



LawKa PaLa

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**WISDOM IS POWER TO TRANSFORM A SOCIETY INTO
A JUST, FREE, PEACEFUL AND DEVELOPED ONE**

Legal Journal on Burma



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Part A: On Sham National Convention and Analysis on SPDC's Constitutional Principles

(1) A CRITIQUE OF THE SPDC CONSTITUTIONAL PRINCIPLES¹

This paper provides a critique of the proposed constitution that has emerged from the *National Convention* process in Burma (Myanmar).² The Constitution will be referred to as the 'SPDC Constitutional Principles', on account of the fact that the military junta, the self-claimed *State Peace and Development Council* (SPDC), has dominated the drafting of this constitution and sidelined all other political voices.

Burma has lacked a constitution since 1988 when the former reincarnation of the SPDC, the State Law and Order Restoration Council (SLORC), abrogated the 1974 Constitution. Certain political observers inside Burma say that at least having a constitution – regardless of whether it is the best one or not – is better than having none at all.³ Such commentators believe that if a constitution emerges from the current National Convention process, then it would inevitably bring some, rather than no, advantages. As a result, the country would emerge from its dire straits.

This paper offers a counter-argument to the above viewpoint. Based on an analysis of the SPDC's constitutional principles and the substantive flaws found within, it is argued that this model should be discredited as a constitution worthy of adopting. More specifically, the military junta's dominance of the three arms of government, the lack of separation of powers, and the failure to genuinely guarantee basic human rights, provide sufficient grounds to reject the SPDC's proposed constitution.

I. An Ideal Constitution



U Aung Htoo analysed on SPDC's Constitutional Principles

It is instructive to start by asking what a constitution is, and what purposes it should serve. For the purposes of this paper, a constitution is defined as: "A system, often codified as a written document, that establishes the rules and principles that govern an organization or political entity. In the case of countries, this term refers specifically to a national constitution defining the fundamental political principles, and establishing the structure, procedures, powers and duties, of a government. Most national constitutions also guarantee certain rights to the people."⁴ In other words, only when the constitution carries such fundamental provisions that grant rights and define governmental power, would it be better for a country to have one. Such a constitution would function to repeal any repressive laws that already exist, and similarly ensure that any legislation passed after the constitution is enacted, is not inconsistent with it.

A constitution should be formulated on the following grounds, all of which collectively embrace past, present and future concerns:



- Recognizing historical events and problems;
- Ascertaining the causes of problems presently facing the nation;
- Laying foundations for dealing with future problems.

A constitution carries the destiny of a country's future. It should be an authoritative legal document that is reflective of lessons learnt in order to help bring about good governance, peace and stability for the people in the future. Most importantly, a constitution should be a primary mechanism to facilitate the peaceful resolution of conflict. It should have the effect of promoting the positive development of society and the country as a whole, and not be an instrument for justifying violence and repression.

Protection of Basic Human Rights

In selecting several provisions that ostensibly protect the basic human rights of citizens, it is evident that the wording operates in such a way to allow for those protections to be undermined by existing repressive laws. This can be illustrated by Principle 35:

SPDC Constitutional Principle 35 addresses the liberty of a person:

“No citizen shall, except matters on precautionary measures taken in accordance with law for the security of the state or prevalence of law and order or the peace and tranquility and interests of the people or matters permitted under an existing law, be held in custody for more than 24 hours without the remand of a competent magistrate”.

On first impressions, this provision appears to guarantee the security of the private person and seems to be reasonable. On closer analysis, however, there is a reservation about the custodial requirements which states, “except...permitted under an existing law.” This is known as an *exception clause*, and means that if a relevant existing law can be applied, then a person may be held in custody for more than 24 hours without the remand of a competent magistrate.

In present day Burma, there are several laws which restrict the liberty of a private person, and it is these such existing laws that would almost certainly be invoked. For instance, the *1975 State Protection Law* is the one of the most abusive laws as it allows for a person to be held in custody for up to five years without any charge or trial. Burma's democratically elected leader, Daw Aung San Suu Kyi, is currently being held under house arrest pursuant to this law. Were the SPDC constitution to be enacted, this law would remain in force and therefore a person's right to a trial, and right not to be held in arbitrary detention, would be violated.⁵

The next area for examination is how the SPDC Constitutional Principles deal with other civil and political liberties, namely the freedom of expression, freedom of association, and freedom of assembly.



SPDC Constitutional Principle 10

“There shall be liberty in the exercise of the following rights subject to the laws enacted for State security, prevalence of law and order, community peace and tranquility or public order and morality:

- a) The right of citizens to express freely their convictions and opinions;
- b) The right of the citizens to assemble peacefully without arms;
- c) The right of the citizens to form associations and unions;
- d) The right of the citizens to develop their language, literature, culture they cherish, religion they profess, and customs without prejudice to the relation between one national race and another, or among national races and to other faiths.”

This provision is very important in terms of measuring the degree of political freedom that Burmese people would be permitted. From a superficial reading, it seems that all the rights in question are clearly mentioned and that a constitutional guarantee is provided. Yet, on closer scrutiny, there is once again, an exception clause. While stating that citizens shall have the rights of freedom of expression, freedom of association and freedom of assembly, those rights will not be available if their exercise conflicts with the “laws enacted for State security, prevalence of law and order, community peace and tranquility or public order and morality.” Put simply, citizens can demand those constitutionally guaranteed rights only when the exercising of those rights does not conflict with the broad range of abusive laws which the SPDC regime has enacted at its whim.

It is instructive to compare Principle 10 with a similar provision in Burma’s 1974 Constitution.

“Every citizen shall have freedom of association, freedom of assembly and procession, freedom of speech, expression and publication to the extent that the enjoyment of such freedom is not contrary to the interests of the working people and of socialism”.⁶

Following the enactment of the 1974 Constitution, workers demonstrated in the streets for an increase in state-issued rice rations. This public action was made by the workers in the belief that it was their constitutionally guaranteed right to assemble and express themselves in such a way. Nevertheless, the Ne Win regime cracked down on the demonstrators with armed violence, claiming that their actions were unconstitutional as they were contrary to Socialist beliefs.

Owing to the broad scope of the exception clause in SPDC Constitutional Principle 10, it is anticipated that even more severe restrictions will be imposed on the people of Burma than the 1974 predecessor. This point is best made with reference to the existing laws which are certain to be included in the interpretation of laws that are “enacted for State security, prevalence of law and order, community peace and tranquility or public order and morality.”

- Emergency Provision Act 1950
- Printers and Publishers Registration Law 1962



- State Protection Law 1975
- Law relating to Formation of Organizations 1988
- The Television and Video Law 1985
- The Motion Pictures Law 1996
- The Computer Science and Development Law 1996
- Law Protecting the Peaceful and Systematic Transfer of State Responsibility and the Successful Performance of the Functions of the National Convention against Disturbance and Oppositions 1996

This raft of legislation is Draconian in nature, and will remain in effect following the putative enactment of the SPDC Constitution. The resultant effect will be that such laws will severely curtail the people of Burma's rights to expression, association and assembly.

Legislative Bodies

Section 1 of the SPDC Principles on the Legislature states the following:

"The legislative power of the State is apportioned to the Union Assembly [People & National Assemblies]; the Regional Assemblies; and the State Assemblies."

Meanwhile, the size and composition of the various legislative bodies are designated as such:

- Out of 440 representatives, 110 military personnel nominated by Chief of Staff of the Defense Forces will be members of the People's Assembly.
- Out of 224 representatives, 56 military personnel nominated by Chief of the Staff of the Defense Forces will be the members of the National Assembly.
- Military personnel, submitted as representatives by Chief of Staff of the Defense Forces, whose number shall be equal to one third of the number of representatives, will be members of the Regional and State Assemblies.

There is a clear abrogation of the principle of popular sovereignty, despite SPDC claims in the alternative. The SPDC has in effect decreed that i) military representatives will occupy one quarter of the seats in Parliament; ii) former military personnel and their cronies may also be elected as civilian representatives; iii) representatives of the Union Solidarity and Development Association (USDA), which is similar to Indonesia's Golkar Party,⁷ will participate in the election and occupy seats in the Parliament.

With the legislature weighted so heavily in the military's favor, any attempts made by elected civilian representatives to repeal unjust laws and enact just laws will surely be defeated.



Lack of Civilian Access to Law Making Processes

Since the military coup in 1962, all legislature processes have taken place behind closed doors. From 1962 – 1974, the military-constituted *Revolutionary Council* made the laws, while from 1974 – 1988, law-making was held under the tight reins of General Ne Win's Burma Socialist Programme Party (BSPP). While Members of Parliament were elected, they were effectively silenced under forced adherence to BSPP ideology.

The present situation is not so different. While an Attorney-General's Office exists, its function is simply to draft laws in strict accordance with directions handed down by the SPDC. There is still an absolute dearth of publicly accessible information about the law-making procedures.

Under the SPDC Constitution, the participation of the people of Burma in the law making process is systematically denied or excluded. As long as this is the case, there will be a stark deficit of laws which actually benefit the people, and the advancement of the country. Instead, laws that serve only to subjugate and repress Burmese people will persist.

The BLC submits that the following recommendations be integrated either in form or spirit into the Constitution of Burma, in order to encourage participatory democracy, accountability and transparency regarding the legislative process.

The legislative process should take into account the following:

- Members of the public should be able to raise questions or submit their opinions through avenues in the media;
- Civil society organizations should also be consulted about their opinions;
- Academics should also be able to present their research and findings;
- Public debates should be allowed in universities and other open forums;
- Judicial officers should have access to legislative bodies regarding creation of judicial laws;
- Persons with the relevant expertise and experience according to the law in question should be consulted. For example, laws enacted about HIV/AIDS, environment, and land;
- Film footage of parliament in session should be taken and broadcast publicly;
- Written records of what is discussed in Parliament (also known as the *Hansard*) should be maintained and publicly available.

There is no provision in the SPDC Constitutional Principles about the above practices. Without such safeguards to ensure that democratic governance is upheld, it is certain that Burma's law-making process will remain unfair and abusive.

The Judiciary

It is widely accepted that democratic societies should adhere to the following principle regarding officially appointed arbiters of the law: that the Judiciary must be



both independent and impartial.

Notwithstanding the SPDC Constitutional Principle that the Judiciary is to “Administer justice independently, according to law,” the reality is far different from that which is implied. The structural and political factors are not in place for the Judiciary to be properly independent, and accordingly, the Judiciary does not enjoy institutional independence from the interfering hand of the SPDC military government.

In an effort to ascertain the degree to which a Judiciary is independent, there are seven factors that should be considered: How the judges are appointed and by whom; whether or not judicial tenure is guaranteed; how the removal of judges from office is to be done; how the remunerations and the compensation of judges are managed; how the budget for administering justice is allocated; how the laws which govern the justice system are enacted; and, how much power the courts are entitled to.

Appointment of the Chief Justice of the Supreme Court

The 1947 Constitution of Burma states the following three elements as necessary in the appointment of the Chief Justice:

- The advice of the Prime Minister;
- The approval of both chambers of parliament in joint sitting;
- Appointment by the President [whose role is ceremonial].⁸

The matching provision in the SPDC Constitutional Principles states that:

- The Chief Justice is to be appointed by the President [who will exercise full executive power];
- With the approval of both chambers of parliament in joint sitting;
- The Parliament cannot reject the Chief Justice nominated by the President unless the Parliament can provide evidence that the Chief Justice should be disqualified for the position.⁹

A brief comparative analysis between the 1947 Constitution and SPDC provisions illustrates the deficiencies in the latter in terms of securing independence and impartiality for the Judiciary. The 1947 Constitution provided a strong degree of judicial independence, and the appointment of the Chief Justice was no exception. Appointments were made by President on the advice of the Prime Minister, and with the approval of both chambers of parliament in joint sitting. The Prime Minister was not authorized to appoint the Chief Justice as [s]/he was charged with exercising supreme executive power. In other words, appointments were made not by the Executive but by the President.

While the 1947 system of a President-appointed Chief Justice seems to be the same as the SPDC proposal, they are markedly different in practice. Under the 1947 Constitution, the President is merely the ceremonial head of the state and does not exercise Executive power. By contrast, the SPDC constitutional principles call for the



Chief Justice to be appointed by a President, who is also the Head of the Executive with full powers.

Moreover, the composition of the Parliaments under the 1947 and SPDC constitutions differ significantly. While the former comprises members of parliament who are elected directly by the people, the latter requires that 25 percent of the members be appointed directly by the military. A striking difference is that under the 1947 Constitution, Parliament was able to hold free and open debates about the appointment of the Chief Justice. Under the SPDC constitutional principles, Parliament is restricted from debating any topic other than whether there is sufficient proof for disqualifying the Chief Justice. Exactly what conditions must be met in order to prove the case for disqualification is left unclear. It is arguable that the SPDC constitutional principles allow the President broad enough powers to appoint a Chief Justice according to whatever grounds suit him/her.

Removal of the Chief Justice

1947 Constitution

- The removal of the Chief Justice must be informed formally with the signature of one-quarter of the members of parliament;
- The charge on the Chief Justice must be taken into consideration only when half of the parliament members who attend the meeting approve it.

SPDC Constitution

- The President shall submit his proposal for impeachment to the Union Assembly
- For any of the following reasons:
 - Commission of high treason;
 - Violation of any provision of the Constitution;
 - Gross misconduct.

Clear safeguards exist for a fair process of dismissal of the Chief Justice pursuant to the 1947 Constitution, such as ensuring at least 25 percent of parliamentarians agree formally to the decision and that at least 50 percent of parliamentarians who are in attendance when the decision is taken approve it.

By contrast, the SPDC principle vests the President - just one individual - with the executive power to propose the termination of Chief Justice's term of office. Moreover, it may be done on such nebulous grounds as "high treason" and "gross misconduct." This begs the question of just how widely these terms should be interpreted and applied. What kinds of action can be called "high treason"? As there are no guidelines or explanation in the SPDC Constitutional Principles, it may be concluded that the chief justice will always be under the threat of dismissal by the



President, and would be required to keep favor with the President in order to retain his/her position.

The Executive

The next focus is the Executive chapter of the SPDC constitution. A serious problem is that the SPDC's legal advisors (including the Supreme Court Chief Justice), who have a major responsibility in conducting the National Convention, have never consulted the delegates about different forms of government that could be adopted.

In basic terms, there are two main institutional forms of government:

1. Parliamentary system (principle of representative democracy)

- The party which wins the majority of seats in the parliament can form the cabinet;

- The executive body is led by the Prime Minister who is elected by the winning party, and not by direct popular vote.

2. Presidential system (principle of direct democracy)

- The candidate who won the majority votes in the presidential election, together with his/her party, forms the government;

- The President is elected by direct popular vote and leads the Executive.

Under the presidential system of government, the roles of the President and the parliament are separated. The parliament's task is to make law and the President's task is to exercise executive power. The Presidential system works effectively in countries where there are some well developed structures in place, such as civil society organizations, media, political watchdogs, and a relatively high level of political awareness amongst the public. For example, the United States practices a very robust form of government using the presidential (also known as a congressional) system. A large proportion of countries in the so-called developing world (approximately 33 countries), and especially in Latin America, which have instituted the Presidential system, have ended up in chaos, violence and civil war. A common problem is that the parliament could not check and balance the power of the President.

Under a parliamentary system of government, the Prime Minister is not elected directly by popular vote but instead by the parliament from among his/her peers. Generally, the majority winning party forms the Executive body but this is not always the case. Even if the winning party occupies the majority of seats in the Parliament, it may give the Prime Ministerial role to a party which occupies fewer seats. An electoral system of proportional representation helps ensure Parliamentary representation of all political forces, regardless of the total numbers of ballots that each political party receives. Such a system will foster a political culture based on negotiation in the Parliament, resulting in the emergence of a united polity inclusive of Burma's diverse ethnic populations.



Concerns with the Presidential System for Burma

If the presidential system of government were to be instituted in Burma, there would be three key areas of difficulty:

1. Nationality problem: Which nationality would the President represent? Given that the country's population consists of a Burman majority along with a diverse group of ethnic minorities, the ethnicity of the President would have great significance and impact.

2. Predictable election outcome: Since the President is to be elected directly by popular vote, it is highly likely that the President will always be from the dominant political party that has the greatest number of members.

3. Political exclusion: A political party which is founded on the basis of a particular ethnic nationality would not have an opportunity to become a major political party. This would preclude an ethnic minority group from fielding one of their own candidates for President, unless they were co-opted by one of the dominant parties.

A Fabricated Electoral System: Deceiving the People

Almost all countries which practice the Presidential system elect the President by direct popular vote, regardless of potential problems. An outstanding feature of the SPDC presidential system of election is that there are no other countries in the world that use a similar one. Pursuant to the SPDC constitution, the President is not elected directly by a popular vote. Instead, the President is selected from one of the three different groups which make up the parliament, and one of these is a military personnel representatives group appointed by the chief of staff of the defense forces. The result is that the President is no longer accountable to the people, and accordingly the people can not control the actions of the President. This is certainly an unusual electoral system that has been designed to deceive and confuse the people of Burma.

The Presidential Election body will comprise three groups:

- 1) elected representatives of the National Assembly
- 2) elected representatives of the People's Assembly
- 3) military personnel representatives.

Each group shall elect one candidate and the President will emerge from these three individuals. The remaining two will become the deputy Vice-Presidents. Considering this, it is a certainty that a representative from the military personnel will become either the President or the Vice-President of the State. It is further problematic that an SPDC principle states that the status of the Chief of Staff of Defense carries the same status as Vice-President.

Additional structural concerns are as follows:

1) The SPDC Constitution states that only the President ranks above the Chief of Staff of Defense; and the Minister for Defense is ranked under the Chief of Staff of Defense. Constitutionally, the Minister for Defense should rank above the Chief of



Staff. Moreover, the SPDC constitution provides that military generals shall be appointed as Ministers in the following government departments: Defense Services, Security, Home Affairs, and Border Affairs. And of grave concern is that the President is also appointed to be the President of the Treasury Commission, which means that the military controls the financial management of the country.

2) The relationship between the Supreme Court and the President is also worrisome. In most countries with the presidential system, the Supreme Court has the ability to hand down a judgment that may over-rule a decision by the President. In the case of the SPDC Constitution, the reverse is true and the President has complete control over the Supreme Court.

Evidently, rigid centralization and continued domination by the military is clearly provided for in the SPDC Constitution.

Lack of Civilian Rule

A general analysis indicates that civilian ruled governance is absent from the SPDC constitution. Rather, the supremacy of the military is still evident. It appears that the SPDC constitution relies strategically on exercising divide and rule tactics over Burma's ethnically diverse population, which provides dim hope for the establishment of a harmonized society. Acceptance of the SPDC constitution will likely perpetuate the worst centralized military rule in Burma's modern history. Given that the Chief of Staff of Defense is constitutionally recognized as the highest judicial officer in the military justice system, the life and destiny of the Army personnel will assuredly be in the hands of the Chief of Staff of Defense.

Lack of Incorporation of International Law

As the world becomes increasingly globalized, it is a matter of good foresight that all constitutions contain provisions relating to the means of adoption and implementation of international law at the domestic level. And yet there is no provision in the SPDC Constitution relating to the incorporation of international law. Instead, it allows the Chief of Staff of Defense Services and his subordinates to control the country according to their own will.

Denial of Emergence of Civil Society

In light of global environmental problems such as climate change, there are no provisions in the SPDC constitution relating to the effective protection of the environment. In today's media and information age, news agencies are serving people by distributing information and empowering them with knowledge and the capacity to solve problems through cooperation. And yet there is no provision in the SPDC Constitution relating to the importance of a free and independent media. Moreover there are no constitutional provisions that recognize the need for and value of civil society. At a bare minimum, the constitution should grant the existence and independent function of social organizations which, for example, provide aid to children, orphans, women, and HIV/AIDS patients, and that of environmental organizations.



No Rule of Law Foundation for Economic Development

The SPDC claims that political stability under a disciplined democracy will allow for the development of the country's economy. While this is not entirely untrue, as there is a connection between political stability and economic development, it is important to note that political stability can only be genuinely achieved if, and when, the rule of law exists. These ingredients provide a firm basis for economic development. To illustrate this point, Singapore may not be a fully-fledged democracy but since the rule of law is clearly in existence, its strong economy can be attributed in part to its democratic practices. China's situation is similar, particularly commencing from 1980. Another case in point is South Korea. From dictatorship to democracy, the economy moved from strength to strength as political stability and democratic practices based on the rule of law have taken root.

It is important to understand the development of a country's economy in connection with the existence of the rule of law. The collapse of Burma's economy has much less to do with the economic sanctions that are advocated for by pro-democracy groups, and much more to do with foreign investors withdrawing due to the desperate lack of infrastructure, namely inadequate energy sources, poor transportation and communication – all of which are essential for doing business properly. The inescapable culture of corruption and bribery were additional reasons why foreign business started to decline.

For example, the Singapore company *Yaung Chi Oo* operated its business inside Burma for approximately 4 ~ 5 years only to have the SPDC unilaterally seize the company in its entirety. The company was completely ruined and consequently withdrew from Burma. Following that episode, many foreign companies withdrew from Burma after taking stock of the negative experience of *Yaung Chi Oo*. These foreign investors' rationale was not about supporting democracy in Burma, but rather, coming to terms with the lack of rule of law which has detrimental effects on the country's economy and major industries. In spite of this, the SPDC constitution fails to include provisions which prevent such incidents from taking place again in the future. At the same time, approaching the issue of economic development from a labor rights perspective is also critical. Constitutional provisions that would allow for the domestic incorporation of International Labor Organization (ILO) Conventions do not exist.

Democratic Transition

When a country transitions from authoritarian rule to democracy, it is essential to have transitional provisions in the constitution to help provide guidelines and limitations. No such provision exists in the SPDC Constitution. Issues such as how to address the massive human rights violations of the past; resettlement of refugees, internally displaced persons, and migrant workers to their respective home towns; and how to provide remedies to those who have experienced forcible relocation, destruction of their villages, and land confiscation, all need to be broached. Provisions dealing with the disarmament of ceasefire and militant groups, and their transformation into legitimate civil society organizations are worthy of mention.

Moreover, constitutional provisions regarding the formation of essential institutions and mechanisms to help put the country back on track must be considered.



An independent human rights commission to protect people from human rights violations; and the establishment of an Ombudsman to supervise and inspect the performance of public servants, are two such examples. Others would include the establishment of an administrative court to impeach the governmental agencies if duties were improperly executed, and a constitutional (or federal) court to settle problems arising between different tiers of government, and also with political parties, in a federal system.



U Aung Htoo's concluded analyses on the SPDC's Constitutional Principles

Conclusive Analysis on the SPDC's Constitutional Principles

There are nine key reasons for why the SPDC Constitution is substantively flawed.

- Basic human rights are not guaranteed;
- Principles of equality and popular sovereignty are ignored;
- The rule of law, which is a major foundation for economic development, is neglected;
- Existing unjust laws will remain in force and more unjust laws will emerge;
- The Judiciary will be under the direct control of the Executive and justice will be denied;
- Self-rule and shared rule for ethnic nationalities will not be a reality;
- The Executive is the focal point of the Constitution and the President, together with the Chief of Staff of Defense Forces, will exercise rigid centralization;
- Governmental institutions which will balance the power of the Executive are absent;
- Military supremacy, rather than civilian supremacy, will be exercised.

It is almost certain that repressive laws, policies and institutions of the ruling military regimes will remain in force even after the putative adoption of a new SPDC constitution. Despite the SPDC constitution having already been in the drafting process for 14 years, self determination for ethnic nationality groups, and the guarantee of civil and political rights remain elusive. The SPDC Constitution will not help to resolve the long-running conflicts which exist within the society. Nor will it provide the fundamental principles for a genuine democratic state where human rights are respected and good governance may develop. On the contrary, it is highly plausible that the SPDC Constitution will serve to further ingrain the conflicts, and pull the people of Burma into deeper poverty. In turn, this may result in greater instability and the eventual collapse of the society.

* * * * *



¹ This analysis is based primarily on presentations given by U Aung Htoo, General Secretary of the Burma Lawyers' Council, in line with the guidance of the BLC Executive Board, at the "Burma in Diversity" Symposium held at Thammasat University on 5 August 2007, as well as at the National Council of the Union of Burma (NCUB) press conference on 15 July, 2007. Lin Lei, a volunteer lawyer from Australia, with the assistance of other staff attorneys at the BLC, contributed to its compilation.

² BLC refers to the country as Burma, rather than Myanmar, in recognition of the fact that the military government unilaterally changed the name of the country without any democratic consultation.

³ Such opinions were reported by Khun Myint Tun, National League for Democracy MP-Elect during the NCUB press conference on 15 July, 2007.

⁴ *Wikipedia Constitution* <http://en.wikipedia.org/wiki/Constitution> Accessed 12 August, 2007

⁵ Pursuant to the *Universal Declaration of Human Rights*, especially Articles 9, 10, 11. G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948)

⁶ The Constitution of Burma 1974, Article 157. See Burma Lawyers' Council website <http://www.blc-burma.org/html/Constitution/1974.html#cpt11>

⁷ The Golkar Party of Indonesia was the ruling party during Suharto's regime (1966 – 1998) and is the biggest party in Indonesian politics today. Besides being dominated by Suharto, it was also controlled by the Army, which allowed for it to pass legislation without any interference and form a Cabinet of Golkar-only members.

⁸ Article 141 of The Constitution of the Union of Burma (1947): "The Chief Justice of the Union shall be appointed by an order under his hand and seal, in consultation with the Prime Minister and with the approval of both Chambers of the Parliament in joint sitting."

⁹ Detailed Basic Principles for the Judiciary, Section 2(c)



(2) Brief Biographies and Comments of Exiled Parliamentary Members on the SPDC Sham National Convention Presented at a Press Conference Held at the NCUB Headquarters

Khun Mar Ko Ban

Khun Mar Ko Ban was elected as a Member of Parliament for Pekon Township in the 1990 multi-party elections, representing the Democratic Organization for Kayan National Unity (DOKNU). The DOKNU is part of the Union Nationalities League for Democracy (UNLD) alliance. He attended the sham National Convention organized by the State Law and Order Restoration Committee (SLORC) on 9 January 1993 as part of an elected representatives group. At the National Convention, NC procedures, by-laws, and rules for delegates concerning presentation in the convention were not distributed in advance.



a Press conference about the SPDC Sham National Convention

To his surprise, *Khun Mar Ko Ban* learned of the six basic principles of the State's objectives, namely (1) non-disintegration of the Union, (2) non-disintegration of national unity, (3) perpetuation of sovereignty, (4) emergence of a genuine multi-party democratic system, (5) emergence of democratic principles such as justice, liberty and equality, and (6) the leading role of the armed forces in the national politics of the state. This was like being force-fed a bowl of delicious biryani rice with a bottle of poison poured in. He could not accept the military's leading role in national politics. He also found in the rules to be observed by convention delegates that frank and open discussions or suggestions could only be done inside the framework of the objectives. For instance, a delegate can only present a paper in the Convention after receiving permission from the group head. Also, topics for consideration submitted by various groups have to pass through the Convening Working Committee, as if the Committee could solve all problems. Only a paper agreed to by the Convening Committee would be presented to the Convention. As a result of this process, *Khun Mar Ko Ban* pointed out, the Convention is merely a "paper-reading" session.

Of the nine administrative committee members, there is one representative from each of eight groups. They are all alternative administrative committee members and only the committee member sent by the Convening Working Committee is the true president of the whole Convention. The alternative administrative committee members have to obtain permission from the president to speak. As is evident from the above-mentioned facts, the sham NC called by the SLORC is restricting and blocking freedom of discussion by means of all kinds of laws and by-laws. *Khun Mar Ko Ban* strongly upholds and supports the principles of DOKNU, UNLD and the Bo Aung Kyaw Street Joint Declaration of the NLD and UNLD. Since he could not accept being a historical culprit and participant in the drafting of the constitution in the sham NC, he fled to Kayan New Land Party's revolutionary area while on the way to the second session of the NC.



He called a press conference at KNU's Manerplaw headquarters in a liberated area on 5 April 1993 to denounce the sham NC. Now he is resolutely fighting the SLORC/SPDC's seven-point Road Map.

Khun Myint Htun

Khun Myint Htun was elected as a Tha Hton Township Secretary of the National League for Democracy (NLD). In the 1990 multi-party elections, he was elected as a Member of Parliament from the Tha Hton constituency, representing the NLD. He worked as a member of the Mon State Lobbying group and a member of the Central Youth of the NLD in 1991. He attended the NC as a representative of the NLD. His assumption in attending the NC was that he could implement the NLD's policy of genuine national reconciliation and building of a future federal union. He was detained on 20 May and, on 20 August 1996, was imprisoned for 7 years in Ka Lay Prison for failing to report to Jean Shirt Journal. He was released on 1 August 2003. Subsequently, he resumed his duties in the Mon State Lobbying Group and as a member of the NLD staff. He took responsibility for communications between the NLD and ethnic nationalities (including the CRPP).

Khun Myint Htun and the Parliamentary Members attended the NC try to discuss their important demands but did not receive a response. He said that, from the very beginning, the NC has been a sham. This made him decide to permanently leave the National Convention.

Khun Ti Saung

Khun Ti Saung was one of the leaders of Shan State Nationalities People's Liberation Organization (SNPLO), which entered into a cease-fire agreement with the SPDC on 9 October 1994. They hoped that by entering into the agreement with the SPDC, they could build democracy, unity among the ethnic nationalities, equality and self determination. The referendum held before the cease-fire agreement was finalized indicated that the people welcomed the cease-fire and reminded their leaders not to repeat what happened in Pa-Ah-La-Pha in 1958.

No opportunities to advance their agenda have been given within the 13 years of their cease-fire with the military. In 1994, SNPLO representatives *U Khun Sein Shwe* and *U Aung Shwe Latt* attended the NC but were unable to represent their people's voices and position since they had to read aloud the papers written in advance by the military. In 2005, representatives *U Khun Sein Shwe*, *U Aung Shwe Latt* and *U Khun Ti Saung* attended the NC. They had prepared a paper regarding eight states but they did not get a chance to present it. The SNPLO was then put under pressure by the military regime and was not invited to the 2006 National Convention.

After evaluating their situation and their experiences, they realized that this sham NC aims to last longer the military regime's power and end the democratic movement. *Khun Ti Saung* has no faith in the SPDC's sham National Convention and knows that the military regime has no interest in restoring democracy in the country.



Saw Eddie Htwe

Saw Eddie Htwe was one of the nine representatives of Karen State attending the National Convention from January 1993 to 1996. He served in the Township Working Group at different levels of the People's Council until 18 September 1988. During the convention there were different topics for group discussion but they were never conducted in a democratic way. It was a centrally-controlled system like the Burma Socialist Program Party (BSPP) structure. The discussion was based on prepared papers and consisted of merely reading the papers instead of discussing them. Before discussing a topic the group had to get chair's permission. Since they were forced to agree against their will, drafting the basic principles in the National Convention was not a democratic process. There were no open discussions, evaluation, debates, criticism or recognition of the minority groups. The agenda and outcome of the NC are predetermined. Most of the representatives now attending the NC are in one way or another connected to the regime and their reason for attending is to protect their own interests so they can get business permits. *Saw Eddie Htwe* says that the effect of the 104 basic principles of the SPDC is to forcibly obtain the people's vote and continue to lie to the world. The military regime will continue to oppress simple farmers and the people of Burma. The real reason for creating the convention is for the military to last longer in power. The lawyers had to put together the military dominated convention that protects the regime. If the military had no weapons, a result approximating justice, truth, and equality would emerge from discussions in the Convention. The opinions of ex-army personnel are different from the ideas they had when in power. Now they sympathize with the people.

