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## Human Rights Council

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Human rights situations that require the Council's attention

### **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.

[14 February 2011]

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

## **UPR as an exercise in the making of fiction: An analysis of the presentation by Myanmar**

1. In submissions on Myanmar for the Universal Periodic Review process of the Human Rights Council, the Asian Legal Resource Centre among 24 concerned organizations made submissions based upon years of in-depth research into the egregious human rights situation in that country. The ALRC took the process very seriously. It accompanied its submission with a 30-page annex with expositions on the 2008 Constitution, sections of 12 laws and 48 cases out of the hundreds that the centre has studied and documented in recent years. Other groups presented similarly detailed and factually based reports.

2. The findings of these groups, as well as those of the Special Rapporteur on human rights in Myanmar, other special procedures and two treaty bodies were reflected in the questions issued by a number of member states in the lead up to the hearings on Myanmar at the tenth session of the Universal Periodic Review Working Group this January 2011. The questions spoke to the staggering array of abuses in the country, encompassing denial of fundamental rights to freedom of expression, assembly and association; custodial abuses; censorship; torture, extrajudicial killing, recruitment of child soldiers, sexual violence, and forced labour, as well as the lack of cooperation of the government with most international bodies working on human rights, and with the government's failure to join most international rights treaties.

3. Despite the meticulous and professional documentation submitted from numerous credible sources to the UPR process, the Government of Myanmar persisted with its usual approach, treating the process not as an opportunity for dialogue but as an opportunity for the making of fiction. The implications of its approach to the UPR are addressed in a separate submission by the ALRC to this session of the Council. In this submission, for the sake of the record the centre points out some of the more glaring fictions contained in the presentation of the government to the UPR Working Group, as described in the group's draft report (A/HRC/WG.6/10/L.7, 2 February 2011), which are most directly related to the centre's work. Aspects of the government presentation not covered here include misrepresentations about the manner in which elections were held in 2010, the extent to which political parties are able to organize and operate, the status and treatment of people in Northern Rakhine State, the standing of the national human rights committee, sexual violence by the armed forces, confiscation of land, and the notion that the country is entering a new democratic era.

4. The draft report of the Working Group contains the following deliberate misrepresentations and fictions by the Government of Myanmar, followed by the corrections of the ALRC:

(a) "[The] Myanmar Constitution of 2008 is committed to promote and protect human rights and the whole Chapter VIII deals with fundamental rights and principles, at par with the rights given by Constitutions in other countries. The legal remedies for the breach of human rights entrusted by this Chapter are given through five Writs which can be found in the same Chapter" (paragraph 6).

The statement is fiction. Chapter VIII of the 2008 Constitution contains no provisions to protect human rights in accordance with international standards. Most of the provisions are qualified through provisos that they be limited "in accordance with law" or similar. There are no institutional arrangements to ensure that even the rights as stipulated can be protected to a limited extent. Under section 182 all rights can at any time be restricted or revoked if contrary to the interests of the armed forces. From a human rights perspective the constitution is a norm-less document. The writ provisions are yet to be

tested. The courts in Myanmar have not received writs for half a century. There is no tradition or understanding of the usage of writs. There is no independent judiciary to receive them, which renders the basic principle of writ petitioning meaningless.

(b) "Those referred to as 'political prisoners' and 'prisoners of conscience' are in prison because they had breached the prevailing laws and not because of their political belief" (paragraph 51).

The statement is a misrepresentation. One of the important distinctions between a system in which human rights norms are acknowledged but violated and one in which they are not so much as acknowledged is that in the latter, even the grounds for imprisonment and punishment of persons deemed to be threats to the government must be denied. Therefore, many political detainees in Myanmar are charged and imprisoned under sections of law that are purportedly unrelated to their political activities. However, even allowing for such cases the statement of the government could only be accepted if provisions such as sedition (section 124A, Penal Code) and having contact with political groups listed as unlawful associations (Unlawful Associations Act, 1908) could be classed as non-political. Furthermore, from study of literally hundreds of such cases in recent years, the ALRC can state that the records of these cases are throughout political in character, and political police, usually the Special Branch or special police units under divisional commands, also bring the cases to court. Therefore this statement, which the Government of Myanmar has persisted in iterating over some years, is ridiculous and false from whichever angle it is examined.

(c) "Torture is a grave crime and the Constitution prohibits torture or cruel, inhumane or degrading treatment" (paragraph 52).

The statement is fiction. There is nowhere in the 2008 Constitution a prohibition of torture or cruel, inhuman or degrading treatment or punishment of any sort. Nor is there a prohibition in the Penal Code or in any other section of domestic law. That the government delegation would make this patently false statement concerning a matter of such grave importance is indicative of its attitude towards the UPR process as a whole. The attitude that the delegation could say anything and expect that nobody would know better prevails throughout, and is an attitude not of a government contemplating dialogue but one of a government treating international processes with contempt.

