



# **LawKa PaLa**

Legal Journal on Burma

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**Burma Lawyers' Council**

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## **Legal Journal on Burma**

**BURMA LAWYERS' COUNCIL**

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

## **Legal Journal on Burma**

Legal Journal on Burma is published three times a year by Burma Lawyers' