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Joint written statement* submitted by the Asian Legal Resource Centre (ALRC), a non-governmental organization in general consultative status and the Lawyers' Rights Watch Canada (LRWC), a non-governmental organization in special consultative status and

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[17 May 2010]

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

Myanmar: The absence of minimum conditions for elections

1. The Government of Myanmar has this year issued a raft of laws and rules for the holding of national and regional elections for new parliaments under the army-prepared 2008 Constitution. The elections are expected late in 2010 but no firm announcement has been made and they could be postponed until any time in the future, as have so many other undertakings by the military government in Myanmar: the preparations for drafting the new constitution alone took over a decade to complete. Anyhow, it is widely acknowledged that the minimum conditions for free and fair elections are absent from Myanmar and whatever takes place this year or thereafter will not constitute an electoral process as understood in most other countries.

2. Although many groups and scholars have pointed to specific problems associated with the electoral process, the Asian Legal Resource Centre (ALRC) and Lawyers Rights Watch Canada (LRWC) are concerned to anchor these in the larger and deeper obstacles to social and political change in Myanmar. In this statement, we have chosen to draw the Council's attention to the absence from Myanmar of three basic minimum features of free and fair elections: namely, the absence of a judiciary; the absence of a normative framework for civil rights; and, the absence of opportunities for free speech.

3. The absence of a judiciary

a. Myanmar has no judiciary capable of performing the functions required of it to ensure fair elections. Without it, there is no agency capable of addressing and settling disputes arising from the electoral process.

b. The absence of the judiciary is manifest in the handling of an application from the National League for Democracy to the Supreme Court on 23 March 2010. This party won 392 out of 405 seats in the 1990 election, but then--as now--there was no judiciary capable of enforcing results. The party submitted a miscellaneous civil application to the court under the Judiciary Law 2000 and the Specific Relief Act 1887. It asked the court to examine provisions of the new Political Parties Registration Law 2010 that prohibit convicted serving prisoners from establishing or participating in political parties.

c. Whereas the 2008 Constitution prohibits convicted prisoners from being members of parliament, the new party registration law prohibits these persons from being involved in a political party at all. As the NLD has hundreds of members behind bars--and hundreds of others who could be detained, prosecuted and convicted at any time--its concern over these provisions is obvious. Nor is it the only party in this situation. The leaders of the Shan Nationalities League for Democracy, which obtained the second-largest number of votes in 1990, are also currently imprisoned; the Working Group on Arbitrary Detention has opined that their detention is arbitrary (Opinion 26/2008, A/HRC/13/30/Add.1).

d. The NLD's approach to the court was premised on the notion that the Supreme Court would at very least be able to entertain its plaint. But according to the NLD, the application did not even go before a judge. Instead it was returned by lunchtime on the same day with an official giving the reason that, "We do not have jurisdiction." Subsequently, an attempt to approach the chief justice directly was also rebuffed.

e. In some countries, courts without effective authority over matters that are technically within their domain go through the pretence of hearing and deciding on these things at least to impress on the government and public that they are cognizant of their responsibilities, even if they cannot carry them out, and still have a degree of self

respect that requires the keeping up of appearances. But the courts in Myanmar have lost even these minimal qualities of a judiciary. Therefore, it is no exaggeration to say that Myanmar is without a judiciary--at least as far as any planned elections are concerned--and that as a consequence the notion of an electoral process as understood elsewhere is in Myanmar an absurdity.

4. The absence of a normative framework for civil rights

a. The Government of Myanmar has set down in the new laws conditions for the forming of political parties that would have people associate in order to participate in anticipated elections, but nowhere and in no way is the right to associate itself guaranteed. While parties are required to have at least a thousand members to enlist for the national election--500 for regional assemblies--a host of extant security laws circumscribe how, when and in what numbers persons can associate.

b. The notion of association without the right to associate is manifest in the Political Parties Registration Law 2010, which has written into it references to some preexisting laws that circumscribe free association. According to section 12,

"A party that infringes [the law in the manner of] any of the following will cease to have authorization to be a political party: ... (3) Direct or indirect communication with, or support for, armed insurgent organisations and individuals opposing the state; or organisations and individuals that the state has designated as having committed terrorist acts; or associations that have been declared unlawful; or these organisations' members."

