P.O. Box 144, Mae Sod Post Office, Tak Province 63110, Thailand; Tel/Fax (66) 055-542910
E-mail: blcsan@ksc.th.com; Website: www.blc-burma.org

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DEMANDING JUSTICE

Legal Analysis Statement: Accepting Statements Made Before Police or Military Intelligence in Court Violates the Principle of an Independent Judiciary

Part 1 of an ongoing legal campaign to reveal how Burmese judges are undermining a fair judicial system and to hold those judges accountable for their disregard of the law.

For more legal comments, please contact U Myo (Phone: (66) (0) 862160108), Coordinator, Legal Analysis Section, Burma Lawyers' Council.

Demanding Justice

1. An essential part of justice is finding the truth. Only with the truth can a fair and just decision be made according to the law. Justice cannot be attained if it is based on untrue facts. The main duties of judges are to reveal the truth, ensure that proper evidence is admitted, and obtain authentic testimonials in court. The courts play an important role in revealing true and complete evidence and developing facts during the hearing of a case. By weighing the submitted evidence and facts, a court can see more clearly how the case should be decided in accordance with the law. Thus, the evidence and facts are essential to the proper functioning of the judiciary.

2. The judicial rules in Burma have completely changed. Before the announcement of the ruling in the "Union of Burma vs. U Ye Naung and 2", statements made before the police or military intelligence were not accepted as evidence in court. But in order to easily put opponents in prison, the court that issued the U Ye Naung ruling accepted the statements made before the police or military intelligence as admissible evidence. With a clear bias for the military regime's wishes, opposition members have been imprisoned with reference to this ruling, which violates the applicable law. The judges themselves were violating the law and thus destroying the rule of law foundation.

These violations can be seen clearly in the following legal analysis statement.

Legal Analysis Statement

Accepting Statements Made Before Police or Military Intelligence in Court Violates the Principle of an Independent Judiciary

1. The Union Judiciary Act, Burma Code, Vol. 1, p. 182 and 1950 Burma Code, Vol. 1, p. 198, were prescribed to establish an "independent judiciary" in Burma. There were opportunities to implement an independent judiciary. These Acts were withdrawn, however, by the Burmese Socialist Program Party government on 26 January 1974 under Law No. (13/74) of the Council of People's Justices. As a result, the independent judiciary disappeared.

   More recently, the SPDC military regime announced Judiciary Law (Law No. 5/2000) on 27 June 2000. An "Independent Judiciary according to the Law" was prescribed in Chapter 2, Section (2)(a) of this law. But the case of "Union of Burma vs. U Ye Naung and 2" is neither in accordance with the prescribed laws nor with an independent judiciary, and thus violates the basic principles of the judiciary. It strongly attacks and endangers the independent judiciary.

2. **"Union of Burma vs. U Ye Naung and 2", 1991 Burma Ruling, p. 63 (Full Bench)**
   In this ruling, the Supreme Court of Burma first completely acquitted the defendants based on Evidence Act Section 24. A Special Appeal in front of the full bench of the Supreme Court was made as a result of Chief Justice U Aung Toe's decision to review the case in accordance with Investigation Procedure Paragraph 17 of Special Appeals Procedures by the Chief Court Plenary Bench, as issued by the Office of the Attorney General. The acquittal order for the U Ye Naung case was issued on 13 January 1989. The procedural rules for special appeal with the Plenary Bench were issued on 10 December 1989.

Re-examining a case in which the defendants were acquitted on 13 January 1989 with the procedure of Special Appeal of Plenary Bench issued on 10 December 1989 clearly violates the basic judicial principle that laws "must not have retroactive effect". The year of this ruling was definitely 1991 ("1991 Burma Ruling, p. 63 (Full Bench)"). This retroactive effect breaches fundamental legal principles and thus violates the law. Eventually, there will be no independent judiciary.