(d) "Myanmar is implementing the UN Standard Minimum Rules for the Treatment of Prisoners. Physicians and nurses are stationed in prisons and specialists from general hospitals are available. Family visits are also allowed" (paragraph 53).

The statement is a misrepresentation. The government is not implementing the Standard Minimum Rules. In particular, with regards to food, health and medicines the conditions in Myanmar prisons are notoriously bad. Prisoners rely upon assistance of family and friends, who bring food, vitamins and medicines to supplement meager rations and help them to survive the poor conditions in prison. However, political detainees have in recent years been systematically sent to remote prisons, including some in the north of the country where the weather is extremely cold, making it impossible for family members to visit more than a few times in the year. Anecdotally, requests by gravely sick prisoners and their family members that they receive treatment from specialists outside of prisons are routinely denied. The use of prisoners as labour for the armed forces in areas of the country with persistent civil war or ceasefire conditions is documented and ongoing.

(e) "Although there is no MOU between ICRC and the Government, from 1999 to 2005, [the International Committee of the Red Cross] made 406 visits to prisons and camps. Thereafter, it stopped prison visits of its own volition. However, after Cyclone Nargis in 2008, ICRC made 16 visits" (paragraph 54).

The statement is a misrepresentation. The ICRC stopped its visits because the Government of Myanmar refused to comply with the terms of its globally recognized mandate, leaving it no alternative but to suspend its visits. The obligation is upon the government to agree for the ICRC to make visits in accordance with the terms of its mandate, not according to whatever terms the government finds expedient.

(f) "Since 2006, the Government issued a public notice in the newspaper to complain against human rights violations to the ministries concerned [sic]. From January to August 2010, the Ministry of Home Affairs received 503 submissions and action was taken on 199 complaints, 203 complaints were under investigation and 101 complaints were found to be false... Punitive actions are taken against military personnel who violate the military recruitment laws and regulations..." (paragraphs 88 & 92)

The statements are misrepresentations. The government does not explain the meaning of "action taken". There is no evidence of serious criminal action taken against state officials who have committed human rights abuses, in accordance with international standards. In most cases, action taken is presumed to mean departmental disciplinary action, such as transfer, demotion and sometimes dismissal. Complainants who attempt to pursue criminal actions are themselves subject to intimidation, coercion and harassment, sometimes resulting in criminal actions and imprisonment of the persons who brought complaints. Persons whose complaints are deemed false are sometimes also subject to counter-legal action, including for contempt of court. Such cases are documented not only by human rights groups but are also found in official published records. So far as punitive actions in cases of forced labour and recruitment of children to the army is concerned, the Committee on the Application of Standards of the International Labour Conference has observed that,

"None of the complaints under the [Supplementary Understanding] mechanism assessed and forwarded by the ILO Liaison Officer [to the government] resulted, in 2009, in a decision to prosecute perpetrators of forced labour... [The government] has routinely rejected recommendations made for more serious sanctions to be applied. Recent cases involving complaints of under-age military recruitment have resulted... [in] only administrative sanctions, if any, imposed on the perpetrators; there have been no prosecutions under criminal law" (C.App/D.5, June 2010, paragraph 21).

5. In concluding remarks to the UPR Working Group, the Government of Myanmar through the delegation leader stated bluntly that there is no impunity in the country. Leaving aside the hundreds of cases that the Asian Legal Resource Centre can cite in detail to show the opposite, the question remains as to why the government persists in using the opportunities presented to it by the Human Rights Council for dialogue to proffer fictionalized accounts of a country that exists only in the imagination of state officials and state media, and nowhere in reality.

6. The answer to the question lies partly in the contents of the delegation leader's concluding remarks. While on the one hand extolling the virtues of the country's judiciary, the delegation leader then observed that international law requires local remedies. These remedies, he added, are available through the Ministry of Home Affairs. Thus, by the Government of Myanmar's own assertion, it is not the judiciary at all but the executive, and specifically the ministry responsible for management of the police force and prisons, that is assigned the duty of providing remedies for complaints of rights abuses. This understanding of redress for rights violations as a responsibility residing primarily with the executive is consistent with the government's non-normative conceptualization of human rights, whereby human rights are not universal principles but relative entitlements, which may be extended or withdrawn from any part of the population, or the population as a whole, according to circumstances. It is this conceptualization of non-normative rights which is the

basis for the government's denials of abuses throughout the UPR process and in other international forums; which is the basis for the new constitution; and, which is the basis for the decades of atrocious treatment that the population of Myanmar has suffered at the hands of the state. What this means for the work for the Human Rights Council is the subject of a second submission to this session of the Council by the ALRC.

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