Saw Eddie Htwe served the dictatorship for nearly four decades and used his power in committing wrongs against the people. His remaining power should be used to further the emergence of true democracy, tripartite discussions and bravely revealing the truth. He does not recognize the legitimacy of the sham National Convention.

U Khu Shay Reh

U Khu Shay Reh was a representative of a farmer's group participating in the National Convention. He was appointed the Chair of the Executive Committee Secretariat of Kaya State Cooperative Association from 1989 to 1992 by the SLORC. In 1993, he served on the Organizing Commission of the Kaya State National Convention for one month. Based on the topics of the National Convention, he had prepared a paper to present in the Convention. Because he was not allowed to discuss or express the contents of the paper widely and independently, however, from a practical point of view he was prevented from presenting the paper. The paper was repeatedly edited until it was in line with the National Convention's objectives. Although the Chair said that the participants could openly discuss issues, in practice they had to merely read out the prepared papers. As a result, the Convention became a "paper-reading convention". *U Khu Shay Reh* believes that the National Convention does not represent the best of the country, especially the ethnic nationalities. He submitted a resignation letter to the National Convention, but the authorities refused to accept his letter and threatened him in different ways. In 1997, he left the country for the Thai-Burma border looking for a safe place. He served as a high school headmaster in Karenni Camp No.



1 from 2000 to 2004. He was then assigned as an Education Officer by his mother organization in 2005. At the same time, he became one of the Members of Parliament in the Karenni government. In 2006, he was the people's representative of the refugee camp. At present he is serving as the Chairman of the Karenni Refugee Committee.

Saw Ta Ru Too

Saw Ta Ru Too became a Member of Parliament for Phar Saung Township in the 1990 multi-party elections, representing the Ta-Sa-Nya Party.

The Karenni State was designated a black area as it is a place where the resistance movement began. The State also suffered from civil war even after Burma became independent. Under the Burmese Socialist Program Party (BSPP), he served as a Secretary of the Township Security Committee (TSC). Under the People's Council, he served as the Chair of the Township Council for three terms, for a total of twelve years. He was chosen as a Chair of the BSPP party unit in 1985 and thus attended the National Convention in 1985 until the 1988 Uprising as a representative of BSPP. The system used by BSPP is centralized. He entered the 1990 election as a representative of the BSPP and won the election due to his commitment to the people and what he had done for them for seventeen years. *Saw Ta Ru Too* stated that the present National Convention has been held for fourteen years and still has not finished. He believes that the Convention is like 'speaking from paper'. It does not respect the people's desire.

Saw Ta Ru Too disagrees with the Ta-Sa-Nya Party's policy and does not want to be historically infamous for contributing to the Convention. Thus, for his safety he traveled to the Karenni refugee camp in 1997.

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(3) THE NATIONAL CONVENTION THROUGH THE PRISM OF THE RULE OF LAW

By B.K Sen

The SPDC National Convention (NC) is now in its final stage, which means that subsequent steps in the road map are to follow. The 6 basic principles and 104 principles on which the constitution is to be drafted have been given a rubber stamp of approval. The constitution thereafter can be marketed as legitimate.

A few comments from the legal point of view are necessary to remind the powers that be that the entire proceedings of the National Convention are in violation of the rule of law and the universally accepted legal procedure followed in drafting a constitution. In the case of Burma, the matter is very simple as the rulers themselves had held the general election in May 1990. The NLD won a landslide victory. This historical event cannot be diluted or put on the back burner. The military junta stated there was no constitution. The prior need was to draw up the constitution, have a referendum and then hold elections to transfer power to the winning party. If there was sincerity in the junta's efforts, the only legal way to proceed was to declare that the winning members constituted the Constituent Assembly, and thereafter vest it with powers to frame its rules and evolve a frame-work compatible with rule of law. The Junta created a national convention dominated by its handpicked people and included a few of the winning members of the election. The NC was the birth of the junta's illegal child. To make the illegality more colorful, it clamped it with hundreds of restrictions, especially on freedom of expression. This is rule by men. But the rule of law has inherent components of freedom of expression. The Junta knows that the illegal evolution of its child, the NC, will devour it.

The evolution of the illegality of the NC is clear if we look at a few examples. Burma's neighbor Thailand is ruled by the military. But it has installed a civilian government. The constitution-making body allowed drafting of the constitution not by the military, but by a group composed of civilians. The political parties are free to function. There is free press and a time frame to hold elections. Similarly in Fiji, although there is a military dictatorship, a civilian government including the ex-Prime Minister has been put in place and a time frame to hold the election is fixed. In Bangladesh a civilian government rules even though the army is in control, and the constitution is in force. In Pakistan the parliament is functioning even though the head of the army is the chief of the civilian government. There is free press and a judiciary. No society under military dictatorship is so closed as it is in Burma. The rule of law is not a challenge to power if the power is judiciously shared and its source is the people's will. The junta had to unwillingly admit it into its basic principles. It has asked that one third of the



administrative power be exempted from election, with elections for the rest to be set. The army has been entrenched in its role in the governance of the country for decades. It has tasted power. Obviously it will create a power sharing arrangement that protects its security and maintains its powerful position. This basic conflict between the rule of men and the rule by law has to be resolved through dialogue and reconciliation. Otherwise the crisis between the army and the opposition will deepen. The ball is in the court of the army. It had talks with the opposition and great hopes were raised. Subsequently it took a u-turn when it detained the leaders of the opposition, giving some leaders fake trials and harsh imprisonment. Over 2000 political prisoners are detained in prison.

A new chapter has to be opened with at least a minimum respect for the rule of law. The State Protection Law must be abolished and the detained freed. The talks and dialogue have to be revived and the peace process continued. Further proceedings in the road map have to be suspended. A timely, agreed-upon process must be established. The National Convention can be revived after withdrawal of the law prohibiting organizations and the Publisher and Printer Law. The opposition hopefully will respond and negotiate easy terms for a peaceful transition through a constituent assembly election.

The NC was wrongly conceived as the instrument for restoration of the rule of law in Burma. Admittedly its main goal is to develop a constitution. The positive aspect is that the basis is the will of the people, but it has been negotiated in a manner in which the junta's vested interests are fully protected. That manner is unacceptable as it is against the very concept of the rule of law. The rule of law was thrown overboard in its constitution, deliberation and decision-making. The NC was not a representative body, deliberation was clamped with restrictions and decisions were formed as they always have been. As stated, a new chapter has to be opened. Much water has flowed down the Irrawaddy. Generations have come and gone. It is high time that all players think hard and a new road to reform and change is effected. There is no magic formula but there is a universally accepted yard stick for conflict resolution. That yard stick is the rule of law. The crucible of the rule of law shines light on all problems and shows what step to take. The old political system has to be replaced and a new one transplanted which will lead to growth and development and when that is based on the rule of law there is certainly trust and hope.

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(4) Cease fire issue and SPDC's National Convention

INTRODUCTION TO THE BACKGROUND OF THE KACHIN INDEPENDENT ORGANISATION (KIO) AND ITS INVOLVEMENT IN THE SPDC'S NATIONAL CONVENTION

The majority of the Kachin people live in Northern Burma as their own ethnic group and with their own leaders. When the British colonial government invaded this area in 1885, the Kachin lost countless lives fighting back for many years.

Under the organizing power of General Aung San, the leader of the Anti-Fascist People's Freedom League (AFPFL), the Kachin agreed to sign the Pinlon Agreement on 12 February 1947. Captain Naw Saing of Kachin Armed Force No. (1), dissatisfied with the political corruption and dishonesty of the AFPFL government with ethnic minority groups, established the Pawng Yawng National Defence Force (PNDF) on 15 November 1949. With the support of the PNDP force, Captain Naw Saing started revolting against the AFPFL government.

The AFPFL, however, incited an internal feud among the Kachin people in a manner inconsistent with PNDP objectives. The role of the PNDP ended with the arrival of Captain Naw Saing and 300 soldiers to China in 1950.

After 1950, the Kachin youth became more politically knowledgeable, and the "7 Stars", the pioneers of KIO, appeared. The 7 Stars were seven Kachin students from Rangoon University who prepared for an armed revolution in 1957. On February 5, 1961, the Kachin Independent Army (KIA) was established, together with the KIO headed by Duwa Zaw Saing, and the armed revolution emerged.

In 1975, with Bran Saing as its chairperson, the KIA was the main ethnic army in the National Democratic Front (NDF). In 1990, KIA Brigade (4), headed by Lieutenant Ma Htu Naw and based in Northern Shan State, surrendered to the military government. They then formed the Kachin Defence Army (KDA), based in Kaung Khar (Kachin Special Region 5), Kutkai Township, Northern Shan State.

On 24 February 1994, the KIO entered into a cease fire agreement with the State Law and Order Restoration Council (SLORC). In February 2001, the KIO leaders changed as a result of differences of opinions and views. In 2002, the Kachin Solidarity Council based in Pan War headed by Sa Khon Taint Yein was established. In the early months of 2004, Laban Aung War and some KIO soldiers had a difference of opinion and separated from the KIO.

At present, the KIO is attending the National Convention conducted by the SPDC. Whenever the KIO attends the NC, they explain their views and opinions to the Kachin populace in their controlled area. Some Kachin people do not support the KIO's attending of the NC.

When the SPDC's National Convention was held for the last time on 18 July 2007, the KIO submitted their 19 point request to the National Convention.

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Additional factors to be provided for in the State Constitution
Submitted by KIO Central Committee,
Kachin Special Region 2, To Heads of State
(Unofficial Translation)

1. In regard to the principles on the formation of State;
 - a. It is mentioned that the State is formed on the basis of a union. In implementing this principle, it aims to be in line with the formation of a genuine federal union. The 1947 constitution provides that Burma is a Sovereign Independent Republic known as “the Union of Burma”. However, in reality the country functions under a unitary system, which exercises rigid centralization. We recommend that appropriate measures be taken to ensure this is not repeated in the forthcoming Constitution.
 - b. It is also mentioned that the Union is divided into seven states (provinces) and seven divisions, each with the same political status. A special request is made to reconsider this factor. Given that the seven states represent the ethnic nationalities, we recommend that the right to self-rule and the basic rights of ethnic nationalities in the states be enshrined in the Constitution.
2. In regard to the division of the sovereign power of the State – legislative, executive, and judicial powers — it is mentioned that such powers are apportioned to the Union, the Divisions, the States, and the Autonomous Territories. In drawing up the Constitution in practice, we recommend that such powers be apportioned to the Divisions or the States reasonably. To this end, a greater amount of legislative power should go to the Divisions and the States than what is currently provided for in the principles. The Legislative Assemblies of the States should have sufficient legislative power regarding the rights of ethnic nationalities, such as:
 - a. Preservation and promotion of the literature of ethnic nationalities by teaching it in the public schools; making the ethnic languages official within provinces;
 - b. Preservation and promotion of the culture and customs of ethnic nationalities;
 - c. Enactment of the customary law of ethnic nationalities into statutory law; and
 - d. Enactment of laws to protect the rights of ethnic nationalities.
3. In the Executive sector
 - a. If the State President (or the President of the Union) has too much power over the provincial government, it will lead to rigid centralization, resulting in the emergence of a unitary system.
 - b. The Chief Minister of the province should be the one who represents the ethnic nationality of that respective state. Under the rule of the AFPFL



parliamentary government and the BSPP Socialist government, a similar selection and appointment process was used for the Chairperson of the (provincial) State Council or State Minister. Such enactment of laws in recognition of the fundamental rights of ethnic nationalities is in line with the emergence of the Union historically. As such, we recommend that such law be included in the constitution being drawn up now.

c. Relating to the formation of (provincial) state governments:

- i. The Chief Minister of a province should be selected in the state parliament under secret ballot with the consent of a majority of parliament members. The President of the State (Union) should appoint that person as Chief Minister of that respective province.
- ii. The Chief Minister of each province consults with the respective Legislative Assembly for the formation of ministries of province, and the number of provincial government ministers. Upon receiving the submission of the Chief Minister of the province, the President of the State (Union) should appoint the provincial government ministers.
- iii. The Chief Minister of the province should appoint the Attorney General and the Auditor General of the Province with the consent of the Provincial Legislative Assembly.
- iv. The Chief Minister of the province should appoint the Chairpersons and Leading Councils of autonomous divisions and regions.
- v. When a minister of a province wants to resign, he or she should submit his or her resignation letter to the Chief Minister of the province who should then handle the resignation with the consent of the Provincial Legislative Assembly, as it deems necessary. If the Chief Minister of a province wants to resign, he or she should submit his or her resignation letter to the President of State (Union).
- vi. If there is concern for the stability within a province, the Chief Minister of the province should discuss with the Provincial Legislative Assembly and submit information to the President of State (Union). Only after consulting with and seeking agreement from the Chief Minister of the province, the President of State (Union) can declare an emergency situation in that respective province.
- vii. A commission on public service employment should be formed by the provincial government and local residents should have priority for public servant positions.
- viii. A police force should be formed under the provincial government and the Chief Minister of the province should control it directly.



- ix. Cease fire groups should transform into provincial security forces of a respective province once the Constitution comes into force. These forces should be a part of the Union army and should be directly controlled by the Chief Minister of the province.
4. Redefining borders and changing the name of a province should be the concern of a majority of nationalities of that state, and should only be conducted after obtaining the consent of the majority of ethnic nationalities of that state.
5. There should be no discrimination among religions and laws should prohibit religious discrimination. People of all religions should have the same rights and status.
6. Given that the National Assembly is to handle affairs of ethnic nationalities, the representatives to the National Assembly should be those whom are selected from among the ethnic nationalities of the respective province.
7. It is not necessary to form a Ministry of Border Affairs in the Union government. Border security should be conducted by Ministry of Defense of the Union and provincial governments, in consultation with each other directly. Forming a Ministry of Border Security in the Union government will restrict the powers of the provinces which exist along borders, resulting in the emergence of unfavorable conflicts in the future.
8. The Provincial Legislative Assemblies should have power to enact laws regarding temporary border crossings and border trade that treat everyone fairly.
9. The Provincial Legislative Assemblies should also have power to enact laws relevant to the economic sector so that the Union government and the respective provincial government can benefit fairly from the underground and aboveground natural and mineral resources. For example, the legislative power relevant to jewels should be granted to the Provincial Legislative Assemblies; it should cover not only the cutting and carving of precious stones but also to the locating and extraction of those jewels. Moreover, it is recommended that the Provincial Legislative Assemblies have power over hotels and guesthouses, tourism, and the border trade industry.
10. The following should be incorporated in the provincial legislative list: agriculture and livestock, land management, land registration, farming, agricultural research, management of water resources, fertilizer and pesticides, and the definition of grazing land.
11. In the tax sector, it is mentioned that the provincial government can collect taxes on timber except teak and hard timber. These recommendations seek to amend this principle so that the provincial government can collect taxes on all timber except teak.
12. Relating to the sector of transportation and communication, these recommendations ask that the legislative power on the development of water resources and rivers, the post, telegraph, telephone, fax, email, internet, intranet,



television, satellite communication, and broadcasting should be added to provincial legislative list.

