreign Exchange Regulation Act Sec. 24. This is solely a penalty section. We believe that the alleged violations are of Section 9(1): “The President of the Union may, by notification, order that, subject to such exemptions, if any, as may be contained in the notification, no person shall, except with the general or special permission of the Controller and on payment of the fee, if any, prescribed, bring or send into the Union of Burma any gold or silver or any currency notes or bank notes or coin whether Burma or foreign.”

⁵¹ Email from U.S. Embassy Consul Colin Furst to Wa Wa Kyaw, Dec. 29, 2009.

⁵² See Nyi Nyi Aung (a) Kyaw Zaw Lwin who plotted internal riots and sabotage arrested Conspiracies of internal and external anti-government groups to instigate uprising and launch terrorist attacks in 2009 exposed, *New Light of Myanmar*, Sept. 23, 2009.

The Article 420 forgery charge against Mr. Aung is also false. Mr. Aung's domestic lawyers note that the initial intake form Mr. Aung signed when he was arrested did not include the fake identity card.⁵³ When testifying during his trial, Mr. Aung strenuously denied ever having a fake identity card. Mr. Aung testified that he signed a second intake form which listed his belongings, including the national identity card. However, he signed this second intake form immediately following his torture (beatings, deprivation of food and sleep for a week, and further threats). Mr. Aung further testified that he was not aware that the identity card was listed on this second intake form.⁵⁴ The complete lack of evidentiary standards relating to chains of custody in the Burmese court system leads us to further question the legitimacy of this charge.

Further, the government's own witnesses on the forgery charge contradicted each other in their testimony regarding this alleged fake identity card. Testimony on charges relating to the forged identity card included the Special Branch Police Chief testifying that Mr. Aung had an identity card with his picture and the name "San Naing" in his possession at the time of his arrest. An immigration officer presented records that the "real" San Naing reported his identity card lost in 1999.⁵⁵ This testimony was contradicted in later testimony from the "real" San Naing who testified for the prosecution that he lost his identity card in 2005.⁵⁶

We also note with interest that the junta commonly uses criminal charges against democracy activists to degrade their activities and prevent them from further pro-democracy activities.⁵⁷ The Working Group noted an example of this practice in Burma when it "[found] convincing the allegation of the source that the criminal proceedings initiated against Ms. Su Su Nway was motivated by her suing the local authorities for their forced labor practice."⁵⁸ In Mr. Aung's case, it is also possible that the junta realized that criminal charges would be easier to sustain against an American than the original terrorism-related charges.

The charges against Mr. Aung are no more than an obstacle to prevent him from continuing his work as a democracy activist. Mr. Aung is therefore being deprived of his liberty for his democracy activities and in order to prevent him from and punish him for peacefully exercising his right to freedom of expression protected by Article 19 of the Universal Declaration of Human Rights.

3. The Burmese Junta is Selectively Prosecuting Nyi Nyi Aung for Failure to Renounce his Burmese Citizenship Under a Law that Does Not Apply to Mr. Aung

The charge against Mr. Aung for failing to renounce his Burmese citizenship is also pretextual. The law does not apply to Mr. Aung, a resident of the United States. It only applies to residents of Burma who fail to renounce their Burmese citizenship when becoming citizens of other countries. We are not aware of any instances of this law being used to

⁵³ Wa Wa Kyaw conversation with Nyan Win, Jan. 25, 2010.

⁵⁴ Email from U.S. Consul Colin Furst to Wa Wa Kyaw, Jan. 8, 2010.

⁵⁵ Email from U.S. Consul Colin Furst to Wa Wa Kyaw reporting on Oct. 23, 2009 trial session, Oct. 23, 2009.

⁵⁶ Email from U.S. Consul Colin Furst to Wa Wa Kyaw reporting on Nov. 27, 2009 trial session, Nov. 27, 2009.

⁵⁷ Human Rights Watch, *Burma's Forgotten Prisoners*, Sep. 16, 2009, available at <http://www.hrw.org/en/reports/2009/08/08/burmas-forgotten-prisoners>, accessed Jan. 28, 2010.

⁵⁸ *Ms. Su Su Nway v. Myanmar*, Opinion No. 4/2006, ¶ 6.

prosecute an individual other than Mr. Aung, including individuals who are residents in Burma. Further, there is no process at the Burmese Embassy in Washington, D.C. (the nearest Embassy to Mr. Aung's home in Maryland) for individuals to renounce their Burmese citizenship.

The law under which Mr. Aung is being charged for failing to renounce his Burmese citizenship is inapplicable to Mr. Aung. The Immigration Rules being applied to Nyi Nyi apply "only to residents of Burma."⁵⁹ Mr. Aung is not a resident of Burma; he is a resident of the United States.

Regardless, this law is being used to selectively prosecute Mr. Aung. In the brief cross-examination they were allowed, Mr. Aung's domestic lawyers asked the testifying Ministry of Foreign Affairs official if he had seen any other case where the Burmese government prosecuted a former Burmese national for failure to renounce his citizenship. In his 20 years of service, the official testified he had seen no such case.⁶⁰

The Burmese government provides no process for former Burmese citizens to renounce their Burmese citizenship. In response to another question by Mr. Aung's domestic lawyers, the Ministry of Foreign Affairs official also admitted that Burmese Embassies do not explain the requirement to renounce Burmese citizenship if acquiring new citizenship and do not provide instructions as to how to renounce Burmese citizenship.⁶¹

Given that the law is being illegally and selectively used against Mr. Aung and no former Burmese citizen is able to renounce his citizenship under the supposed requirements of this law, it is clear that the junta is improperly using this law to imprison Mr. Aung and silence his democracy activities.

4. The Burmese Junta's Use of Pretextual Charges Against Nyi Nyi Aung Qualifies as a Violation of Article 19 of the UDHR

Because of the shifting nature of these charges and the many reasons to doubt their accuracy, it is clear that the junta is using these charges as a pretext to silence Nyi Nyi Aung's pro-democracy activities regularly noted in the state-run *New Light of Myanmar*. Article 19 of the UDHR protects the right of freedom of expression and the accompanying right to free speech. The Burmese junta has violated Mr. Aung's "freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

In a prior case involving Burma, the Working Group stated that "[p]eaceful expression of opposition to any regime cannot give rise to arbitrary arrest."⁶² The junta has previously been censured by the Working Group for detaining those publicly opposing the regime.⁶³ As with prior cases involving democracy activists, this is precisely what the junta is

⁵⁹ Verdict for US Citizen Due Wednesday, Democratic Voice of Burma, quoting Mr. Aung's domestic lawyer, Nyan Win, Jan. 25, 2010.

⁶⁰ Email from Consul Colin Furst to Wa Wa Kyaw regarding January 8, 2010 trial session, Jan. 8, 2010.

⁶¹ *Id.*

⁶² See *James Mawdsley v. Myanmar*, Opinion No. 25/2000, at ¶ 6.

⁶³ "[T]he Government of Myanmar does not deny that the detention . . . is connected solely with their activities in opposing the current regime . . ." *Dr. Ma Thida and Others v. Myanmar*, Opinion No. 13/1994, at ¶ 7.

doing even though they are nominally attempting to cloak Mr. Aung's detention under provisions of Burmese criminal law.⁶⁴

B. Burma's Detention of Nyi Nyi Aung Violated His Fundamental Right to a Fair Trial and Should Qualify as a Category III Detention

Nyi Nyi Aung's case qualifies as a Category III detention because the junta failed to observe international norms relating to the right to a fair trial. Mr. Aung was not given a fair and public hearing as provided for in Article 10 of the UDHR: "Everyone 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 of any criminal charge against him."

Mr. Aung was denied access to counsel, the right to call witnesses under the same conditions as the prosecution, an unbiased tribunal, and his right to a public trial. Mr. Aung has therefore not received a fair trial under international standards. Even under the limited rights provided to him by Burmese domestic law, Mr. Aung has been denied a fair trial.

1. The Burmese Junta Denied Nyi Nyi Aung Access to His Counsel

Nyi Nyi Aung has been allowed only severely limited access to his lawyers in violation of Article 10 of the UDHR and Principle 18 of the Body of Principles. This denial of counsel is also a violation of Burmese domestic laws Article 340⁶⁵ of the Code of Criminal Procedure and Article 2(f)⁶⁶ of the Judiciary Law.

Mr. Aung was allowed to meet with his lawyers only twice during his five-month detention. He was allowed to meet with them on October 27, 2009, and once during the week of November 22, 2009. These two visits were short in duration and supervised by prison officials. At no time was Mr. Aung permitted by Burmese officials to communicate confidentially with his lawyers.

Mr. Aung's limited access to his lawyers is a clear violation of Article 10 of the UDHR. Without the ability to prepare an adequate defense with his attorneys, Mr. Aung could not have a fair trial.

This lack of access to his attorneys is also a violation of Principle 18 of the Body of Principles. Mr. Aung was regularly denied the right to consult his counsel—a violation of 18(1). He was also denied the right to be allowed time to consult with counsel under 18(2), the right to communicate with counsel confidentially under 18(3) and the right to interview with counsel outside of hearing of guards under 18(4).

In finding a Syrian petitioner's detention to be arbitrary, the Working Group previously noted, "Lawyers are not granted access to their clients prior to trial . . . Lawyers

⁶⁴ The Working Group has held "[a]lthough the detention may be regarded as being in conformity with national legislation, it is not in keeping with the relevant standards set forth in the Universal Declaration of Human Rights. *Felix Carases and Others v. Cuba*, Opinion No. 1/1998, at ¶ 13(b); *see also Liu Xiaobo v. China*, E/CN.4/2000/4/Add. 1, Opinion No. 17/1999, at ¶ 11.

