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Written statement* submitted by the Asian Legal Resource Centre (ALRC), 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.

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

The absence of normative and institutional frameworks to protect human rights in Myanmar

1. The Asian Legal Resource Centre has closely studied and documented the situation of human rights in Myanmar for close to a decade, throughout much of which it has also presented findings on a range of topics to the UN Commission on Human Rights, and more recently, to the Human Rights Council. The topics that it has addressed in recent submissions include the absence of minimum conditions for elections, torture, the effects of corruption on citizens' rights, the 2008 Constitution, the September 2007 uprising and aftermath, and what the ALRC has characterized as the country's "injustice system" of police, prosecutors and courts under military guidance.

2. In previous years, it could be said that the amount of knowledge about the true human rights situation in Myanmar was quite limited. For this reason, the ALRC has concentrated its efforts on research that would reveal systemic problems and obstacles for human rights arising from the persistence of military dictatorship in the country. However, in recent times it has become increasingly clear that despite a manifest increase in detailed awareness about conditions there--due not only to the work of the ALRC but also many other organizations, as well as the consistent efforts of successive Special Rapporteurs on human rights in the country--the international human rights movement has been unwilling and therefore unable to address the true extent and nature of these problems.

3. One reason for this incapacity of the international community to come to terms with the scope and nature of the human rights disaster in Myanmar is that the international framework for protection of human rights is premised upon there being domestic frameworks for the same. Although it is accepted everywhere that no domestic framework to protect human rights is perfect, the international system for protection of rights is premised upon the existence of some kind of minimum domestic framework that it functions to some extent to address those human rights problems with which it is supposed to be concerned.

4. The problem in Myanmar's case, by contrast, is that no such framework for the protection of human rights exists at all. Thus, when international agencies and monitors call for things to be done in response to human rights abuses that would be pertinent in other settings, they are in the case of Myanmar meaningless. For those state parties and individuals who are interested to do no more than mouth human rights rhetoric and do nothing in fact to address the problems, this is a source of comfort: since rhetoric is quite literally all that is possible in Myanmar's case, they cannot be blamed when nothing is done. For the rest of us, it is a source of immense frustration that should provoke exploration of new avenues for effecting change in very serious human rights situations of the sort found in Myanmar.

5. There are two frameworks with which we are here concerned: the normative framework and the institutional framework. The absence of each in the case of Myanmar can be explained as follows.

6. **The Normative Framework**

a. The State is not a party to most international human rights treaties, including the International Covenant on Civil and Political Rights. It has a domestic normative framework not for the protection of human rights but for their denial. The State has retained and continues to use antiquated and highly regressive colonial-era and postcolonial statutes. Since 1988, all laws have been passed as executive decrees, not through any legislative process, during which time it has issued many new laws that also reflect its concern a preoccupation with the defence of the state rather than defence of human rights.

b. As the ALRC has previously made clear to the Council, the 2008 Constitution is in terms of human rights a norm-less constitution. Under its provisions, the armed forces are placed outside of judicial authority. The military, not the judiciary, is the constitution's guardian. The judiciary is separated from other branches of government only "to the extent possible". All rights are qualified with ambiguous language that permits exemptions under circumstances of the State's choosing. For instance, the right not to be held in custody for more than 24 hours before being brought before a magistrate, which already exists in the Criminal Procedure Code, is under the new constitution delimited by an exception for "matters on precautionary measures taken for the security of the Union or prevalence of law and order, peace and tranquillity in accord with the law in the interest of the public, or the matters permitted according to an existing law" (section 376). This provision effectively legalizes arbitrary detention of the sort that is already rife in Myanmar. Other provisions that purport to guarantee rights do so only to the extent permitted by other laws, and in so far as they do not threaten the security of the state or contravene undefined standards of public morality. The constitution allows for rights to be revoked at any time and for their suspension during a state of emergency. The cumulative effect of these qualifications is to render all guarantees of rights meaningless.