13. Relating to the social sector, the power on private schools and trainings, free hospitals and clinics, private hospitals and clinics, formation of firefighting units, and the rehabilitation, protection, and rescuing of children, young women, disabled persons, the elderly, and the homeless should be added to provincial legislative list.
14. In the management sector, power on administration, management of rural and urban land, renting houses, leasing land, organizations, development of border regions, and the census should be added to provincial legislative list.
15. The border of Kachin Province should be the same as the border that was originally designated at the commencement of the formation of Kachin Province.
16. To protect the constitution should be the obligation of the people, as a whole, and the people should be the guardians of the constitution, given the fact that the constitution comes into force only after adopting it with the majority consent of the people in a referendum.
17. The Provincial Legislative Assembly should have the power to enact laws that bind the citizen of a province in the same way that the Union Legislative Assembly has the power to enact laws that apply to the citizens of the State (Union). If not, future problems such as identity fraud during elections and referendums may arise in the provinces, just as in the Union.
18. Every province should have a constitution within the framework of the Union, which reflects the unique situations of each province. This will bring about the solidarity of the union, facilitating development of the country.
19. The Army comprising various ethnic nationalities, which takes responsibility to protect the Union, should be known as the Union Army.

Central Committee
Kachin Special Region 2, KIO



(5) Constitutional Discussion

The following is a transcript of a radio conversation among *U Aung Naing Oo*, an observer and analyst of Burmese affairs, Burma Lawyers' Council General Secretary *U Aung Htoo* and BBC Burmese program presenter *Daw Yin Yin May*, addressing the questions, "To what extent will decisions from the National Convention be acceptable?" and "Who will accept these decisions?"

An authority in charge of convening the National Convention (NC) announced both inside Burma and internationally that the reconvening on 18 July will be the final meeting of the Convention. According to his announcement, the NC is supposed to finish in 2007. The NC, which started convening in 1993, is being criticized by some people who say that after 14 years it has departed from its original aims and path. They also say there is no right to hold free and open discussions since only a few delegates who represent the people are present. But some believe that only a constitution produced and confirmed at the National Convention could end the political crisis of Burma. So in order to discuss these issues, I have invited *U Aung Naing Oo*, who is living in Thailand, and *U Aung Htoo*, General Secretary of BLC currently living in Sweden, to participate in this, our BBC weekly conversation program.

Question: *U Aung Naing Oo*, did you observe points in the forthcoming constitution that could be applied practically in the current situation of Burma?

Answer: As for me, it doesn't seem this constitution is written after complete and proper discussion to resolve the past, current and future conflicts. But if we look at it from a political viewpoint, there are some points persistently demanded by the army. Some mechanisms to protect the army demands are found in it. But the interesting thing is that the rights of freedom of speech and publishing; freedom of forming parties and freedom of organization, are provided for in the constitution. The constitution also guarantees the existence of a multi-party democratic system and it could be said this is one of its strong points. Another good thing is that the constitution grants legislative power to the state and region parliaments, with some limitations, and also the states are allowed to levy limited taxation and I think compared to the past 45 years of military administration it cannot be said that these are bad.

Question: *U Aung Htoo* do you think the points in the forthcoming constitution will work practically, as is *U Aung Naing Oo*'s view? For example, if you look from the perspective of ethnic groups.

Answer: Speaking frankly, I didn't see any good points in the forthcoming constitution. The rights of freedom to form parties and freedom of organization, as *U Aung Naing Oo* mentioned earlier, are given in the forthcoming constitution, unless the exercise of those rights conflicts with the existing laws. There is a similar provision in the 1974 Constitution saying people are free to form organizations and free to act to achieve their aims so long as they are not against the socialist economy. In 1974, the government suppressed the labor demonstration using this provision by saying, "Don't you see in the Constitution? We have the right to crush the demonstration if you are against the socialist economy", and we were put down in that way. Here, *U Aung Naing Oo*, please read carefully about the rights of freedom to form organizations and freedom to act so as to achieve one's aims. There is a restriction or limitation to those rights



called the Exception Clause. When a constitution emerges, in order to secure their freedom the people should have the ability to repeal some existing laws that take away their freedom. But the forthcoming constitution allows continued effectiveness of the existing laws that take away the rights of the people. There is no provision in the forthcoming constitution that allows repeal of the unfair or unjust existing laws and orders, such as the 1975 State Protection Act, the 1962 Publishers and Printers Act, or the 1988 Law Relating to the Formation of Organizations. Please think it over *Ko Aung Naing Oo*. *Hkun Htun Oo* and the other Shan leaders didn't make an insurgency and didn't attempt to kill anyone by a bomb blast. They merely attempted to form the Shan State Professional Association; nonetheless they were convicted under several criminal sections and sentenced to 75 to 106 years imprisonment. There is no provision to form an independent judiciary to protect against this kind of incident from happening again in the future. This is the first point I would like to make. The second point is the matter of levying taxes. It is found that levying taxation is an ability of both the National Parliament and the state parliaments. Please look at it again. The National Parliament has authority over such important matters as national defense, foreign affairs, finance, economy, agriculture, raising animals and industry. State assemblies are just given authority over small and unimportant matters such as producing salt and decorating jade stone. How could the big matter of the states' development function properly since the states have power on levying taxation from only small matters? The matters of foreign investment and financial and other aids to be received from foreign countries are all controlled by the central government. So how could the states operate their regional development? The good points that *U Aung Naing Oo* pointed out will surely not work in practice if we compare them with all the things I mentioned early, so it proves that the proposed constitution of the SPDC is totally inapplicable and useless.

Question: At the beginning of June, the Chairman of the National Convention Convening Commission announced that the Commission will allow amending, adding and repealing some provisions of the Constitution in this coming final session of the Convention. So there is a proposal submitted by all of the CFG (13), which includes a demand that each state has its own legislative power with respect to its legal system. So, *U Aung Naing Oo*, could you tell me whether the ethnic groups who are representing cease fire groups and other ethnic groups will obtain all the matters mentioned above?

Answer: There are some interesting demands of ethnic groups. In 2004, CFG 13 submitted a proposal to the military regime with their demands. But the military regime rejected that proposal in a meeting. I have read that proposal paper. But the interesting thing is that when we look at the results of the National Conventions held in the years 2005 and 2006, the military regime, without saying anything, put some points in the Constitution that were demanded by ethnic groups as their rights. For example, the military regime gives concurrent legislative power to state parliaments and the National Parliament in some areas. But I am not sure to what extent it will work in practice, as *U Aung Htoo* said earlier, there was an incident in 1974 in which massive human rights abuses were committed. The citizens' rights had been taken away by the government. Nowadays *Min Ko Naing* and his colleagues are also struggling for those citizen rights. So if we look from a political point of view, there might be difficulties in the present situation as well as in the future. However, isn't it easier to struggle for rights when these are given in the constitution? For example, as *Ko Aung Htoo* said, there is



a limitation clause in the area of the rights and duties of citizens. There is also a provision which says no one shall be subject to more than 24 hours detention. But we have to take into consideration how to resist those laws if they still exist, such as the 1975 State Protection Act and the 1950 Emergency Provision Act. The good or bad of a constitution lies in how important political parties and people respond to it, whether they accept or boycott it after making a thoughtful decision. So now the military regime is stating that it will compromise and reconsider adding some points in the Constitution. If that statement is true, in my opinion after studying the Constitution, if the opposition groups could hold discussions with the military regime, then a new path could emerge from there and it could result in either a political solution or national reconciliation. But it depends on whether the people inside the country can accept this idea or not.

Question: *U Aung Htoo*, what will be the attitude of the political organizations, pro-democracy groups and people toward the forthcoming constitution if the military regime makes some compromises on it? As a legal academician, how could you explain this with the words that the normal citizen could understand?

Answer: It is simple. Let me explain based on the point that *Ko Aung Naing Oo* made earlier, if the normal citizens are given the fundamental rights simply from that ground, then we can participate in the so-called democracy process of the SPDC. For example, please try to put the rights of freedom of speech and freedom of assembly in today's constitution simply without limitation clauses. Please *Ko Aung Naing Oo*, reread it. Those limitation clauses don't allow repealing the existing laws and beside that it seems we have to accept a constitution which allows the continued existence of unfair laws. What I want to say is if this constitution gets confirmed, the people's condition will become worse. Earlier, *Ko Aung Naing Oo* said isn't it better to struggle for rights by referring to a constitution in which those rights are guaranteed? I affirm that the constitution doesn't guarantee the rights but it seems that we have to recognize legitimately the oppressive rule of the military regime on the people by using those unfair and unjust laws. To answer *Daw Yin May's* earlier question, if you want to participate in the constitution drafting process of the SPDC, first it needs to include the fundamental rights that the people should get in the constitution. If these are put in it then it may be first thing for us to be able to participate in the SPDC constitutional drafting process. The second thing is that we have to view the constitution from the aspect of a mechanism of resolving conflicts. But there might be different ways of viewing the constitution. We should not view the constitution from the political perspective. When we view the constitution from the perspective of resolving conflict, then we would see different conflicts in it. For example, a conflict could occur from sharing legislative power and administrative power between national and state levels. When those conflicts occur, they should not be resolved through the use of armed attacks, but through the judiciary, which should be the main mechanism responsible for resolving those conflicts. Look in the SPDC constitution, there are judiciary mechanisms constituted but they are not empowered to handle those conflicts. The chief justice is appointed by the president upon the confirmation of the union parliament, but the union parliament cannot object to the chief justice unless it proves through evidence that he/she is disqualified for the position. Also the constitution empowers the president to dismiss the chief justice on the ground of when he/she betrays the state or when he/she is considered to conduct an insurgency or when he/she violates the constitution



or when he/she is considered not qualified for the position, but all of these matters are not tasks of a president. The question of violating the constitution or not is the task of the legal academicians from the constitutional court by holding a serious debate. The president alone could not decide whether someone is committing treason or not and convict the person. So it proves there is no independent judiciary under the constitution of the SPDC.

Question: So, *Ko Aung Naing Oo*, do you think the delegates of the National Convention, delegates of ethnic nationality groups who are supposed to confirm the constitution in this coming final session, could understand the facts that *U Aung Htoo* has mentioned?

Answer: As for me, compared to the suffering of people, we should think wisely about whether our three main duties are more important or changing the political situation is more important. Another thing is, whether the constitution is bad or good, if we don't have one what would we continue to do? If we want to object to this constitution we should boycott it clearly or we shouldn't hesitate to make an objection. If we make the objection, as a result, how long will the military rule continue? What I mean is, our country has a dilemma and it does not have many other options to choose. What I am trying to say is that I would rather think more basically about whether there is any possibility that participating in the National Convention can lead to a resolution for the political deadlock. Or would the constitution possibly lead to political changes? These are important and fundamental concepts. There is a problem of whether the constitution could apply in practice or not if the military regime persists to hold on to its original principles without any changes or compromises. So the delegates who are supposed to attend the National Convention are really the people who need to think of the above questions. So I think the military regime should make proper compromises on it.

Question: *U Aung Htoo*, could you explain to me what the results would be if the constitution receives objections?

Answer: Earlier *Ko Aung Naing Oo* said that the SPDC should make proper compromises for the political process to progress and I think that is a reasonable suggestion. To answer *Daw Yin May's* question, it is our responsibility to think clearly irrespective of the constitution. It is the responsibility of our people to think about the question of what we would do if we don't have a constitution. But if we accept this constitution then it is like we jump out from the hot oil pot into the fire under it because we feel like living in the hot oil pot is so hot. We shouldn't have uncertainties about what would happen if we accept the military constitution; the situation may be getting better, please don't even think that way because there is nothing good in the constitution. Show me if there is anything good. So I would like to suggest to people that you shouldn't jump into the fire from the hot oil pot. There is nothing to be happy for, people, because the constitution continues restricting the rights of the people and it is a document which recognizes the military leadership as a legitimate government and allows them to rule the country officially. There are no constitutions in either communist or authoritarian countries which are written on the basis of military leadership in politics. This is totally unacceptable that the military regime forces the people to accept its constitution, no country in the world even has a similar one, and this is obviously the military regime insulting its own people. So finally I would recommend that if the SPDC



realizes this it should carry out proper compromises as *Ko Aung Naing Oo* said earlier to be able to take another step in the political process and it will be beneficial to solve the conflicts of the country.

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Part (B): Heinous Crimes in Burma and the International Criminal Court

(1) LEGAL ANALYSIS OF THE BURMA LAWYERS' COUNCIL ON HEINOUS CRIMES IN BURMA (May 29, 2007)

Article 6 of the Rome Statute delineates the crimes over which the International Criminal Court shall have jurisdiction. They are considered the most serious violations of international humanitarian law as formulated throughout the history of human society. The military regime has violated a litany of these crimes as delineated in Article 5 with complete impunity and therefore the military regime in Burma falls squarely under the jurisdiction of the International Criminal Court.

Under the principle of complementarity, the International Criminal Court will not exercise jurisdiction if the national court maintaining original jurisdiction over the crimes has initiated a prosecution. The principle of complementarity also implicates the principle of exhausting domestic remedies. Pursuant to Article 17(1)(a) a case shall be deemed inadmissible when it is found that the state with jurisdiction over the crime is investigating or prosecuting the case. There is no independent judiciary in Burma, the judges are appointed by the military regime and are often members of the regime therefore there can be no reasonable expectation that the courts in Burma will impartially investigate or prosecute heinous crimes in regards to Article 5.

Case Studies

The use of forced labor by the military regime in Burma has been well documented and is a violation of Article 7(1)(c) of the Rome Statute of the International Criminal Court. The Burmese military junta regularly employs a policy of forced relocation against ethnic minorities and other identifiable groups in violation of Article 7(1)(d), as forcible transfer of population. The military regime has continued its policy of imprisoning and severely depriving physical liberty of political opposition members and the terms and conditions of the prisons in Burma are in violation of the fundamental norms of international law in violation of Article 7(1)(e). It is also evident, inter alia, in a case, that U Khun Htun Oo and eight other Shan ethnic leaders were sentenced into long term imprisonments, from 75 to 106 years, respectively, for peacefully expressing their political opinions, and for their attempt to form an organization "Shan State Consultative Council" without getting involve in any violent means.

The practice of torture has become an institution under the successive military regimes in Burma and the practice continues to this very day in violation of Article 7(1)(f). The military junta has been implicated in the systematic use of rape as means of oppression and the enforced prostitution and enforced pregnancy and sterilization in violation of Article 7(1)(g).

In its reign of terror the military regimes have employed various modes of oppression against any who have dared to oppose their rule and also any whom the junta has even slightly suspected of harbor such disloyalties to their rule, one such



method has been the intentional enforced disappearances of persons in violation of Article 7(1)(i). The crime of enforced disappearance is not merely a crime perpetrated against the victim of the disappearance but it also constitutes a crime against the larger group of which the victim is a member of, such as political groups. Thus, the crime of enforced disappearance also implicates the crime of persecution against identifiable groups because it is intended to terrorize the representative group such that will be unwilling to exercise any of their inherent rights such as self-determination in violation of Article 7(1)(h). Furthermore, the crime of enforced disappearance also implicates the crime of torture because the family of the vanished person are also victims of this crime in that they suffer an intentional infliction of severe pain and suffering for a prolonged duration (i.e. until the discovery of their loved one's fate). Furthermore, since this torture is ongoing in that the families still suffer from not knowing the fates of their family members the crime is therefore ongoing and thus the perpetrators are within the jurisdiction of the ICC.

The systematic and institutionalized persecution of the ethnic minorities in Burma by the ruling military regime constitutes the crime of apartheid as forbidden by Article 7(1)(j). A caste system has been instituted in Burma whereby members of ethnic groups receive second class citizen status and are thereby constricted in their movement and rights in the Burmese society. The practice of discrimination in awarding citizenship and brutal oppression against the ethnic minorities constitute the crime of apartheid as defined in Article 7(2)(h) as a institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining the regime.

The junta has employed a systematic and wide spread campaign of violence against the civilian population of Burma in furtherance of state and organizational policies to commit such violent acts, such as to meet the definition of "attack against any civilian population" as delineated in Article 7(2)(a).

