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## **Submission by the Asian Legal Resource Centre to the Human Rights Council's Universal Periodic Review concerning human rights and rule of law in Myanmar**

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### I. SUMMARY

1. This submission, pursuant to Human Rights Council resolution 5/1, which provides for civil society to participate in the Universal Periodic Review process of United Nations Member States' human rights obligations and commitments, concentrates on the features of legal, judicial and policing frameworks that enable the un-rule of law in Myanmar. The country lacks a normative framework to protect human rights under article 5 and articles 8 through 13 of the Universal Declaration of Human Rights. It lacks an independent and impartial judiciary. Its police force is militarized. Gross human rights abuse is systemic. Avenues for redress as envisaged in international standards are absent. Two major obstacles to implementation of human rights are the State's perception that the rule of law is a function of the executive and therefore that the role of the judiciary is to enforce policy rather than law; and, the accompanying systemic corruption in all parts of the State apparatus, especially in the judiciary and police. The Council should consider how it can work better within the United Nations system to apprise itself of the un-rule of law in Myanmar, and coordinate its activities with other parts of the system with a view towards substantive political change in the country, which must pre-empt any substantive change in the normative and institutional frameworks through which to implement human rights.

**Key Words:** Rule of law, judiciary, police, arbitrary arrest, arbitrary detention, torture, deaths in custody, trial, redress, corruption

### II. METHODS

2. Specialist staff and associates of the Asian Legal Resource Centre have worked intensively on the situation of human rights and the rule of law in Myanmar over the last four years with which the Review process is concerned. In this time, the Centre has studied and documented hundreds of cases upon which the analysis in this submission is based. The Centre communicates regularly with human rights defenders and other persons inside the country, and with experts and knowledgeable concerned persons abroad. It follows closely media reports in Burmese and English from inside and outside the country. And, it has done extensive documentary research on the historical causes of the current un-rule of law in Myanmar.

3. The Centre has frequently communicated its findings to the Special Procedures, and has presented them in submissions to the Council at successive sessions. It has issued a number of special reports on Myanmar. An annexe to this submission contains a list of pertinent documentation.

### III. BACKGROUND

4. At independence in 1948, Myanmar inherited British colonial laws, policing and judicial systems. The police force was corrupt and violent; however, the courts

checked abuses. Under the 1947 Constitution they exercised powers independently. The superior judiciary had a reputation for impartiality and concern for constitutionally-enshrined fundamental rights. After the military coup in 1962, the administration brought the judiciary under its control. It steadily degraded the entire institutional framework for the rule of law. In 1972, it abolished the professional judiciary and integrated the courts into the executive. It also brought specialized policing units under military intelligence. Citizens had no means for effective redress of fundamental rights without executive endorsement.

5. In 1988 following nationwide protests, the massacre of protestors and establishment of a new military regime, the administration laid down the basic blocks for the present-day legal, judicial and policing framework. It re-established a professional judiciary, but kept it under executive control through supervision of the Supreme Court. It has increasingly militarized the police force, and has also assigned other agencies—such as the fire brigade—policing and paramilitary functions. It has continued to assign the police a de facto military intelligence role. In recent years, as seen during the September 2007 protests, it has used auxiliary paramilitary forces of ambiguous legal status for security purposes. In 2008, it passed a new constitution that will come into effect after general elections that are expected before the end of 2010. A timeline of key events since independence is contained in the annexe.

#### IV. FRAMEWORK

##### A. The Normative Framework

6. The State is not a party to most international human rights treaties, including the International Covenant on Civil and Political Rights. Therefore in international law its human rights obligations in terms of the rule of law must be assessed in accordance with the Universal Declaration, in particular, articles 5, and 8–13.

7. The State has practically no domestic normative framework for the protection of human rights through the rule of law. Rather, it has a framework for the denial of rights through what the Special Rapporteur on the situation of human rights in Myanmar in 2003 correctly described as the “‘un-rule of law’ which presently affects most of the population in Myanmar” (E/CN.4/2003/41, para. 58).