7. **The Institutional Framework**

a. The main features of the institutional framework that deny human rights are the militarized functions of the police force, resulting in routine and systemic abuses, and the non-independence of the judiciary.

b. The police force in Myanmar is not a discrete professional civilian force but a paramilitary and intelligence agency under command of the armed forces. It shares policing functions with other parts of the state apparatus, including with executive councils at all levels that supervise and oversee other agencies, and with other local bodies, including the fire brigade and civic groups. Specialized police agencies, in particular the Special Branch, operate as proxies for military intelligence, rather than as autonomous investigators of crime. Consequently, the characteristics of policing and prosecutions in Myanmar include: routine arbitrary arrest and detention; common use of torture and other forms of cruel and inhuman treatment, and frequent deaths in custody; coerced signing of documents that have no basis in law; baseless and duplicated charges; and fabricated cases.

c. As the courts are subordinate to the executive, they can neither function in accordance with the laws that they purport to uphold nor in a manner that can defend, let alone implement human rights. In fact, the notion of the courts in Myanmar operating to protect human rights would be absurd, since it would profoundly contradict their function as defenders of the state against the intrusions of citizens and their claims. Where they do appear to be functioning to protect rights, such as in cases concerning protection of women and children, the function they are in fact performing is that of implementers of government policy.

8. This last aspect of the judiciary's operations as a non-norm enforcing institution in Myanmar has not yet been properly understood and requires much further discussion. The perception of successive governments in Myanmar that the role of the judiciary is not to protect rights but to enforce State policy is deeply entrenched. It goes back at least to the beginning of permanent military rule in 1962, and has roots in the authoritarianism of earlier periods. Under this construct, the rule of law is shorthand for the State's use of law and institutions of law to achieve whatever ends suit its purposes. Where some of these intersect with programmes for the defence of human rights they are liable to be misunderstood as expressions of support for human rights norms when in fact they are no such thing. The principle of the supremacy of law, which is integral to the defence of human rights, is entirely absent. Therefore, there is no normative basis for the building of a regime of rights as required in terms of international human rights standards.

9. Because this instrumental concept of the law as an administrative technique overrides specific qualities of the normative or institutional framework, it is impossible to attribute to specific laws or agencies the authority to implement certain human rights, and therefore impossible for international agencies to make specific demands for the defence of rights in response to particular incidents or issues. The authority of a law or institution is always delimited by a higher imperative, which means that the State party while passing laws, applying laws and establishing institutions to enforce laws does not actually feel beholden to those laws or institutions. To the extent that human rights appear to receive some form of official recognition and protection, it is entirely on a situation-specific, non-normative basis, and therefore on a non-human rights basis, since the latter is necessarily normative.

10. Consequently, there is no basis for the global human rights movement to make a human rights claim on the government of Myanmar, because there are neither the normative or institutional frameworks in which to place it. In this setting, any call from a United Nations mechanism or attempt at intervention is reduced, like those plaints of private citizens in the country itself, to an appeal for some form of mercy, placed before the powerful executive authorities for their discretion. This, of course, is not the work of human rights defence but a king of impoverished, contemporary feudalism: the very opposite of what the modern human rights movement is supposed to represent.

11. For many years, human rights defenders in Myanmar and around the world have scrupulously documented and categorized an astounding array of human rights abuses, committed across all parts of the country and against practically all types of persons. The Asian Legal Resource Centre too has been engaged in that work, as it will continue to be. But the point has clearly been reached at which it is necessary to use the knowledge accrued through this work to dig much deeper into the systemic problems, and to analyse these not just as a challenge to the government of Myanmar over its atrocious record, but as a challenge to the international human rights movement over its incapacity to respond when a state is bereft of the frameworks upon which the protection of human rights are dependent. It is clearly inadequate to continue to document abuses that spring forth daily, monthly and annually because of the absence of normative and institutional frameworks for human rights without stating the fact of this absence plainly. And it is not merely inadequate but ridiculous for the international community to continue to make calls upon the Government of Myanmar for the implementation of human rights standards in the absence of these frameworks.

12. After a decade or more of intense work on Myanmar in international human rights gatherings, and after the compilation and submission of vast quantities of information about the factual situation in the country at considerable effort and often great risk on the part of large numbers of human rights defenders in the country and abroad, it is not only disingenuous but insulting for the Council to continue to do no more than make the same carefully worded calls that are disconnected from reality and lacking in either intellectual or moral fibre. The absence of either normative or institutional frameworks for the protections of human rights in Myanmar precludes business as usual. It must be said plainly and clearly that the Council has failed utterly to address the situation of human rights in Myanmar; that the Council has been amply informed about the real situation in the country and cannot pretend that the normative and institutional frameworks for the protection of human rights exist when they do not. The question remains as to what, given these facts, the Council can do about it.