⁶⁵ Article 340 states: "Any person accused of an offence before a criminal Court, or against whom proceedings are instituted under this Code in any such Court, may of right be defended by a [lawyer]." If a lawyer cannot have access to his or her client before trial, then there is no way to prepare a defense.

⁶⁶ Article 2(f) states: "2. The administration of justice shall be based on the following principles: . . . (f) guaranteeing in all cases the right of defence . . ."

require written permission from the Court's President before they can see their clients in prison."⁶⁷ Similarly, with reference to the right to counsel enshrined in the ICCPR, the Working Group noted that the "'right to communicate with counsel of his own choosing'...is seriously undermined, as the meetings take place at unforeseeable intervals as dictated by the United States authorities, no documents can be exchanged between the lawyer and his client and a United States official always remains present, denying the privacy which is essential between a defendant and his counsel."⁶⁸

Like the above petitioners, Mr. Aung was denied access to his counsel in violation of Article 10 of the UDHR and Principle 18 of the Body of Principles. Therefore, he has not received a fair trial.

2. The Burmese Junta Did Not Allow Defense Witnesses Under the Same Conditions as Prosecution Witnesses

In addition to not being able to adequately prepare a defense because he was not provided access to his lawyers, the Burmese junta did not allow Mr. Aung to present defense witnesses under the same conditions that the prosecution presented its witnesses, in violation of Article 10 of the UDHR.

Mr. Aung was only allowed to present two witnesses on his behalf. The government was allowed to present at least 16 witnesses.

The Working Group has previously noted Burma's failure to grant a defendant his right to a fair trial using methods such as not allowing "[t]he right to call witnesses on his behalf under the same conditions as witnesses against him."⁶⁹

3. The Burmese Junta Denied Nyi Nyi Aung His Right to an Impartial Tribunal

Mr. Aung was tried before a biased court.

The UDHR provides that "[e]veryone is entitled to full equality and to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations of any criminal charges against him."

The Insein Prison trial court in Mr. Aung's case was not impartial as required by international law. As noted, *supra*, in Section I, the Burmese judiciary exercises little independence. The judiciary is controlled by the government, and "the military regime frequently directs verdicts in politically sensitive trials of civilians."⁷⁰

4. The Burmese Junta Illegally Closed Nyi Nyi Aung's Trial; Preventing A Fair Trial

Nyi Nyi Aung's trial was closed, in violation of Article 10 of the UDHR. A closed criminal trial is also a violation of Burmese domestic law.

⁶⁷ *Ayman Ardenli and Muhammad Haydar Zammar v. Syrian Arab Republic*, Opinion No. 8/2007 ¶ 24.

⁶⁸ *Mr. Tariq Aziz v. Iraq and United States of America*, Opinion No. 33/2006, ¶ 19.

⁶⁹ *Maung Chan Thar Kyaw v. Myanmar*, U.N. Doc. E/CN.4/2005/6/Add.1 at 64 (2004), ¶ 11.

⁷⁰ State Department Report, *supra* note 4.

Under Article 10 of the UDHR, a trial must be open. Article 10 provides: “Everyone 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 of any criminal charge against him.” A closed trial is not a public trial as required by Article 10.

Mr. Aung’s closed trial was also illegal under Burmese law. A closed trial is a violation of Article 352⁷¹ of the Burmese Code of Criminal Procedure and of Article 2(e)⁷² of the Burmese Judiciary Law; it also betrays the political and pretextual nature of the charges against Mr. Aung.

V. Indicate internal steps, including domestic remedies, taken especially with the legal and administrative authorities, particularly for the purpose of establishing the detention and, as appropriate, their results or the reasons why such steps or remedies were ineffective or why they were not taken

The United States Embassy in Rangoon has repeatedly filed official demarches with the Government of Burma with regards to Nyi Nyi Aung’s mistreatment. In particular, the U.S. Embassy filed complaints relating to Mr. Aung’s torture and lack of counsel. The Government of Burma has not responded to any official complaints.

Mr. Aung’s domestic lawyers will attempt to appeal his detention. However, given the lack of independence in Burma’s judiciary, we have little doubt he will again receive a guilty verdict.

VI. Full name and address of the person(s) submitting the information (telephone and fax number, if possible)

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⁷¹ Article 352 states: “The place in which any criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed an open Court, to which the public generally may have access, so far as the same can conveniently contain them”

⁷² Article 2(e) states: “2. The administration of justice shall be based on the following principles: . . . (e) dispensing justice in open court unless otherwise prohibited by law.”