8. Certain laws have limited provisions to protect the rights outlined in the Universal Declaration. These are mostly procedural delimitations on police powers under the Criminal Procedure Code and Evidence Act, and some broad guarantees under the Judiciary Law. Not only are these routinely ignored in reality—both deliberately as well as through the overall debasement of the legal system, and through the loss of judicial independence upon which they are premised—they are formally negated through jurisprudence, examples of which are in the annexe.

9. The preponderance of legislation in Myanmar is aimed not at the defence of human rights but at their denial. The State has retained and continues to use antiquated colonial-era and postcolonial statutes. Those include but are not limited to: Contempt of Courts Act, 1926, section 3; Emergency Provisions Act, 1950, section 5; Foreign Exchange Regulation Act, 1947, section 24(1); Immigration (Emergency Provisions) Act, 1947, section 13(1); Official Secrets Act, 1923, section 3(1); Penal Code, sections 124A, 153A, 186, 189, 211, 294, 295A, 332, 353, 505(b); Printers and Publishers Registration Law, 1962; the so-called State Protection Law, 1975; Tuition Law, 1984; and, Unlawful Associations Act, 1908, section 17(1). Since 1988, all laws have been passed as executive decrees, not through any legislative process. In this

time, the laws that have been introduced to curtail human rights include: the so-called Anti-Subversion Law, 1996; Electronic Transactions Law, 2004; Organization Law, 1988; and, Television and Video Law, 1996. Some extracts of these laws and examples of cases decided under them are contained in the annexe.

10. 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 statements of rights meaningless. Some relevant sections of the constitution can be found in the annexe.

#### B. The Institutional Framework

11. To the very limited extent that norms exist for the protection of human rights in Myanmar, under the current institutional framework they cannot be enforced except in certain types of cases that correspond with state policy. The main features of the institutional framework that prohibit enforcement are the militarized functions of the police force, resulting in routine and systemic human rights abuses, and the non-independence of the judiciary.

12. The police force in Myanmar has two broad functions that correspond with those of other forces around the world. First, it secures public order, and second, it investigates crime. However, in Myanmar it does not perform these functions as a discrete professional civilian force but as a paramilitary and intelligence agency under command of the armed forces. Policing functions are also shared among 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 a government-organized mass group. At the same time, specialized 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. The annexe to this submission contains examples to illustrate and support each of these points, as well as for those in the next paragraph, on the judiciary.

13. 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. Some of their features include:

- a. Closed and unreported trials: The law ostensibly guarantees open trial, but politically-motivated cases are tried in closed courts inside prison facilities. Ordinary cases are held in public; however, a lack of media reporting and the enclosed character of the judiciary mitigate the usefulness of open trial even where it occurs.
- b. Procedurally-incorrect cases: Breaches of legal procedure are routine in all types of cases. In politically-motivated cases, breaches occur because of the imperative to arrive at predetermined verdicts; in ordinary cases, because of the general debasement of the judiciary under the un-rule of law and because of endemic corruption.
- c. Evidence-less cases: Accused persons in criminal cases in Myanmar are routinely imprisoned without evidence for the same reasons that cause procedural incorrectness.
- d. Denial of defendants' rights and targeting of defence lawyers: The denial of the right to a defence occurs in two forms. First, defendants are unrepresented in court either because they are unable to afford or find a lawyer or do not know what one is (see 2009 report of the Special Rapporteur, A/HRC/10/19, para. 20); or because despite their efforts to obtain a lawyer they are denied one. Second, defendants are represented in court but the lawyer is unable to present the case in accordance with law. The judge may deny requests to call witnesses, deny cross-examination and threaten to or in fact take disciplinary or legal action against the attorney, by way of suspension or revocation of license, or threat of imprisonment for contempt of court.
- e. Lack of means for redress: There are no effective means for redress to victims of human rights abuse through the courts in Myanmar, other than in certain types of cases that correspond with State directives, such as under the Anti-Trafficking in Persons Law. In these cases, the courts are effectively performing an administrative function, not a judicial one, by implementing policy that has been written into law. Where law does not correspond with policy, courts do not enforce it. Consequently, many legitimate complainants are instead themselves made the targets of counter-complaints and prosecution by state agents.