3. The decision of "Union of Burma vs. U Ye Naung and 2" provided that the statements made by the defendants in front of the military intelligence did not clearly indicate that there was persuasion, threatening, or promising involved, as mentioned in Evidence Act Section 24, and so there was no reason to reject the statement.

   If the defendants were obliged to make the statements due to the military intelligence's persuading, threatening or promising, under Evidence Act Section 24 the government clearly could not use the statements as evidence in court. The Director of the Attorney General's Office, however, agreed to make a Special Appeal which resulted in the two defendants being found guilty and punished.

   The declarations made before the military intelligence officers were used to convict the defendants. The following rulings show clearly that the judge's decision to admit the declarations was incorrect.

   - The case of "U Sein Tun and Union of Socialist Republic of Burma", 1980 ruling of Ma Ta Sa (Central Court), page 13, states that a statement made in front of investigation personnel cannot be used as evidence in examination of a witness or defendant, as is prescribed in Criminal Procedure Section 162.

   - In the case of "U Min and the Union of Socialist Republic of Burma", the police summoned U Min, handed him over to Kha La Ra (62) and began an investigation into his activities by the order of Army Sergeant Kyaw Sein. U Min's confession was not given in front of the judge but rather was made in the police detention center. Therefore, this confession cannot be used as evidence according to Evidence Act Section 26. This ruling was stated on page 22 of 1977 Ma Ta Sa (Central Court).

4. By making a Special Appeal that argued that the defendants did not clearly show persuading, threatening or promising during the interrogation, the Office of the Attorney General was asking for the high court to apply the Special Appeal law retroactively.

   The Evidence Act does not provide that the defendants have the burden of proof to present the persuading, threatening or promising by the police or military intelligence as evidence. Evidence Act Section 102 provides that the prosecutor always has the burden of proof in criminal cases.
   - "Mg Yay and Ma Mae Htin" (1962 Ma Ta Sa – Chief Court - 304)
   - "Kamalar Sen and U C Paul (1970 Ma Ta Sa – Chief Court - 116)
   - All precedence has followed the principle of Evidence Act Section 102.

5. It was not proper to present the evidence of the declarations since they are inadmissible under the Criminal Procedure Code and Evidence Act. They cannot be

admissible by force. In Evidence Act Section 4, "shall presume" means "whenever it is directed by this Act that the Court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved." The court was wrong to presume that the Attorney General's argument that the defendants could not present evidence regarding the persuading was true. The law provides protection against this type of argument made by the prosecutor.

Evidence Act Sections 24 - 30 provide the circumstances under which a confession of a defendant can be used as evidence. In Evidence Act Section 26, it is clearly prescribed that the confession of the defendant in a police detention center cannot be used as evidence.

In recent interrogations, not only ordinary threats but also life-endangering conditions are used by the Director General of People's Force and in the military investigation centers. Examples of this can be seen below.

- Ko Aung Hlaing Win of Kamaryut Township, Rangoon Division, was beaten to death and seven of his ribs were broken into pieces while being interrogated in the military interrogation center.

- Ma Nyo Kyi (age 28), mother of an eight-month old child, from Yaytarshay Township, Pegu Division, was tortured to death in Myohla Police Station on 18 July 2006 at 14:30 hours.

- Ko Myint Thein of Maubin Township, Irrawaddy Division, was called to the Pantanaw Police Station to check a guest list and was murdered there.

From these examples, it is obvious that government interrogators not only resort to ordinary threats, but also murder, when interrogating defendants.

6. There are regulations for the police officers and military intelligence to prevent them from using shortcuts when investigating a crime and to stop them from abusing their power when the defendant is in their custody. For example, Criminal Procedure Section 162(1) provides: "An interview given in front of the police cannot be used as evidence". Criminal Procedure Section 343 provides: "An authority's power cannot be used to persuade the defendant to produce a statement". Also, Criminal Procedure Sections 164 and 364 provide a procedure for documenting a confession in writing when it is made before a judge, in order to avoid an appearance of persuading, threatening or promising.

