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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.

[14 February 2011]

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

The problem of a UN member state disconnected from a normative framework: Myanmar and the Human Rights Council review

1. In a separate submission to this session of the Human Rights Council, the Asian Legal Resource Centre has analyzed how the Government of Myanmar recently treated the Universal Periodic Review process not as an opportunity for dialogue of the sort that the process envisages but as an opportunity to present an almost entirely fictionalized account of human rights conditions in its country. The ALRC explained that the reason for the government delegation's gross misrepresentations is not so much the consequence of a strategy to thwart the UPR process in Geneva, as it is the consequence of the disconnection of the government from any type of normative framework for the protection of human rights, international or domestic alike. Whereas the UPR process is premised upon the existence of a domestic framework for the implementation of normative international standards on human rights, in Myanmar, no such normative basis for the protection of rights exists. On the contrary, the Government of Myanmar's conceptualization of rights is that these are entitlements that can be extended or withdrawn according to circumstances. Consequently, gross misrepresentation of the human rights situation in the country is not so much strategy as it is inevitability.

2. In this submission, the ALRC considers the implications of this disconnect between the norms-based language and activities of the global human rights movement and the norm-less reality of a member state. This disconnect is not merely a disconnect between rhetorical aspirations and hard truth. It is a much more significant problem of the gap between a norms-based system and a norm-less one, and unless it is properly understood and accounted for in the work of the Human Rights Council and other international agencies, the many functional and technical proposals being put forward during the ongoing Council review process will have little if any relevance to the situation of human rights in Myanmar, or other countries with analogous conditions.

3. The problem of the gap between a norms-based international system and a norm-less domestic one is a difficult problem to approach and understand for people who have been trained in and are accustomed to norms-based systems, which is perhaps one of the reasons that it attracts relatively little of the debate about the work of the Council. However, the problem is often implicit in questions and exchanges about human rights issues in member states, such as those raised in the lead up to the UPR Working Group's tenth session, this January 2011. Two of the Government of Japan's questions to Myanmar were particularly interesting because of their implicit acknowledgement that the problem of systemic rights abuse in Myanmar is less a problem of refusal to engage with the standards of the international community, less a problem of engagement with international law, than it is a problem of engagement with domestic law, or rather, with any standards of law whatsoever. These questions ran:

> "Although the Constitution of the Republic of the Union of Myanmar provides for the right of peaceful assembly and freedom of association, concerns over restrictions on such freedoms continue to be expressed in UN reports and resolutions. Likewise, the continued practice of arbitrary detention and torture, while prohibited by the Penal Code, has been raised as a matter of concern. We would like to request that the Myanmar Government explain how its understanding of the provisions laid out in its Constitution and Penal Code relates to the concerns and issues pointed out by the UN…
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> "What are the prospects for Myanmar becoming a signatory to the international conventions on human rights that it is currently examining, including the

International Covenant on Economic, Social and Political Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and the Optional Protocol to the Convention on the rights of the Child on the sale of Children, Child Prostitution and Child Pornography? In this connection, we would also like to inquire as to why the Convention Against Torture and the Optional Protocol on the Convention on the rights of the Child on the involvement of children in armed conflict are not also under examination for signature by Myanmar."

4. While it is not correct to say that the constitution and Penal Code protect people in Myanmar from abuses of the sort mentioned by Japan, the first question is essentially correct in that it raises the basic problem of the government's routine failure to comply with its own domestic law. This is not merely a practical problem of the gap between what is on paper and what goes on in real life of the sort found to one degree or another in all jurisdictions. It is, rather, a consequence of the imperative for all institutions in Myanmar to follow instructions on the implementation of policy, irrespective of law. It is a consequence of the disengagement of the state in Myanmar with any firm concept of law, properly understood as the product of a legislature, for over two decades. The gap between domestic law and reality in Myanmar is not a simple consequence of practices that engender rights abuses; it is a matter of policy. This is a primary cause of chronic rights abuse in Myanmar, yet it is one that has not yet been properly or fully acknowledged by the Human Rights Council.

5. Where a state is as a matter of policy disengaged from any meaningful concept of law nationally, it can hardly be expected to engage with international law. Thus, as Japan indicates in the second paragraph, there is a vast gap between the development of human rights standards internationally and the recognition of these by the government of Myanmar. Decades after the rest of the world passed core covenants of the international bill of rights, Myanmar still has not joined them; and, while more and more countries in Asia join the Convention against Torture and introduce domestic legislation of varying quality to prohibit its use, Myanmar still has not seemingly even recognized the convention's existence. But the important point in coming to terms with this second type of engagement is the linkage with the first, since even where a state pretends to engage with law internationally, if it is not doing the same domestically then any such apparent engagement will have few or no practical consequences.