## V. TWO MAJOR OBSTACLES

14. Two major obstacles to the implementation of human rights in Myanmar are the political perception that the rule of law is an executive function, and the profound level of corruption throughout the entire State apparatus, including the courts and police.

15. Since 1962, the perception of successive governments in Myanmar has been that the role of the judiciary is not to protect rights but to enforce State policy. Some examples of statements by officials during the last four years to this effect are contained in the annexe (see also Schedule I of the 2008 Constitution in the annexe). The rule of law is shorthand for the State's use of law and institutions of law to achieve whatever ends suit its purposes. It does not constitute a normative basis for the building of a regime of rights. Nor does it signify the supremacy of law, or even adherence to law. Because this perception overrides specific qualities of the normative or institutional framework, it would be wrong to attribute to specific laws or agencies the authority to implement certain human rights. 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 itself feel beholden to those laws or institutions. Where its superior imperatives coincide with law, there is superficial coherence between policy and legality. But where superior imperatives contradict law, they override it and the underlying incoherence in the system is manifest.

16. The systemic incoherence that is an attribute of the un-rule of law in Myanmar engenders another major obstacle to the implementation of human rights: systemic corruption. Some brief examples of how corruption is embedded in the workings of ordinary courts and police stations around Myanmar are contained in the annexe. Successive governments in Myanmar, including the current administration, have themselves acknowledged the incidence of corruption either directly or indirectly, including in the judiciary. However, because this corruption is intimately linked to the un-rule of law that the government has formalised and institutionalised through the construct of rule of law as an executive function, it cannot be addressed in any meaningful way. On the contrary, anecdotal evidence points to its persistent increase with privatization of state enterprises and market-style economics in Myanmar.

## VI. A REALISTIC APPROACH

17. As substantive change to the situation of human rights in Myanmar will depend upon substantive political change, at present the Council has very limited means to get involved in the implementing of measures to protect and uphold rights there. The Council should acknowledge these limitations rather than make unrealistic proposals and issue recommendations that will not be implemented for want of an enabling environment, or that will give a false appearance of progress.

18. The Council should use the Review process to study how it can better understand and devise responses to the systemic features of the un-rule of law in Myanmar. Despite copious amounts of documentation narrating abuses of rights in Myanmar, the Council still has little detailed understanding of the institutional arrangements enabling abuse and the extent to which these are embedded in all parts of the State apparatus. It has practically no information on the endemic corruption that affects all institutions with which the Council is concerned when addressing questions of human rights implementation. The Council's continued support for the mandate of the Special Rapporteur assigned to the country is commendable, and successive mandate-holders have played an important role in outlining the features of abuse and some of the obstacles to a regime of human rights in Myanmar; however, the mandate is limited by the amount of time that each rapporteur can devote to it, the limited resources and support for the mandate, and the fact that each new mandate-holder has to acquaint himself with the country before engaging with the issues and concerned persons. Therefore, the Council should not be satisfied with limiting itself to the work of the Special Rapporteur or other Special Procedures, but consider how it can use these and other mechanisms to work better within and through the wider United Nations system, to apprise itself of the facts, and coordinate its activities with other parts of the system with a view towards substantive political change of the sort that must pre-empt any substantive change in the normative and institutional frameworks through which to implement human rights. Its strategy should take into account and be coordinated with initiatives on Myanmar in other peak bodies, including the General Assembly and the Security Council, as well as draw upon the work undertaken by a range of UN agencies within Myanmar.