   Evidence Act Section 26 requires that "the defendant cannot be sentenced with a confession made in front of a military officer during police detention". The examples of this ruling can be seen in the following cases:
   - "Mg Thein vs. Union of Burma" - 1966 Ruling - page 158
   - "Mg Myint vs. Naingantaw" - Volume II, Rangoon – 31
   - "Mg Pein vs. Union of Burma" - 1953 Burma Ruling (Chief Court of Justice)

7. According to the Criminal Procedure Code, all investigations must be done by police officers. Nowadays, investigations are not made in the police station anymore, but rather are handled by military intelligence. The investigation documents are then

handed over to the police. At no time have courts ever accepted these as official documents legally admissible as evidence. There is no precedence for using these documents as evidence.

In the U Ye Naung case, Chief Justice U Aung Toe based the ruling on evidence that did not comply with the Evidence Act and Criminal Procedure Code. He abused his power to satisfy the military regime. Due to the precedence that this case and other subsequent cases set, the courts will have to allow confessions made in front of the police or military intelligence as evidence. Other cases have been investigated and adjudged referring to this ruling. The police documents have now become evidence in judicial proceedings. The pleaders, lawyers and counsels are failing to function independently, according to the law. Justice and independence have vanished. The following cases have been adjudged referring to this ruling:

- Deputy Constable Than Win vs. Zanimarbiwuntha (a) Soe Thein and 23. 84/2003 – Mandalay Division Court
- Constable Mg Than vs. Khaymarsarya (a) Kyaw Shein and 23. – 86/2003 – Mandalay District Court
- Deputy Constable Ye Nyunt vs. Yi Yi Win and 3 – 74/2004 – Western Division Court (Rangoon)
- Deputy Constable Hla Myint vs. U Aye Kyu and 4 - 23/2000 – Rangoon Division Additional (4)
- Deputy Constable Ye Nyunt vs. Aung Gyi and 2 – 1347/2004 – Insein Prison Special Court
  (These cases were received from Assistance Association for Political Prisoners – AAPP.)

All of these cases were adjudged by referring to the U Ye Naung ruling and thus also ignored the applicable laws, were investigated unjustly and unjustifiably punished defendants.

The Chief Justice of the Supreme Court, U Aung Toe, has to obey natural law and the role of the judiciary. Ordering the use of the statements made in front of the military intelligence as evidence in the court and the subsequent judgment is truly a black spot in the history of the Burmese judicial system. The judges in effect have lost their neutrality; they have become joint or additional parties in the abuse cases committed by the military intelligence and the police. The independent judiciary has deteriorated. This ruling shows that the judiciary is clearly biased in favor of the military administration.

8. The 6th Conference of the Chief Justices of Asia and the Pacific, held in Beijing, China in 1995, issued a "Statement of Principles of the Independence of the Judiciary". The Chief Justice of the Supreme Court of Burma, U Aung Toe, attended the conference and signed this statement. According to this statement, "the Judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law <u>without improper influences, direct or indirect, from any source</u>". The judiciary must be totally absent of any biases.

   Now, U Aung Toe himself has violated the Criminal Procedure Code and Evidence Act by issuing the ruling of "Union of Burma vs. U Ye Naung and 2". The ruling is based on the confessions made in front of the military intelligence and police. This is

an attack on the entire independence of the judiciary. It is also a breach of the Beijing Statement that U Aung Toe signed. Although the U Ye Naung ruling was issued before the Beijing Conference, the legal principles that it established have been followed in numerous cases (listed above) decided after the date of the Conference. To fulfill his commitment to the Beijing Principles, U Aung Toe has a duty to vacate the U Ye Naung ruling and all the cases that relied on it.

The Burma Lawyers' Council demands that the Chief Justices of the Asia and Pacific regions hold Chief Justice U Aung Toe accountable to the Principles to which he agreed. Those who implement justice issue this notice to assist in the development of an independent judiciary.

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Burma Lawyers' Council