6. This incapacity to engage with basic norms for the protection of human rights at either an international or domestic level is manifest in the 70 recommendations "that do not enjoy the support of Myanmar" listed in the UPR Working Group's draft report on Myanmar (A/HRC/WG.6/10/L.7, 2 February 2011, paragraph 107). While rather awkwardly insisting that it is in compliance with international standards, the government rejected recommendations that included, among many others, the following:

(a) "Amend the Constitution… [to be] in compliance with international human rights treaties and humanitarian laws (Denmark)";

(b) "Begin a transparent and inclusive dialogue with all national stakeholders… aimed at reviewing and reforming all relevant national legislation to ensure that it is consistent with international human rights law (Maldives)";

(c) "Repeal laws that are not in compliance with international human rights law and review its legal system to ensure compliance with the rights to… a fair trial and respect for the rule of law (New Zealand)";

(d) "Cooperate with the international human rights mechanisms and humanitarian agencies, specifically by issuing a standing invitation to the Special

Procedures of the Human Rights Council and allowing full and unhindered access to all persons in need of humanitarian assistance (Republic of Korea)";

(e) "Take appropriate measures to end de-facto and de-jure discrimination with all minority groups (Pakistan)";

(f) "Investigate and punish all cases of intimidation, harassment, persecution, torture and forced disappearances, especially against political dissidents, journalists, ethnic and religious minorities and human rights defenders (Uruguay)"; and,

(g) "Seek technical assistance from United Nations to reform judiciary, to establish accessible judicial remedies as well as to alleviate poverty (Turkey)".

7. It would be difficult to understand why any government with a commitment to international standards would not in principle at least agree with any of the above non-specific recommendations. However, when a government has disengaged from human rights norms both in international and domestic law not only is it understandable that such recommendations would be rejected, but it is also imperative that they be rejected. For a government divorced from any normative framework for human rights, arbitrary, inconsistent and contradictory positions on human rights standards are both necessary and unavoidable. In the absence of adherence to any consistent set of standards, whether at home or abroad, there is no body of principles against which decisions can be made and policies applied. Decision-making is relativised and situation-specific; recommendations are accepted or rejected according to expediency.

8. The problem of what the U.N. can do with a member state that is disconnected from any normative framework for the protection of human rights urgently needs to be taken up in the ongoing Human Rights Council review process (in accordance with General Assembly resolution 60/251, 15 March 2006).

9. There have been some initiatives in the lead up to the review; however, many of the issues raised, such as at the Algiers retreat in February 2010, are technical in nature or concerned mainly with the inevitable politicization of the Council processes, rather than the more difficult problem of a member state operating according to an entirely different conceptualization of human rights than that on which the work of the international human rights system is premised, and one disconnected from any standards for the application of human rights not only at the international but also at the domestic level. Consequently, challenges facing the Council, such as the apparent ineffectiveness of special sessions, are discussed mainly in superficial terms, with reference to specific difficulties associated with specific identifiable outcomes, and without critical examination of possible underlying reasons for failure.

10. The problem that a norm-less state in a normative framework presents is also in part due to the confusion caused by apparently common language that disguises fundamental differences in conceptions, which are revealed only through careful study of circumstances and rhetoric. Although the discussions around the review acknowledge the importance of dialogue, they implicitly take any exchange of views to be a form of dialogue. They also presuppose that member states in the UPR process will in fact engage in frank discussion of their human rights problems and challenges. They fail to recognize and grapple with the problem of what happens when a member state, while apparently talking in the same language as the international community, in fact holds or expresses views that are profoundly contradictory to the values and human rights goals of the latter.

11. The most important problem for the Human Rights Council regarding Myanmar is not a functional problem, but a problem of understanding. The Council review process presents an opportunity for the Council to go into more significant conceptual and epistemological questions about how to engage with a member state that is disengaged from

human rights standards both internationally and domestically. If the Council can couple its examination of procedural and technical issues with genuinely substantive questions of this nature, then the review process will yield fruit. If not, the Council will continue to offer little to people in countries like Myanmar, who lack avenues to address violations of their human rights not for want of the language of rights, but for want of a normative framework in which rights can be realized.