The military regime has intentionally inflicted conditions of life upon identifiable groups, such as the deprivation of access to food and medicine, in a calculated attempt to bring about the destruction of those identifiable populations in whole or in part, as defined by Article 7(2)(b).

The military regime has completely flouted the fundamental principles of humanitarian law as applying in armed conflicts, namely the principles of proportionality, military necessity, and discrimination in the protection of the civilian population. The military regime, in ignoring these fundamental principles, has committed with complete impunity both grave and serious breaches of the laws of war.

The actions of the military junta cannot be deemed legitimate means of maintaining or re-establishing law and order in the state or defending the unity and territorial integrity of the state as in accordance with Article 8(3). The acts committed by the military junta cannot be deemed legitimate because acts of violence against civilians are forbidden by the fundamental laws of war and even during an armed conflict the laws of war still apply (i.e. proportionality and military necessity).

The junta has committed as part of plan and in part of a large-scale commission of crimes that constitute grave breaches of the Geneva Conventions of 12 August 1949 in violation of Article 8. The military regime has committed acts of willful killing;



torture; and willfully causing of great suffering and bodily injury in violations of Article 8(2)(a)(i), (ii), and (iii). A policy of extensive destruction and appropriation of property, which has not been justified by military necessity and has been carried out unlawfully and wantonly against civilian populations in Burma, as prohibited by Article 8(2)(a)(iv). In violation of Article 8(2)(a) (v) the military regime has forced protect persons under the Fourth Geneva Convention (i.e. civilians, children, and prisoners of war) to serve in the forces of the military as child soldiers, porters, and human shields. Furthermore, the junta has violated Article 8(2)(a) (vi) by committing extrajudicial killings of prisoners of war and civilians not party to the hostilities.

Under Article 8(2)(c) the acts committed by the military junta constitute serious violations of article 3 common to the four Geneva Conventions in the case of an armed conflict not of international conflict. Article 8(2)(d) does not apply to the circumstances of Burma because the situation is not one of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, rather the situation resembles more that of a civil war of a prolonged duration. In the situation of Burma Article 8(2)(f) applies in that the armed conflict takes place in the territory of the state of Burma and is a protracted armed conflict between governmental authorities (albeit an illegitimate one) and organized groups. Some of the serious breaches which the junta has committed are systematic rape, attacks directed at civilian targets, and intentionally directing attacks against buildings dedicated to religion, education, art, science and others which do not constitute military targets.

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(2) THE CHANGING LANDSCAPE OF INTERNATIONAL LAW: THE GLOBAL RESPONSIBILITY TO PROSECUTE PERPETRATORS OF GRAVE CRIMES INFLICTED ON THE PEOPLE OF BURMA

By: **Professor Janet Benshoof** (President of Global Justice Center)
August 16, 2007

On June 10, 2002, Captain Ye Htut and 19 other soldiers raped 22 year old Nan Bway Pong from Kyaukyi Township in the Nyaunglebin district. Before raping the young Wa Buddhist women, Captain Ye Htut “said to his soldiers, ‘You all must rape that woman, those who refuse to rape will be shot and killed’.”

-Shattering Silences Report, April 2004

Myanmar women have never been known to have lost their rights nor been subjected to torture and degradation.

*-The New Light Of Myanmar (8-5-98)
SPDC Newspaper*

Introduction

The Burmese military junta, the State Peace and Development Council (SPDC)¹ continues to exercise dictatorial control over the lives of the people of Burma as it has done with impunity for over forty years. The SPDC, under its various guises, routinely employs torture, rape, slavery, murder, and mass imprisonment as tools to consolidate its power and silence any dissent.² These acts go far beyond a repudiation of democracy; they are crimes against humanity and war crimes, including grave breaches of the Geneva Conventions.

There is a growing consensus in the global community that no “safe harbor” should exist for perpetrators whose crimes violate international law. This article will examine how global advances in prosecuting state actors under international criminal law should be used to force the SPDC to face the specter of real, present day judicial accountability for their crimes and thus provide a new tool to weaken their heretofore-unchallenged power.

This article argues that crimes perpetrated by the Burmese military leaders, including torture, forced labor and gang rapes, should not be buried under the rubric of “human rights violations,” but called what they are, international crimes or war crimes as defined by Common Article 3 of the Geneva Conventions of 1949 and Protocol II Additional to the Geneva Conventions. This interpretation is reflective of the Rome Statute application of Common Article 3 as referenced in Article 8 (2) (d) to cases of non-international armed conflicts.³ The global community should rally behind a Security Council Resolution for a Commission of Experts to investigate the junta’s criminal activity as a first step in bringing perpetrators suspected of heinous crimes before the International Criminal Court.



I. International Criminal Law Developments and How They Apply to Burma

There is an increasing global consensus that certain atrocities are too onerous to sustain absolute sovereignty. This was made explicit in both the Genocide Convention and the Convention against Torture⁴. This has also led to other international law developments culminating in the establishment of the International Criminal Court (ICC) in 2002⁵.

New opportunities to hold perpetrators responsible for war crimes, including current heads of state or military commanders, arise from parallel legal developments, four of which I discuss in this article. These are, *first*, the Security Council's increasing willingness to abandon its longstanding policy of noninterference when faced with systematic state sponsored criminal atrocities. *Second*, the legal concept of "universal jurisdiction" which is gaining a legal foothold in some national courts which are prosecuting alleged war criminals, in some instances even for crimes which occurred elsewhere or when the state would not otherwise have jurisdiction. *Third*, there are new international legal tools and criminal law precedents specifically designed to rectify the historic discrimination denying women access to justice for rape and other forms of sexual violence. *Fourth*, the International Criminal Court (ICC) now insures the availability of an international forum to try perpetrators and others responsible for war crimes, crimes against humanity, and genocide⁶.

A. The Security Council

The Security Council powers under Article 41 and 42, enabling it to take all necessary actions up to the use of force to "do justice, to deter further crimes, and to contribute to the restoration and maintenance of peace", were rarely exercised between 1955-1992⁷.

The horror expressed by the global community in reaction to the atrocities committed in the former Yugoslavia propelled the Security Council in 1992 to equate such "crimes against humanity" with a "threat to the peace" under Chapter VII and set up a commission of experts to investigate the crimes.⁸ After some 35 field missions to the former Yugoslavia, undertaking what was then the world's largest rape investigation, and establishing a database of 65,000 documents, the Commission reported back to the Security Council and adopted the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY).⁹ The Security Council in 1994 issued a similar "threat to the peace" Resolution 955 on the Rwanda situations and set up a second ad hoc International Criminal Tribunal for Rwanda (ICTR).¹⁰

The Statutes setting up these Tribunals established important precedents, including that of the ICTY, which for the first time in an international context explicitly recognized the legal rights of victims and survivors. The witness/victim protections provided were critical to the success of the ICTY since in 1993 there were still powerful factions in Yugoslavia with the ability to exact revenge against people who cooperated with the Tribunal.¹¹

Another Security Council development advancing criminal accountability, although it is not usually viewed in those terms, is Resolution 1325 passed in 2000.¹²



SCR 1325 is the first Security Council Resolution solely addressing the rights of women in peacemaking and peacekeeping processes and seeks to rectify gender inequality in conflict and post conflict situations including peacekeeping processes, nation building steps and equality in transitional justice forums. The provisions of SCR 1325 make clear it applies to the United Nations itself as well as state parties, albeit in different ways. Relevant to the situation of Burma is the strong language in SCR 1325, that it is the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, war crimes including those relating to sexual violence against women and girls.”¹³

Although SCR 1325 is binding on states, passed under the authority of the Security Council, it remains more a promise than a reality due to its less than clear language and lack of enforcement mechanisms. However, the use of SCR 1325 in a legal context is undeveloped and an argument to advance is, that by passing SCR 1325, the Security Council accepted that SCR 1325 imposes affirmative obligations on the Security Council itself. Thus, given the context of the long-documented crimes of sexual violence in Burma by the military should be given an initial presumption for a Chapter VII referral to the ICC.

Finally, the ICC statute in laying out the relationship between the United Nations and the ICC strengthens the Security Council’s formal role.¹⁴ The principal way to bring non-member states to the ICC is to use the Chapter VII authority of the Security Council to make a direct referral or, as a first step, set up a commission of inquiry as was done in the case of Darfur, Sudan.¹⁵ This is instructive for Burma, since after reviewing the Darfur Commission report the Security Council referred the Darfur situation to the ICC.¹⁶ After its own investigation the ICC issued an arrest warrant for the former Secretary of State Minister of the Interior in Sudan, Ahmed Haroun on May 2, 2007, requesting that President Bashir of Sudan extradite him to The Hague to be tried as an alleged war criminal.¹⁷

B. Universal Jurisdiction: No Safe Harbor

The Commission Report on Darfur, acknowledging that the ICC would be able to only prosecute a few perpetrators, recommended that in addition all state parties be encouraged to prosecute perpetrators of grave crimes in Sudan in their national courts under the concept of universal jurisdiction.¹⁸ This recommendation reflects the growing incorporation of the concept of universal jurisdiction in both national and international jurisprudence.¹⁹

Universal jurisdiction presumes that some crimes are so heinous that prosecuting the perpetrators is the responsibility of the world community. Thus, national courts can and should try persons suspected of such crimes even if neither the suspect nor the victims are nationals of the country where the court is located and even if the crime took place outside that country. International law now strongly suggests that certain crimes are exempt from amnesty and any statute of limitations, as shown by the Spanish Courts’ landmark order in 1998 calling for the arrest and extradition of Chilean dictator Augusto Pinochet.²⁰ The Constitutional Court in Spain recently set another precedent by upholding the right of Spanish prosecutors to initiate criminal investigations of



members of the Guatemalan military accused of abuses targeting indigenous groups in Guatemala even though none of the alleged perpetrators had ever been in Spain.²¹

The growing consensus against any “safe harbor” for war criminals has led to increased cooperation by countries in extraditing suspected war criminals. For example, the former president of Liberia, Charles Taylor was recently extradited from Nigeria, which had previously given him asylum, and turned over to the Special Court for Sierra Leone, which is trying him in The Hague for his alleged war crimes and crimes against humanity.²²

C. Advances in Gender Justice

Women’s rights under international law are only rarely enforced by courts, however, in a surprising development, the opposite has become true in the context of the war crimes tribunals. Dr. Kelly Askin, renowned expert on women and war crimes, points out that although the laws of warfare have prohibited the rapes of combatants and noncombatants for centuries it was not until the first ad hoc Tribunals that gender crimes have been prosecuted with some regularity.²³ Both the ICTY and ICTR have over the last decade established strong legal precedents, beginning with the now famous Akayesu decision, placing rape and sexual violence firmly under the rubric of war crimes, crimes against humanity and instruments of genocide.²⁴

Although there is still a long way to go until sexual violence is adequately addressed, these tribunals are a large step forward. Further, military or civilian leaders who should have foreseen the possibility of the criminal acts or who can be shown to have failed to punish criminal acts by soldiers are themselves liable under theories of joint criminal enterprise or superior responsibility.

D. The International Criminal Court

The ICC, unlike the Ad hoc Tribunals or the International Court of Justice, is an independent institution created by the Rome Treaty, which as of July 2007 has been acceded to by 105 States.²⁵ Because the ICC will prosecute only those crimes which occurred after its implementing date, July 1, 2002,²⁶ any ICC investigation should be accompanied by a simultaneous campaign to encourage parallel prosecutions in national courts of perpetrators whose crimes took place prior to 2002.

There are three ways for a case to be brought to the ICC. First, a state party can refer a case or even self-refer perpetrators in its own territory. Second, the prosecutor can initiate an investigation of crimes within the ICC jurisdiction, and, finally, under Article 13(b), the only way non-signing states can be referred to the ICC is by a Security Resolution under Chapter VII.²⁷

Since 2002, the ICC has opened investigations into crimes in Darfur, the Democratic Republic of the Congo, the Central African Republic, and Uganda, and issued arrest warrants in the cases of Uganda, DRC, and Darfur.²⁸



i. Crimes covered by the ICC

ICC jurisdiction is limited to prosecuting the crimes of most serious concern to the international community, i.e., genocide, crimes against humanity and war crimes. Prosecutions under genocide and crimes against humanity do not require proof of any ongoing-armed conflict as do the war crimes provisions.²⁹ Crimes against humanity as an initial matter do require proof of “widespread and systematic” criminality pursuant to or in furtherance of a State or organizational policy. However, once such a pattern is established any one particular criminal act, such as rape or torture or forced labor, need itself not be committed in a widespread matter to be charged as a crime against humanity – only the attack needs to be widespread or systematic.³⁰

Although the ICC Statute sets out some basic international humanitarian law, which regulates the conduct of armed conflict, its provisions minimize any difference in criminal culpability depending on whether the conflict is deemed to be of an international character or an internal conflict. This includes the enumerated gender crimes listed in Article 8 (b) (xxii) of the Rome Statute. In addition the ICC explicitly provides for jurisdiction over top military commanders and even current heads of state.³¹

ii. The ICC and Women’s Rights for Redress for gender crimes

The ICC, incorporating the case law from the ad hoc Tribunals, has codified rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and other forms of sexual violence as elements of genocide and acts which could constitute war crimes and crimes against humanity.³² Further, the ICC requires affirmative measures to ensure redress for gender crimes. The rape and sexual violence by the military as detailed in the seven reports by the women from Burma, if proven, could amount to genocide, crimes against humanity, and war crimes under the ICC.³³

Conclusion

Over the last two decades there has been a sea of change in the sheer number of prosecutions of perpetrators of the most serious of state sponsored crimes. This enforcement reflects a growing consensus, not only that lawless states are a threat to security, but also that the world community has a moral and legal duty to protect people held prisoners by their own leaders. The military junta in Burma has had unbridled license to use a country and destroy a people. A Security Council Resolution under Chapter VII setting up an international criminal investigation is not a political decision but rather a legal obligation enforcing the most fundamental of rights of the people of Burma. All countries, including Myanmar/Burma, should cooperate with this inquiry and welcome the opportunity to be part of a constructive engagement with justice.

* * * * *



(Endnotes)

¹ State Peace and Development Council is the official name of the military regime of Myanmar (known as Burma). In 1997, Burma's ruling military junta announced it was changing its name from the State Law and Order Restoration Council (SLORC) to the "State Peace and Development Council" (SPDC).

See, e.g. <http://hrw.org/english/docs/2007/07/18/burma6412.htm>

² Human Rights Watch, World Report 2007: Burma, Event of 2006, available at <http://hrw.org/englishhrw2k7/docs/2007/01/11/burma14865.htm>

See, e.g. Shattering Silences (2004) by the Karen Women's Organization Shattering Silences: Ongoing Rape of Karen Women by the SPDC (2006) by the Karen Women's Organization, <http://www.karenwomen.org/>, Catwalk to the Barracks (2005) by the Women and Child Rights project and Human Rights Foundation of Monland (Burma), <http://www.rehmonnya.org/> License to Rape (2002) by the Shan Women's Action Network, Still Licensed to Rape (2005) by the Shan Women's Action Network, <http://www.shanwomen.org/>, System of Impunity (2004) by the Women's League of Burma, <http://www.womenofburma.org/>, No Safe Place: Burma's Army and the Rape of Ethnic Women (2003) by Refugees International <http://www.refugeesinternational.org/content/country/detail/2892/>

³ See Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9, adopted July 17, 1998, Article 8 (2) (d) which reads: "Paragraph 2 (c) applies to armed conflict not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature."

⁴ Both Conventions provide that state parties to the aggressive steps to prosecute perpetrators of the grave crimes enumerated. The Genocide Convention entered into force on 12 January 1951, G.A. Res. 260 (III) A, U.N. GAOR, U.N.T.S. (United Nations Treaty Series), No. 1021, vol. 78 (1951), Article IV, V & VI. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, enter into force 1987, G.A. Res. 39/46, 39 U.N. GAOR, Supp. No.51, at 197, U.N. Doc. A/39/51 (1984) provides in Article IV that each state party "shall ensure that all acts of torture are offences under its criminal law."

