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**Promotion and protection of all human rights,
civil, political, economic, social and cultural rights,
including the right to development**

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.

[10 May 2013]

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

Myanmar: Police who attacked peaceful protestors must be prosecuted

1. The struggle of farmers and their allies in the Letpadaung Hills of central Myanmar against the expansion of a copper mining operation under a military-owned holding company and a partner company from China obtained international attention when in the early morning hours of 29 November 2012 paramilitary police launched a night time attack on encamped protestors. The attack received international media coverage because the police fired white phosphorous into the protest camps that caused extensive burns to protestors, the majority of them Buddhist monks who had joined villagers in resistance to the mine project.

2. The attack on protestors occurred precisely as the president established a commission of inquiry into the mine project, the findings of which were published in the 12 March 2013 edition of the state newspaper. Unfortunately, the Asian Legal Resource Centre has been forced to conclude from the contents of its report that the commission's members have either unintentionally or deliberately misconstrued their role as fact finders. The report is concerned primarily with the interests and needs of the state and specifically, with its interests and needs in maintaining good relations with the government of China and its business interests; not with the concerns or human rights of the population affected by the mine, and least of all, of the human rights of those persons subjected to the police assault on the night of November 29.

3. This submission is concerned specifically with the attack on protestors, in part out of respect for the victims of the attack, in part also with regards to larger questions of the role of investigative commissions in the current political circumstances in Myanmar.

4. Details of the police attack are available in extensive documentation by human rights defenders in Myanmar and partners abroad. In particular, the ALRC draws the attention of the Council to the report by the Lawyers Network (Myanmar) and Justice Trust of 5 February 2013. Researchers of this 37-page unofficial report interviewed over 60 locals in the Letpadaung region, and over 20 witnesses to the attack on encamped protestors. Their report discusses the synchronised police raids on protest camps fully, setting out in vivid detail not only the horrendous and unjustified manner in which the attacks were conducted, as well as noting the absence of significant assistance given to over 100 injured monks and other persons in the aftermath. The accounts of witnesses leave little doubt that the police behaved as if on a war footing, attacking an enemy emplacement rather than some crude shelters designed to protect demonstrators against the elements, not against incendiary weapons. The military style of the attack and its conduct at night are consequences of the last few decades of steady militarisation of the police force, throughout which time police units were treated as auxiliary forces for the army and given combat training.

5. The unofficial report raises a series of critical questions that its authors, due to limited resources and lack of cooperation from the authorities, have flagged as requiring answers. Among these questions is the question of who issued the police with white phosphorous, and who gave the orders that it be used to disperse protestors? But if the report's authors had hoped that answers would be forthcoming in the official report when it was issued, they were soon to be disappointed. Far from offering a forensic and independent account of the attack, the official report reads like a police version of events. It obscures important questions about the use of force by concentrating on subsidiary and technical details, such as the distances between police and protestors, the flammability of materials on the camp sites, and other features of the event that serve to partially describe but not actually explain what happened and why.

6. The failure of the official commission of inquiry to deal with the true character of the attack and go to the root issues is manifest in its failure to identify who was responsible for the use of phosphorous or even ask questions about the chain of command and supply of weapons. Instead, the report offers three generic recommendations on better training and reform of the police to prevent such incidents in the future; recommendations that could have been arrived at without the need for any inquiry of this sort at all. That police might learn of the limits to what they can or cannot do in such cases through effective prosecutions of counterparts who commit criminal acts, such as firing incendiary weapons into crowds, is a concept that does not appear to have even been entertained by the report's authors. In its closing recommendations, the report goes so far as to imply that the police did not intend to deliberately cause injuries to the assembled demonstrators, and that the injuries were caused because the police lacked training on how to use equipment effectively and safely.

7. Whether or not the police intended to cause injuries deliberately—an issue not proven one way or another by the investigative commission—misses the point. Under the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990), the general rule that applies without exception is that, “Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms” (principle 4), and use them against persons only “in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives” (principle 9). Where the use of firearms is unavoidable, officers are required to exercise restraint, minimize injury, render medical aid promptly and notify relatives of the injured (principle 5). The police in Letpadaung failed on all of these counts.

8. Lastly, under principle 7 of the Basic Principles, “Governments shall ensure that arbitrary or abusive use of force and firearms by law enforcement officials is punished as a criminal offence under their law.” Currently, no specific offences relate to the abusive use of force by police in Myanmar; however, police officers can be subject to prosecution for assault under the ordinary criminal law, and under a police disciplinary law. Prosecution for command responsibility is more problematic, and is a matter that will require further consideration and discussion by persons in Myanmar concerned with these problems.

9. Although better training may go some way to improving the handling of such incidents by the police in the future, to address the endemic impunity enjoyed by all security forces in Myanmar—which has carried over from the former period of military rule into the present—the prosecution of perpetrators also is an essential part of responding to incidents of this nature. The commission is remiss not to have recommended criminal investigations and prosecution of persons responsible for the attack with phosphorous. The commission also is remiss not to have pointed to the absence of provisions in existing law by which persons higher up the chain of command might be held responsible for their orders given to subordinates.

10. Despite its multiple failings, it appears that the commission’s report is to be used as the basis for further government action, and the matter will end there. Government officials indicated in March that they would act on the recommendations, and began paying out compensation to farmers for lost land. When farmers refusing the compensation tried to furrow land and sow crops in April, the police again attacked them, and issued an order for the arrest of alleged ringleaders.

11. Clearly, many people in the Letpadaung region feel that their views have not been heard, or respected, and that the commission has done more harm than good. The ALRC is also of the view that the commission has failed in its task: certainly insofar as holding the

perpetrators of the November 29 attack is concerned. But the larger concern that the ALRC has from observation of the work of this investigative commission and a number of others over the last year—including one on the violence in Rakhine State, on which it has submitted a separate submission to the current session of the Council—is that such ad hoc bodies may, far from contributing to the development of a human rights-protecting state, inhibit the development of essential institutions for the rule of law. These essential institutions include permanent agencies like the police and courts whose proper functioning would greatly diminish the need for ad hoc agencies in the first place. Rather than invest in making these agencies work more effectively to respond to such exigencies, the government of Myanmar seems, for the time being at least, to find it more expedient to fill gaps with temporary bodies holding limited mandates. Although in the short term some justification exists for the use of such agencies, they are not substitutes for permanent bodies. The Letpadaung commission did not engage in a criminal inquiry. It did not do anything that would enable prosecutions of those responsible for the phosphorous attack. It did not even make recommendations towards that end. Therefore, it is in no way a substitute for criminal investigation by the appropriate agencies, such as the Bureau of Special Investigation under the Ministry of Home Affairs, or the Criminal Investigation Division. Yet, it has acted as if, and has been treated as if, it is some kind of proxy for those bodies and the courts, and with its findings delivered, the matter is settled.

12. For the Asian Legal Resource Centre, like those human rights defenders and members of the local community in Letpadaung continuing to struggle against the copper mine and for their rights, the matter is not at all settled. Accordingly, the ALRC urges that:

- Special criminal inquiries are launched into the attack on encamped protestors with a view to prosecuting the police officers involved. The principle of deterrence in punishment of criminal offenders is applied throughout the legal system of Myanmar. Police officers who commit criminal acts should not be exempted from the principle.
- The legislature pass a new law or amend existing law in accordance with principle 7 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials so that police who commit crimes like those against the demonstrators in Letpadaung are subject to prosecution in accordance with international standards.
- Actions taken by the government to implement the recommendations of the report be suspended until such as time as further negotiations have taken place with local residents, and the views of all affected persons are taken into consideration when deciding whether or not to proceed with the mine project.
- The Special Rapporteur on human rights in Myanmar and other Special Procedures of the High Commissioner for Human Rights continue to press the government of Myanmar on the need to prosecute police officers responsible for crimes conducted in the course of their duties, including assault, torture, forced disappearance and extrajudicial execution, and amend the law to ensure that appropriate sanctions exist for such crimes, in accordance with international standards.
- More attention be paid by all concerned persons to the building up of permanent, durable, efficient and credible institutions for the rule of law—including the police force, the judiciary and the public prosecution—and that presidential commissions of inquiry not be equated with, nor used as proxies for, these other institutions. Although investigative commissions can in certain circumstances serve useful purposes, they are also highly limited, politicized, potentially damaging and due to their temporary nature largely immune from public criticism and hence unaccountable, as the commission in the current case has shown itself to be.