c. As in present-day Myanmar anybody can be found guilty of having supported insurgents, of having been involved in terrorist acts, and above all, of having contacted unlawful associations, the law effectively allows the authorities to de-register any political party at any time. The ALRC has documented many such cases. That of U Myint Aye is indicative. For founding a local group of human rights defenders and speaking on overseas radio broadcasts about what he saw in the delta in the aftermath of Cyclone Nargis, Myint Aye was arrested and accused in a fabricated bombing plot. The military tried and convicted him and two other accused in a press conference during September 2008; in November a court did so officially, handing down a sentence of life imprisonment.

d. The inherent denial of the right to associate in the party registration law speaks to the absence of any normative framework of civil rights, as understood in terms of international standards, from Myanmar. The right of association does not exist not only because of specific terms of law to prevent it but more importantly, because of the conceptual absence of any framework for rights at all.

e. The 2008 Constitution has confirmed that Myanmar citizens are expected to live in a rights vacuum. Whereas the notion of a constitution is to establish a normative framework under which the apparatus of state is supposed to operate, in this constitution rights are at virtually every point negated and qualified, including the right to associate. Under section 354 citizens have a "right" to form associations that do not contravene statutory law on national security and public morality: which can be construed to mean literally anything. This is a constitution without human rights norms. In this it is at least consistent with other aspects of the military government's project, in which democratic and rule-of-law concepts and institutions are consistently inverted and defeated.

5. The absence of opportunities for free speech

a. When the Government in Myanmar passed new laws and rules for the planned elections, it attracted a lot of interest in the global media. The only place where the

media did not pick up on the story was in Myanmar itself. Aside from official announcements and some articles in news journals iterating the facts as found in the state media, there was no analysis, commentary or debate.

b. The lack of debate was not because the persons writing and publishing periodicals did not want discussion, or even try to have some. Journalists had in fact interviewed experts and prepared articles that they had thought would be printable. But instead they were prohibited from analyzing the laws at all, or from saying anything about parties already registering for the ballot. The absurd situation thus arose of an election having been announced and the process of party registration begun without any information about it being given to the electorate.

c. The blackout on news about the electoral process is not merely a question of media freedom. It is indicative of the wider and more profound incapacity of people in Myanmar to communicate with one another, after half a century of military rule. Where internal communication is blocked for a long time, as it has been in Myanmar, it brings about all sorts of deep psychoses hidden under the surface of day-to-day life. As different parts of society are not able to communicate openly with each other, problems build up and fester. People become deeply frustrated and angry, and occasionally the frustration and anger burst out suddenly, as during the nationwide protests of 2007. At such times, when the authorities use force to bring people back under control the problems are again submerged and worsened.

d. Under these circumstances, the type of controlled communication that the Government of Myanmar envisages for the anticipated elections is not a form of communication at all. It is a mere contrivance aimed at a different type of social control from what came before. In this way, the Government attempts to construct a debate in which the public is an onlooker and recipient of fabricated, sanctioned and sanitized views.

e. Constructed debate will, of course, do nothing to address or ease the deep afflictions in Myanmar society, nor address its tensions, nor contribute to the holding of meaningful elections. In fact, it will only make things worse. Until there are enough opportunities for open communication, the possibility of some kind of democratic government emerging in Myanmar is zero. And if there is no significant political change--not the type of superficial engineered change which the armed forces are planning--there can be no hope of any significant change in the country's appalling human rights conditions, which have been documented now for over a decade by successive Special Rapporteurs on human rights in Myanmar, and numerous other agencies and individuals both inside and outside the United Nations for longer still.

6. In light of the above, Myanmar's planned elections can be nothing but an elaborate farce, following on from the referendum on the new constitution that coincided with the biggest natural disaster to hit the country in living memory. If indeed the Government of Myanmar were sincere about the elections it would start by, at an absolute minimum:

a. Releasing all prisoners of conscience, allowing all persons to engage actively in the electoral process, and permitting the International Committee of the Red Cross access to all detention facilities in accordance with its international mandate.

b. Announcing the dates of elections sufficiently far enough in advance to allow all parties time to prepare and engage in campaigning.

c. Guaranteeing that all media outlets are free to print any news and analysis concerning the electoral process and ceasing requirements that they submit copy for scrutiny and censorship prior to publication.

7. Some problems associated with the electoral process indicated above, notably those of the judiciary and the 2008 Constitution, will take much longer to address than the interim between now and the planned elections allows. But if obvious, feasible, immediate steps like the three indicated here cannot be taken then there can be no reason to expect that far more intractable aspects of the anti-human rights government in Myanmar will be addressed any time soon. Under these circumstances, we also need to question the limits of international pressure on Myanmar for change, and strategies and approaches that the Human Rights Council ought to take. This question is the subject of a separate written submission from the Asian Legal Resource Centre to the Council's 14th session.