⁵ Rome Statute of the International Criminal Court, The United Nations Diplomatic Conference of Plenipotentiaries adopted Rome Statute of International Criminal Court establishing International Criminal Court and certain related Act in Rome, Italy, UN Doc. A/CONF.183/10, (July 17, 1998).

⁶ Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, Arts. 7(1)9(g);8(2)(b)(xxii) and 8(2)(e)(vi) (1998).

⁷ See M. Cherif Bassiouni, From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court, 10 Harv. Human Rights J. 11 (1997).

⁸ S.C Res. 789, U.N. SCOR, 47th Sess., 3150th mtg., U.N. Doc. S/RES/789 (1992).

⁹ The Statute of the International Criminal Tribunal for the Former Yugoslavia, UNSC Res. 827, U.N. SCOR, 48th Sess., U.N. DOC S/RES/827 (May 25, 1993).

¹⁰ The Statute of the International Criminal Tribunal for Rwanda, UNSC Res. 955, U.N. SCOR, 49th Sess., U.N. DOC S/RES/955 (Nov.8, 1994).

¹¹ See A. Rydberg, "The Protection of Interests of Witness in the ICTY in Comparison to the Future ICC" (1999), 12 Leiden, Journal of Int. Law 455 at 462. The ad hoc tribunals are important in both bringing some measure of justice to victims and setting positive precedents for new mechanisms in victim protections. For example, the Special Court for Sierra Leone adopted the Rules of Procedures and Evidence of the ICTR, which under Rule 34 established a Victims and



Witness Unit to provide protective measures to victims and witnesses along with counseling and support, particularly in cases of rape and sexual assault. The expansion in victim and witness protections is also exemplified by the various gender provisions of the Rome Statute, which has drawn heavily from this jurisprudence and developed concepts even further. The ICC Statute and Rules of Procedure and Evidence offers special protection to victims and witnesses of sexual or gender violence, for example, under Rule 88 (2) the Court is required to control the questioning of witnesses to avoid harassment or intimidation, especially in sexual violence cases. Additionally, motions may be filed under seal to protect victims and under Rule 87 (3) as an exception to the principle of public hearing, the Pre-Trial, Trial or Appeals Chamber may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera (closed to the press and public)

¹² UN Security Council, Resolution 1325, S/Res/1325, adopted Oct. 13. 2000.

¹³ *Id.*

¹⁴ See Rome Statute, *Supra* note 9, at art. 13 (b).

¹⁵ In September 2004 the Security Council adopted Resolution 1564 to establish an international commission of inquiry to investigate “violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable”. S.C. Res. 1564, U.N. SCOR, 5040th mtg. S/RES/1564 (18 September 2004).

¹⁶ UNSC Res.1593, U.N.SCOR, 5158th meeting., U.N.Doc. S/RES. 1593 (March 31,2005). Resolution 1593 referring Darfur to the ICC was adopted by a vote of 11 in favor and 4 abstentions in the Security Council. (Algeria, Brazil, United States, and China). Both China and the U.S. are permanent members. The 11 members that voted for the resolution are Argentina, Benin, Denmark, France, Greece, Japan, Philippines, Romania, Russia, Tanzania, and United Kingdom. See Press Release, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, U.N. Doc. SC/8351 (Mar. 31, 2005), available at <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm>

¹⁷ The Prosecutor v. Ahmad Muhammad Harun (“Almad Harun”), Case No. ICC-02105-01107, Warrant of Arrest for Ahmad Harun, (27 April 2007).

¹⁸ UN Security Council, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, ICC-02/05-3 (July 20, 2005) p.153-164.

¹⁹ The most helpful sources are the website of Amnesty International available at <http://www.amnesty.org> and the Human Rights Watch (<http://www.hrw.org>). See also Kenneth Roth, The Case for Universal Jurisdiction, 80 Foreign Affairs 150 (2001).

²⁰ In the Proceedings relating to Chili, decision of judge Manuel Garcia-Castellon, Judge-Magistrate of the Central Investigatory Court number six, Madrid, Summary Proceeding 1/98-J, 20 September 1998, see the order of November 5, 1998 (no. 1998/22605) of the High Court (Audiencia Nacional) in the proceedings against Augusto Pinochet.

²¹ Guatemala Genocide, Judgment No. STC 237/2005 (Tribunal Constitucional Sept.26, 2005), at <http://www.tribunalconstitucional.es/Stc2005/STC2005-237.htm>

²² Nigeria to give up Charles Taylor, BBC News, (2006), <http://news.bbc.co.uk/2/hi/africa/4845088.stm>

²³ Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 Berkeley J. Int'l Law 288 (2003).



See also, Christine Chinkin, *Rape and Sexual Abuse of Women in International Law*, 5 Eur. J.Int'lL. 326 (1994).

²⁴ Prosecutor v. Akayesu, Case No. ICTR-96-4-A, Decision (1 June 2001). The Akayesu case held that when rape used as a method to destroy a cause physical and mental damage to a group or member of a group it constitutes genocide. Id. In the ICTY in Dragoljub Kunarac, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgement (22 Feb. 2001). The court found the rapes against the Bosnian-Muslim women constituted “crimes against humanity,” war crimes, an “outrage upon personal dignity within Article 3c of the Geneva Conventions

²⁵ See. ICC website. (the ICC is based on a treaty, joined by 104 countries). <http://icc-cpi-int/about.html>. Japan becomes 105th country by its accession to the Rome Statute of the ICC on 17 July 2007.<http://www.iccnw.org//mod=country&iduct=86>.

²⁶ ICC Statute, supra note 8, art. 11.

²⁷ ICC Statute, supra note 8, art.13.

²⁸ See ICC website <http://icc-cpi-int/about.html>

²⁹ ICC Statute, supra note 8, art. 6,7.

³⁰ See. Kelly D. Askin, supra note 28, p.11.

³¹ ICC Statute, supra note 8, art.27, 28.

³² The ICC definition of enslavement includes trafficking of prostitutes. ICC statute supra, note 8, art. 7(2)(c).

³³ See supra note 2.



Part (C): On The Rule of Law

(1) STATEMENT OF THE BURMA LAWYERS' COUNCIL ON THE NECESSITY OF DECLARING THE VIOLENT AND LAW-BREAKING UNION SOLIDARITY AND DEVELOPMENT ASSOCIATION AS AN UNLAWFUL ASSOCIATION (24 August 2007)

The Union Solidarity and Development Association, led by top SPDC military personnel who occupy positions at every level of the USDA, was established and commenced actions on 15 September 1993.¹ Their stated aim when registering at the Home and Religious Affairs Ministry was focused solely on social activities.² In practice, however, the USDA is committing violence and, even today, continuously breaking the law (some of the specific criminal acts of USDA will be described separately).

In the Unlawful Associations Act, Section 15(2) provides that “unlawful association” means an association –

- (a) *which encourages or aids persons to commit acts of violence or intimidation or of which the members habitually commit such acts, or*
- (b) *which has been declared to be unlawful by the President of the Union under the powers hereby conferred.*

Additionally, Section (16) of this law provides –

If the President of the Union is of opinion that any association interferes or has for its object interference with the administration of the law or with the maintenance of law and order, or that it constitutes a danger to the public peace, the President of the Union may, by notification in the Gazette, declare such association to be unlawful.

The Code of Criminal Procedure, Section 54(1), provides –

*Any police-officer may, without an order from a Magistrate and without a warrant, arrest-
first, any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned;*

Section 59 of the Code of Criminal Procedure provides –

- (1) *Any private person may arrest any person who in his view commits a non-bailable and cognizable offence, or any proclaimed offender, and without unnecessary delay shall make over any person so arrested to a police-*



officer, or, in the absence of a police-officer, take such a person or cause him to be taken in custody to the nearest police-station.

- (2) If there is a reason to believe that such person comes under the provision of section 54, a police-officer shall re-arrest him.*
- (3) If there is no sufficient to believe that he has committed any offence, he shall be at once released.*

The civilian members of the USDA who have no rights to arrest are openly violating the provisions of the present Criminal Procedure Code and, in cooperation with the authorities, have violently arrested, kicked and beaten the peaceful demonstrators who have not committed any crimes. These actions are violating the citizens' basic rights of peaceful association, assembly and freedom of expression.

We demand the SPDC to immediately declare the USDA an "unlawful association" and call for the USDA to immediately stop all violence and cease its criminal acts.

If the SPDC does not comply with these demands, then it will have been proved that SPDC is using the USDA as its weapon, to crush down its own people violently. The fundamental responsibility of any government is to provide security and legal protection for the people. We cannot call it a government if it fails to fulfill this obligation.

The BLC calls upon the public inside Burma and also those international communities helping establish peace and the rule of law in Burma to assist in the following ways.

- (a) The Burmese people inside and outside Burma expose and denounce the violence and criminal acts of the USDA.
- (b) International countries do not make contact with the SPDC because it is using the USDA to commit violent crimes against the public.
- (c) Those lawyers and legal academicians who love the rule of law and justice sue the lawless, criminal USDA and other criminals and thus protect the public.
- (d) Taking advantage of human resource development program contributed by Japan, SPDC sent USDA members to Japan, actually to prolong its administrative mechanism. We would like to request Japan and other international communities to cease providing similar assistance to USDA and its members who commit crimes, through SPDC.
- (e) Any country that loves the rule of law and justice exercise the visa ban on the USDA members who have been proved by sufficient evidence to be involved in committing violent acts.

* * * * *

(Footnotes)

¹ P.16 The White Shirts: Published by Network for Democracy and Development: May, 2006.

² P. 17 Ditto



(2) THE STATUS OF THE RULE OF LAW IN BURMA

Radio Free Asia Roundtable Discussion (May 13, 2007)

Participants: *U Nyan Win, U Myo Swe, and U Thein Nyunt*
(Lawyers Practicing Inside Burma)

Moderator: *U Win Naing Oo*

U Win Naing Oo (moderator): Today we will discuss how authorities are interfering with the legal process for political reasons and aims. We will also discuss how the public must be aware of the law and its effect. I understand that the law aims to protect the people. The people must be protected against this dangerous government. The present government said that no one should be above the law. For the lawyers, which facts should be looked at to decide whether the country follows the rule of law or not?

U Nyan Win: When implementing the law, the authority should respect the law. If they ask the people to respect the law and they don't respect it, there is no rule of law. There must be a fair judiciary. Without respect for the law and a fair judiciary, there is no rule of law. Only when there is rule of law, can we implement the essence of the law. Only when we apply the essence of law, will the people in the country be protected. Without these the people will not have the protection of law.

U Myo Swe: From the time of the Roman age, the people have said that no power should be above the law. In Burma, they are using the same concept, that no person should be above the law. If this concept is true, both the authorities and the people should follow this concept. In the country, if one part of the country follows the concept and in another part they don't, this is not a good situation. The role of the rule of law will disappear.

U Thein Nyunt: With respect to the rule of law, I would like to give one example. In Burma there is a famous journalist, *U Win Tin*. He was charged under Criminal Law Section 216. According to this section, he could be released on bail. But the court didn't allow him to be released on bail. *U Win Tin* appealed to the highest court, the Supreme Court. The Supreme Court agreed with the lower court and decided that violators of Section 216 can, but do not have to be, released on bail. From this example you can see what the Burma judicial system is like. Those who are in power, those who are poor, and those who are rich must have equal rights. Only then is there rule of law.

U Win Naing Oo (moderator): In the U.S., *Mr. Gonzales* dismissed eight U.S. attorneys. This is a great problem. The Senate and the House of Representatives are investigating. The White House is also interfering in this matter. If democratic countries like the U.S. have these kinds of problems, what will happen in those countries without democracy?

U Nyan Win: In democratic countries the political systems are based on a balance of power among the executive, legislative and judiciary. However, in Burma all power is centralized. There is no balance between the three branches. Thus, there is no rule of law.



U Thein Nyunt: I would like to give an example about the house arrest of *Daw Aung San Suu Kyi*. The arrest was made under the State Protection Law, which was drafted based on the 1974 Constitution. The law purports to protect the country from those who wish to destroy it. However, the nature of this law has become deformed. Those protections stated in section 9 are meaningless. There are problems in challenging facts when considering whether the arrest is in accordance with the law. The arrest and continuing detention prescribed by the central committee can only be submitted to the board of ministers. When there was a constitution, if the defendant was unsatisfied with the order of the board of ministers, the order could be appealed to the Council of People's Justice. The Council of People's Justice could repair, dissolve or confirm the decision of the board of ministers. Now there is no section providing for an appeal. In the latest news, the NLD headquarters was unable to obtain a true copy of the arrest order of *Daw Aung San Suu Kyi* in order to submit an appeal to the board of ministers. The NLD has issued a statement asking for a true copy of the arrest order. The Criminal Procedure Act (371/1) provides that, when a copy of any order is requested, it should be given to the person concerned without delay and free of charge. The Criminal Procedure Act still provides this.

U Win Naing Oo (moderator): Let us continue discussing the previous topic about legal action on crimes connected with politics. What we have seen and heard is that a student of age 20 was sentenced to 60 or 70 years in jail for a political crime and the sentencing of a 60-year-old man to 100 years in prison for the same crime. Additionally, in a town where everyone rides un-licensed motorcycles, a politician riding an un-licensed motorcycle will be sent to jail. *U Myo Swe*, what is your opinion on the legal aspect of these crimes and their punishment?

U Myo Swe: The judges have jurisdiction to sentence a defendant to life imprisonment, a death sentence, two to three years in prison or be acquitted. The judge can make a decision based on his own reasoning. However, in dictatorship countries there is centralization. The dictators do the following: (1) arrest all those in the area of the crime and send them to court, (2) charge them under the most severe criminal section possible, (3) order the highest punishment, and (4) acquit no one. These actions should not happen to the people.

Another example is the Printing Act. A person was jailed for 3 years under the Printing Act and sentenced again for the same offense to 7 years under section 5/J. He was jailed twice. The law prescribes that nobody should be sentenced twice for the same offense. Here he was sentenced twice. So many cases of this type have happened. In the case of *Dr. Win Aung*, he was sentenced to 2 years in prison under the Printing Act and later to 2 years imprisonment under the Video Act and additionally to 7 years under section 5/J. The law prescribes that in making decisions on crimes, punishments should not be separate but should be given as a whole. Here, he was sentenced to a total of 9 years. This judgment was unknown by our nation's leaders but was happening in the lower strata. We want to reveal this judgment. These unjust decisions and deviations of the legal mechanisms must be straightened out. In our law we frequently say that things must be done truthfully, and decisions must be based on truth and should not be hearsay but be seen by all the people. Only then the power of the pillar of law becomes strong, respectable, and prestigious and everybody will follow the rules. We hope and believe that we will have a true judiciary that considers things



systematically. Whether the government will accept this concept or not can be seen by all people in our country.

U Thein Nyunt: Punishment to opposing politicians, democratic supporters, and the cases we are handling personally reveal that defendants are given severe sentencing. The severe sentencing should be given only when it is necessary. Now they are given the harshest punishment. As can be seen from judicial rulings, sentencing to several years in prison is an act of resentment. I plainly believe that this act is the settling of a grievance against sentenced persons, the country and the civil society. Another point is that the upper court does not know the decision of the lower court. The lower court has to submit its decision to the higher court and if the higher court rules that the decision is unfair, then the higher court can revise the punishment and can correct it in line with the objectives I mentioned above. However, in practice this is not how it works. Because of this failure to exercise these concepts in practice, the observer groups who come and study the laws in Burma have said that “Burma is included in the list of countries where the severest punishments by lower courts are not corrected by the higher court.”

U Win Naing Oo (moderator): The courts do not accept that people accused of crimes give the excuse that they did not know something was a crime. Do the people need to know the law and is it important for the public to personally and actively participate? *U Thein Nyunt*, please express your opinion.

U Thein Nyunt: We should promote and encourage the people to learn as much as possible about the law because justice is not solely the work of the judges but also concerns the people. Judges are not the owners of the law. It is not a must for the people to have skilled legal knowledge but consciousness of law is very important. Though there may be a good constitution and good laws, to have a good judicial system the participation of people is very important. If the people do not participate, the good constitution and the good laws are only pieces of paper. To show the sign of life in law, the people with the legal consciousness in mind must report the unfair cases and convey the details of the unlawful cases. If the authorities subsequently take no action then any possible way to take action must be used. People must be courageous to complain about these unlawful acts so that the public can obtain a just decision. Now it is the time for people to have the courage to express their desires and this is the duty of the people.

U Myo Swe: Responsible government personnel must prevent the unjust cases, cases of violating law and cases involving force. They must report them to the responsible authorities and the authorities must take action. Every citizen has the duty to inform the authorities of cases of violence when they see or hear of them. If a crime is committed in plain sight, the citizen must inform the responsible authority. The duty of a citizen is to report criminal cases that they see or hear about. For example, if a citizen knows the whereabouts of a murderer, he must reveal it and report it to the responsible person. He will be blamed if he knows it but does not reveal it. If he finds stolen property he must inform the responsible person. If he does not, he will be blamed for accepting stolen property or for conspiracy. These are the laws. The duty of a police officer is to find the truth, the duty of a citizen is to inform and the duty of a judge is to determine guilt or innocence.



U Win Naing Oo (moderator): The last thing to discuss is about judges. In the judiciary, the decisions of the judges must be made independently. The most important matter here is the judge's reasoning. In deciding whether to impose a harsher or lighter sentence, the judge must use his own reasoning. The law says that, in sentencing, a judge cannot be held liable. What is your opinion *U Thein Nyunt*?

U Thein Nyunt: In the policy of the law, it is clearly provided that sentencing must be independent in accordance with the law. The answer to your question can be seen in the sentencing in political cases. With respect to the judiciary, our national leader *Bogyoke Aung San* said in the First Preliminary Conference of AFPFL held on 19 May 1947 that the "*court of the nation must look to benefit the people*". He said these words 60 years ago. All of our citizens know whether the present court of our country benefits the people or someone else.

U Myo Swe: It is stated in Criminal Procedure Code Section 77 that in the judiciary the judge can use the power given by the law and, when plainly believing that the power is given by the law, he is not committing a crime. In revealing the truth, conducting a fair trial and arriving at a fair decision, the main people from the legal side are the judges, prosecutors and police. If the process is unfair then the judge must have the courage to decide the case using his own reasoning. It is the duty of the entire citizenry and also the tax service personnel and everyone should fulfill this duty. We believe that the minister on the other hand should revise these unfair cases and uphold the law and also reform the judiciary so that everybody will cherish and respect the pillar of the law and practice it. We pray to God that they can control the pillar of the law so that it is upright and also maintain their dignity. We wish to those practicing the law that they be respectable and reliable and bring about true, accurate and just decisions in the judiciary.

U Thein Nyunt: Power is unstable in anybody's hand. When it is the turn for the powerful to suffer, only then are they grieving and remorseful. I will give the example of my detention at Moulmein Jail in 1964 while I was a student. At that time a Tavoy parliamentary member was detained in the same jail and stayed together with me. He said to me that the cell in which we were staying had no electric lights and we would have to depend on the corridor lights only. I asked him that since he had been the chairperson of the judicial affair committee of AFPFL and also the uncle of *Prime Minister U Ba Swe* at that time, why he had not repaired the jail, which is related to the judiciary. He answered to me that he thought the jail was not concerned with them and the power would be everlasting. Only when we suffer do we personally know the importance of maintaining the law and that the judicial system is important to all the people. I remember this distinctly even today.

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(3) THE POLITICAL CRISIS IN TURKEY AND THE ROLE OF THE CONSTITUTIONAL COURT An example for the Burmese judiciary?

Compiled by *Judicial Research Team*
of *Peace Law Academy*

The political crisis in Turkey shows how a constitutional court contributes to the country stability and its economic progress. Since Burma does not know any court similarity empowered, one could ask, whether the Burmese judiciary should be completed with a comparable constitutional court. This article analyses the political crisis in Turkey and how the Turkish judicial system dealt with it, evaluating whether Burma would benefit from the establishment of such a court.

Location, capital city, people and establishment of Turkey

The Republic of Turkey (Turkey) is a Eurasian country that stretches across the Anatolian peninsula in southwest Asia and the Balkan region of southeastern Europe¹. Turkey was founded in 1923 by Mustafa Kemal Atatürk, following the fall of the Ottoman Empire in the aftermath of World War ()². Ankara is its capital and Istanbul its largest city³. As of 2005, the population of Turkey stood at 72.6 million⁴. 99.0% of its population is Muslim, the majority of whom belongs to the Sunni branch of Islam⁵. Turkish is the sole country's official language⁶.

The political System of Turkey

Turkey's constitution governs the legal framework of the country. It sets out the main principles of government and establishes Turkey as a unitary centralized state⁷. The current constitution was ratified by a referendum in 1982 and since then has been amended numerous times⁸.

Turkey knows a parliamentary representative democracy⁹. The head of state is the president of the Republic, who has primarily a ceremonial function¹⁰. However, the president has a veto power on all laws and appoints some key figures in the government and administration¹¹. He is elected by the parliament for a seven-year term and is not required to be one of its members¹².

The executive power is exercised by the government, composed of the Prime Minister and the Council of Ministers, while the unicameral parliament, the Grand National Assembly of Turkey, is vested with the legislative power¹³. The Prime Minister is usually the leader of the party that won the elections¹⁴. Similarly to the Prime Minister, the Ministers do not have to be members of the parliament¹⁵. The parliament counts 550 members, who are elected for a five-year term by a party-list proportional representation system¹⁶.



A secular tradition

Since its foundation as a republic, Turkey has developed a strong secularist tradition, which has become fundamental to Turkey's identity as a nation¹⁷. Mustafa Kemal Atatürk decided that this mainly Muslim country would be modern and secular, and, therefore, he introduced wide-ranging reforms, including the emancipation of women, the western dress code, the legal code, and the alphabet, while he abolished Islamic institutions¹⁸. The modern Turkish state was established on strict secular principles and traditionally, the country's presidents have always been secularists¹⁹. Turkey prohibits by law to wear religious head cover and theo-political symbolic garments for both genders in government buildings, schools, and universities²⁰.

The Turkish Constitutional Court

The Constitutional Court of Turkey is the highest legal body for constitutional review in Turkey²¹. It "examines the constitutionality, in respect of both form and substance, of laws, decrees having the force of law, and the Rules of Procedure of the Turkish Grand National Assembly"²². When necessary, it also functions as the Supreme Court to hear any disputes arisen between the President of the Republic and members of the Council of Ministers or members of the High Courts²³. The Constitutional Court can strip the public financing of political parties that it deems anti-secular or separatist, or even ban their existence altogether²⁴.

The cause of the crisis

The crisis arose in April, 2007 from the attempt to elect a new president, as the term of the current president Ahmet Necdet Sezer, who was elected on May 16, 2000, was scheduled to end in May, 2007²⁵. Turkey is currently ruled by Prime Minister *Recep Tayyip Erdoğan*, whose Islamic conservative Justice and Development Party (AKP) won with absolute majority the 2002 general election and occupied 353 of the 550 parliament seats²⁶. Turkey's governing AK party without consulting with the main opposition Republican People's Party (CHP), nominated Foreign Minister Abdullah Gül as its candidate in the upcoming presidential election²⁷.

The parliament held the first round of voting on Friday, May 25, 2007²⁸. The Foreign Minister Abdullah Gül, the sole candidate in the elections, narrowly missed becoming the next head of the state²⁹. According to the parliament minutes, 361 lawmakers attended, 352 of whom belong to the ruling AKP³⁰. Mr. Gül secured 357 votes, just 10 less than the 367 - or two thirds of all deputies, needed to win³¹. The election process sparked a new round of tensions between the country's nationalist, secularist establishment and the ruling Islamic rooted AKP³². The oppositional CHP boycotted the vote because it had not been consulted on Mr. Gül's selection as the AKP candidate for the presidential election³³. After the vote, the CHP declared that it would challenge the election in court because only 361 lawmakers were present at the vote, fewer than the 367 required for the quorum³⁴.



Army concern over presidential poll

The Turkish military regards itself as the guardian of Turkey's secular constitution³⁵, suspects the AKP of having an Islamist agenda and fears that the influence of Islam will grow and threaten the republic's secular order, if Mr. Gul was elected³⁶. Within hours of the presidential poll, the army issued a statement saying that it was ready to take action to preserve the country's secular identity³⁷. "It should not be forgotten that the Turkish armed forces are a side in this debate and are a staunch of secularism," the statement said³⁸. But the AKP denied there was any hidden Islamist agenda and it sharply criticized the army threat to intervene in politics, saying the military must remain under civilian control³⁹.

Secularist fears

On Sunday 27, May 2007 as many as one million people attended an anti-government rally in Istanbul, Turkey's biggest city and business hub⁴⁰. Many protesters accused the government of planning an Islamist state and criticized it for failing to consult the opposition over the choice of the president⁴¹. The secularists fear that Mr. Erdogan and Mr. Gul, both former Islamists whose wives wear the Muslim headscarf banned from the state institutions, want to end Turkey's strict separation of state and religion⁴².

The court ruling on the controversial presidential vote

The CHP asked the constitutional court to declare the vote null because the minimum number of members of the Parliament required for a presidential election there was not present at the time of the vote⁴³. It argued that, while the constitution requires in the first round of voting the presence of at least 367 lawmakers, or two-thirds of the members of the parliament, according to parliament minutes, only 361 lawmakers attended to that presidential vote⁴⁴.

The AKP argued that the usual quorum of 184 suffices and it condemned the CHP's legal challenge as political manoeuvring⁴⁵.

The Turkey's Constitutional Court declared Tuesday 1, May, 2007 that the first round of the parliamentary election of a new president was invalid⁴⁶. The court ruled that the 550-seat parliament should have been convened with at least 367 deputies - or the two thirds majority in order to make the first-round vote legal, while, according to parliamentary minutes, only 361 lawmakers were present in the assembly⁴⁷. With this ruling, the Constitutional Court settled the disputed presidential vote⁴⁸.

This is not the first time that the Turkey's Constitutional Court rules on constitutional issues. In the past, it has several times decided constitutional disputes⁴⁹. For instance, in its decision no. 1989/12, dated 07.03.1989, the Court decided that wearing headscarves in universities is unconstitutional⁵⁰.

So it is obvious that Turkey's constitutional court plays a significant role in the country's stability. If there were no court in Turkey entitled to rule this issue, the crisis would have last longer, become more serious, and lead to political instability. Even only



a week long political instability decreased Turkish stocks and currency to some extent⁵¹. The importance of the judiciary in keeping the unity of the nation is felt everywhere. The king of Thailand, Bhumibol Adulyadej, said: "What ever court you belong to, judges need to make the right interpretation, otherwise the country will be doomed"⁵². Therefore, the power of the judiciary is important for a country's stability and to promote its economy.

The comparison with the current Burmese judicial system

If we look at nations around the world, almost every nation has a judicial mechanism that ensures the constitutionality of parliamentary acts such as draft legislations and elections. Most countries, whose legal system is based on the Common law tradition, vested the country's highest court (usually called "Supreme Court" or "High Court") with this power, while the countries, whose legal system is based on the Civil law tradition, set up separate courts (habitually called "Constitutional Court" or "Constitutional Tribunal"). Consequently, countries following both of these legal traditions, the Common law and the Civil law tradition, foresee a mechanism to handle political election issues.

In comparison, since the independence of the country, the Burmese courts never had a power and responsibility similar to the Turkey's Constitutional Court. Since it gained independence from Britain, Burma had adopted two constitutions, one in 1947 and another in 1974⁵³. The Chapter VIII of the 1947 Constitution established the court system, headed by the highest court called the "Supreme Court"⁵⁴. The Union Judiciary Act (1948) prescribed the power of all country's courts⁵⁵. The People's Justices Council Act (1974), which was enacted according to chapter VII of the 1974 constitution, defined the power of the courts⁵⁶. Neither the laws under the 1947 constitution nor under the 1974 constitution empowered the courts to rule on the validity of laws, the legality of governmental acts and as well as parliamentary acts. There is no evidence that the Burmese courts ever ruled on any constitutional issue.

The current judicial system of Burma has been established by the Judiciary Law 2000 under the SPDC dictatorship and it created the Supreme Court and, respectively, inferior courts⁵⁷. The courts can neither question the validity of any SPDC's law nor the legality of any governmental act⁵⁸. Despite formally performing its function independently, the judiciary is totally under the control of the military. The judges usually admit that they decide the cases according to the instructions from their superiors⁵⁹. Since the Judiciary Law 2000 does not guarantee the compensation and tenure security of the judges, they must comply with the instructions coming from the regime if they want to keep their position. The current Burma's judiciary is just a mechanism applying the SPDC laws, having no capability to question their validity⁶⁰.

In conclusion, the Turkey's case proves the importance of the judiciary in maintaining the stability of the society. Since an unstable society is hindered in its economical development, the judiciary has significant role in the country's development as well. As already mentioned, through the whole history of Burma, its courts were not given the power to rule on the matters such as the validity of laws, the constitutionality of government acts, and political parties' and electoral issues. In other words, Burma's judiciary has never had a real judicial review power. If Burma wants to build a stable society, it should secure itself a strong, active and independent judiciary, able to rule



on the constitutionality of parliament and government acts and political parties' and electoral issues. It does not mean that Burma must have a separate constitutional court like Turkey. Burma legal system is based on the Common law tradition. Many common law countries such as United States and Canada vested the Supreme Court with the constitutionality review power. Likewise, in Burma the constitutional review could be performed by the Supreme Court. Therefore, it is necessary to take into consideration the establishment of a mechanism to resolve constitutional disputes in future Burma, which may affect the country's stability.

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(Endnotes)

- ¹ <http://en.wikipedia.org/wiki/Turkey>
- ² <http://en.wikipedia.org/wiki/Turkey>
- ³ <http://en.wikipedia.org/wiki/Turkey>
- ⁴ <http://en.wikipedia.org/wiki/Turkey#Demographics>
- ⁵ <http://en.wikipedia.org/wiki/Turkey#Demographics>
- ⁶ <http://en.wikipedia.org/wiki/Turkey#Demographics>
- ⁷ http://en.wikipedia.org/wiki/Turkey#Government_and_politics
- ⁸ http://en.wikipedia.org/wiki/Turkey#Government_and_politics
- ⁹ http://en.wikipedia.org/wiki/Turkey#Government_and_politics
- ¹⁰ http://en.wikipedia.org/wiki/Turkey#Government_and_politics
- ¹¹ <http://news.bbc.co.uk/2/hi/europe/6589503.stm>
- ¹² http://en.wikipedia.org/wiki/Turkey#Government_and_politics
- ¹³ http://en.wikipedia.org/wiki/Turkey#Government_and_politics
- ¹⁴ http://en.wikipedia.org/wiki/Turkey#Government_and_politics
- ¹⁵ http://en.wikipedia.org/wiki/Turkey#Government_and_politics
- ¹⁶ http://en.wikipedia.org/wiki/Turkey#Government_and_politics
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- ¹⁹ <http://news.bbc.co.uk/2/hi/europe/6602375.stm>
- ²⁰ <http://en.wikipedia.org/wiki/Turkey#Demographics>
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- ²⁸ <http://archive.turkishpress.com/news.asp?id=173962>
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Part (D): On Social Security

(1) BLC's SOCIAL SECURITY REPORT FOR 2007

Analysis on the Social Security Status of People in Burma

Introduction

As a country that has prioritised military expenditure over welfare provision for its people during the past four decades, Burma has succumbed to an acute economic and social crisis. The ruling State Peace and Development Council (SPDC) continues to spend over 40% of the national budget on the military, while International Monetary Fund (IMF) figures estimate that under one percent of the gross domestic product (GDP) is spent on health and education combined.¹ Consequently, the people of Burma are systematically denied their basic economic and social rights, whether it is access to employment, healthcare, education, livelihood, or other fundamental needs.

In this report, Part (A) introduces case studies which reflect lack of social security in Burma. Part (B) continues to highlight the factors that have influenced social security status of people, such as state policy, trend of privatization, deprivation of livelihood and lack of income security. Finally, Part (C) provides recommendations for promotion of social security status with a forward looking perspective. Burma Lawyers' Council attempts to address the social security issues from both the sociological and legal aspects.

Part (A) Case Studies

A sharp rise in inflation since 2005 has caused a significant rise in the cost of basic commodities, such as rice, cooking oil, meat and sugar, throughout the country.² As a result, people have been flocking to the government-run tax-free market, which sells a bowl of rice at 350 kyats, as opposed to 800 kyats outside.³ The latter can be prohibitive, considering that an average daily wage is 1,200 kyats for those who are lucky to find employment. Without any adequate social protection provided by the State in such times of distress, they are forced to seek their own means of survival. These desperate measures place people at further risk of vulnerability to exploitation and abuse, thus trapping them in dire social conditions.

HAIR THEFT

One of the indicators of Burma's lack of social security is the growing number of reported **theft cases of women's hair** since 2003⁴. Hair purchasing centres have dramatically increased in Rangoon, where 1.6 kilograms of hair can be sold at 400,000 kyats (320 US dollars) to 500,000 kyats (400 US dollars)⁵. Rising incidents of women's hair being cut off at crowded places to be sold to these centres, as well as women who secretly sell their hair to buy food despite the dignity associated with long hair in



Burma, reflect the increasing need of the population to compensate for their lack of income.

TRAFFICKING OF WOMEN

A more alarming trend is the continuing incidence of **trafficking of women** as a result of poverty and lack of employment opportunities.⁶ Due to the failure of the state to provide identification documents, these women and girls are denied their right to travel or migrate legally and thus become vulnerable to trafficking. Once trafficked, the majority of women and girls are forced into sex work or sold as wives in China, where they are often exploited and abused due to their lack of legal status that render them vulnerable to trafficking.⁷

HUNGER AND FOOD SCARCITY

"Hunger is widespread and serious in Burma" in both civil war and non-civil war areas, and it is spreading both geographically and demographically.⁸ The causes of this growing phenomenon have been found to be: (1) the destruction of staple crops which provide the local food supply; (2) uncompensated conscription of people to work on State projects which do not leave enough time for them to work their fields; (3) uncompensated conscription of porters to areas far from their villages leaving them without time to grow food; (4) forced relocation of people to areas where rice is difficult to grow, or to unfamiliar terrain making it difficult to find enough food; and (5) a quota system whereby the villagers must provide a set amount of rice to the government well below the market price, regardless of whether or not the harvest was adequate, which leaves people in debt and without any rice of their own to eat.⁹

CHILDREN

Food scarcity has had an alarming impact on the health and well-being of children in Burma. According to a World Bank study, "the level and depth of hardship among families in Myanmar is vividly reflected in high rates of **malnutrition among pre-school-aged children**. Even based on official statistics, far too many of Myanmar's children suffer from **wasting and stunting**. Moderate wasting affects almost 3 out of 10 children under 3 years of age, and 1 in 10 is severely malnourished. This has been described elsewhere as a 'silent emergency' in Burma. Deprivation on this scale indicates not only immediate need, but also adverse long-term repercussions for the health and intellectual development of the affected children".¹⁰ According to the UNICEF report *The Progress of Nations 2000*, 45 per cent of Burmese children under five are stunted in growth, and according to the World Health Organization (WHO), 39 per cent are underweight.¹¹ Food deprivation, repeated illness, lack or absence of healthcare and death or forced relocation of parents appear to be the major causes of the phenomenon of stunted growth of children.¹²

Furthermore, families that cannot afford to pay for their children's needs often send them to work as **child soldiers**.¹³ Burma is reported to have the highest number of child soldiers in the world¹⁴, with unofficial sources estimating the figure to be around 50,000.¹⁵ Children lacking basic social security, such as street children, orphans and children belonging to ethnic minorities, are believed to be the most vulnerable to forced recruitment.



HEALTH AND HIV/AIDS

In addition, due to the SPDC's lack of initiative in disease prevention work and a history of non-recognition of major threats to health, such as the spread of HIV infection and intravenous drug use, there are **more than 1 million persons affected by HIV/AIDS in Burma**.¹⁶ In 2003, UNAIDS reported that more than 20,000 people died of HIV/AIDS.¹⁷

Part (B)

Factors that influence the social security status of people in Burma

(B. 1) SPDC's State policy

The principal policy of the SPDC is to **strengthen the military might through rigid centralised control**. Burma has the highest budget allocation for military expenditure in Southeast Asia, amounting to over 40% of its national budget, which excludes hidden accounts and subsidies to the armed forces.¹⁸ The size of its army has more than doubled since 1987 from 186,000 personnel to 440,000 in 2002.¹⁹ The United Nations Development Programme (UNDP) estimates that arms imports comprise more than one-fifth of total imports.²⁰ Escalating fuel prices have stoked inflation, now running as high as 40 percent annually, up from about 10 percent a year ago.²¹

A related SPDC policy is to **create a military-dominated society, or a "military welfare state"**, as opposed to a social welfare state that ensures that wealth and security are shared by the majority and nobody is excluded. This policy has resulted in the under-development of physical infrastructure for the people, such as electricity, transportation and communication systems. Only an elite few are able to receive basic healthcare services or achieve a moderate level of education.²²

The decision by the junta to move its capital from Rangoon to Naypyidaw in November 2005 is a case in point. Huge costs have been incurred to build a vast military complex, golf courses and high-rise government buildings, yet there are few signs of the schools and hospitals that the government has promised.²³ Electricity supply which was already erratic before the move has now become even more unreliable.²⁴ In addition, villagers and farmers have been forced off their land and their properties destroyed to make way for the building of new administrative offices, residential homes and military barracks.²⁵ On 18 November 2005, the authorities ordered the destruction of 100 houses along U Razat and Maung Khin roads in Pyinmana to widen a road leading to the new capital.²⁶ On 6 December 2005, it was reported that 500 more homeowners lost their homes for road widening projects associated with the Pyinmana move.²⁷ It is therefore obvious that the combination of the factors above, occurring under faulty state policies, has led to a steady deprivation of people's social security.

In such times of hardship, the people of Burma lack unemployment insurance or public financial support. Despite an existing pension system, civilian pensioners live in dire need of subsidies as the amounts of pension salaries are sufficient only for a few days of food.



(B. 2) Trend of privatisation

The government's failure to adequately transfer its social security responsibilities to the private sector is evident by observing the impact of its resistance to the emergence of civil society inside Burma combined with its convoluted privatization policy. The SPDC does not cooperate effectively with international organizations in providing aid to the country's citizenry, while it rigidly restricts the operations of local people's organizations.

The Joint United Nations Programme on HIV/AIDS (UNAIDS) reports that resources made available to combat HIV/AIDS are meagre in comparison with the magnitude of the problem, which is exacerbated by the SPDC's reluctance to permit international non-governmental organisations to work in collaboration with community-based organisations.²⁸ Permits to visit patients are difficult to obtain and access to high-risk groups and vulnerable groups is restricted. UNAIDS has warned of a growing epidemic in Burma and indicated that the regime has largely been ignoring it.²⁹

Flagrant neglect by the SPDC of its own citizens' health resulted in Burma's overall performance in health being ranked second-to-last: 190th out of 191 States.³⁰ Its policies in health "still appear to be indecisive and inadequate" with "wide inequality of access to adequate health care, both preventive and curative."³¹ Denied the basic right to health, people in Burma cross the border to Thailand to receive free medical assistance at the Mae Tao clinic.³² It is estimated that over 100 patients from Burma arrive at the clinic each day. Poor quality of public health care services has become undisputed and must be addressed urgently in all of Burma.

Laws enacted by the SPDC have contributed to the lack of privatisation of social security services. For instance, without declaring a privatization policy, the SPDC enacted "The Law Relating to Private Health Care Services" on April 5, 2007, with a publicized objective "to carry out systematically by private care services in the national health care system as an integral part." However, this law essentially lacks positive foundations for the successful operation of private health care services: there is no provision which sanctions them to communicate with the international health communities independently, and receive financial, material and academic assistance, nor is there any provision which prescribes the obligation of the state to facilitate the private health care services such as availability of the advanced medical equipment and hospital construction materials, promotion of medical capacities, access to emergency transportation, communication, electricity and other basic infrastructure, reduction of income tax, etc. Instead, this law imposes negative prohibitions on private health care services; and, penalties for violations of the law range from a minimum of 6 months to a maximum of 5 years imprisonment.

Similarly, the 1988 Law Relating to Forming of Organizations, enacted by the SPDC, obstructs the formation and independent functioning of all organizations, including those which attempt to promote social welfare of local people. Section 5 vaguely provides that legal action can be taken against organizations that attempt, instigate, incite, abet or commit acts that may effect [sic] or disrupt the regularity of state machinery and, if found guilty, an accused shall be punished with imprisonment for a term that may extend to five years. Penalties rendered under that law have created



situations in which organizations operated by local civilian people are strictly controlled on one hand, while lackey organizations of the SPDC, such as Union Solidarity Development Association, Myanmar Maternal and Child Welfare Association and Myanmar Red Cross, operated by the military leaders, wives and relatives of the military leaders, ex-army personnel and their cronies, enjoy opportunities to communicate with the international community, and receive development and social welfare assistance under the guise of civil society.

(B. 3) Deprivation of livelihood and lack of income security

The fishing license granted 500 Thai fishing boats the right to operate in the zone, which covers about 358,500 square kilometres in the Andaman Sea.³³ Thai fishing boats, which are equipped with technologically advanced fishing nets, are capable of catching enormous amounts of fish within a short period and exceeded the fishing capacities of boats traditionally operated by local Burmese fishermen. This licensing has caused a negative impact not only on the livelihood of fishermen in seashore areas, but also on the availability of fish for all Burmese consumers living in low land areas of Burma, exacerbating the hunger and poverty of people.

Similarly, Burma's timber continues to be sold to foreign companies. According to the World Resources Institute, the rate of deforestation has more than doubled since the present military regime came into power in 1988.³⁴ Forest devastation continues in Kachin, Karen and Karenni States, benefiting only the SPDC officials and Chinese companies.³⁵

Cultivators in Burma have effectively lost the right to own land. Under domestic law sections 9-12 of the Lands Nationalization and Agricultural Lands Act 1953, the transfer, partition or lease of land can only occur with permission from the authorities. In the 1963 Tenancy Act, the regime usurped the right of landowners to lease their land and the 1963 Protection of the Right to Cultivation Act stipulated that land would be protected from confiscation, except in the case of "(a) non-payment of dues owing to the State, and (b) disputes arising from inheritance cases or actions taken by the State for security reasons."³⁶

The regime was further granted authority to confiscate land through Notification No. 4/78, which was enacted on 18 September 1978.³⁷ This notification states that failure to sow the allotted land with the earmarked crops to obtain optimum results, or failure to sell the full crop quota to the SPDC at the stipulated price, would result in confiscation of land. Currently village and Township administrators have the power to confiscate land and the cultivators are compelled to follow their dictates with no means to protest.

The primary reason behind land confiscation and forced displacement of people is to further extend SPDC's military control over the country. This includes establishment of military encampments, State enterprises and development projects to bolster the position of the SPDC in general, as well as vis-à-vis the ethnic armed cease-fire groups. Confiscated land is also often used to grant concessions to foreign companies, to benefit SPDC's lackey organisations, as well as to obtain access to natural resources.

Development projects that have led to forced displacement in Burma include the construction of infrastructure, mines, irrigation systems, and natural gas and oil



extraction facilities as well as commercial agricultural fields and military bases.³⁸ According to Earth Rights International, “dozens of large-scale dams (fifteen meters in height) have been already built or are currently under construction throughout Burma, especially in the central region of the country.”³⁹ The construction and resulting water displacement of such hydro-electric dams necessitate the mass relocation of those living in the affected area.

In addition, the SPDC relocates villagers not to use the confiscated land itself, but to undermine the support base of armed opposition groups by severing their connections to recruits, information, supplies and finances. Known as the “four cuts” policy, this military-based strategy has been implemented by forcibly relocating villagers from “brown” (contested) areas to “white” (SPDC-controlled) areas, thereby isolating villagers from resistance forces and placing them more firmly under military control.⁴⁰

Part (C) Recommendations

Burma is a multi-ethnic society with diverse cultures, religions and traditions. Ultimately, peaceful co-existence and the guarantee of social security for all persons can be ensured only if the people’s **right to self-determination** is respected through an accountable, transparent and **decentralised system of governance**. Within the framework of federalism in which civil society exists in every constituent unit of the union, Burma must embrace a structure of governance whereby people’s rights and needs can be expressed and protected through institutionalised inputs to the decision-making processes at all levels of the administrative system. In essence, the notion of “self-rule and shared rule” must be respected.

In particular, the issue of people’s access to social security must be resolved by three sectors of society:

- (a) the state;
- (b) civil society organizations and institutions; and
- (c) individuals.

Essentially, the state must take primary responsibility for the social security of people depending on available natural resources, gross national income, and state budgets, while promoting the economic, social and cultural rights of people on one hand and fostering the economic welfare of people on the other, with a “people centred concept”, and rejecting state centric development programs. The State is also obliged to respect and promote the genuine principles of the Rule of Law with the existence of an independent judiciary, by which corrupt practices and power abuses of administrative officials can be brought to justice and transparent society be established.

In addition, the emergence of civil society organizations and institutions will help secure the right to social security for all. As such, all oppressive laws and other restrictions imposed on civil society organizations for their formation and independent functioning must be abrogated; and, their communications with the outside world and among the organizations themselves to seek assistance and cooperation on social security matters must be institutionalized and legalized.



Social security can also be protected when people live in dignity with a secure livelihood. To this end, last but not least, the state must guarantee people's access to resources required, in addition to cancellation of legal and administrative barriers which hinder equal right for employment, equal pay for equal work, and independent formation and operations of trade unions, commencing with the right not to be forced to work.

Eventually, the right to social security will become a reality when the inner dynamics, interconnectedness and interaction between the state, civil society organizations and capable individuals better reflect the dire need of the Burmese people.

Burma Lawyers' Council
June 25, 2007

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Burma Lawyers' Council

Everyone is equal before the law.

Wisdom is power to transform the society into a just, free, peaceful and developed one.

Mission Statement

“By vigorously opposing all unjust and oppressive laws, and by helping restore the principle of the Rule of Law, the Burma Lawyers Council aims to contribute to the transformation of Burma where all the citizens enjoy the equal protection of law under the democratic federal constitution which will guarantee fundamentals of human rights.”

The Status of Organization

The Burma Lawyers' Council is an independent organization which was formed in a liberated area of Burma in 1994. It is neither aligned nor is it under the authority of any political organization. Individual lawyers and legal academics have joined together of their own free will to form this organization.

Objectives of the BLC

- Promote and assist in the educating, implementing, restoring and improving basic human rights, democratic rights, and the rule of law in Burma;
- Assist in drafting and implementing a constitution for Burma, and in associated matters of legal education; and
- Participate and cooperate in the emergence of a Civil Society in Burma.

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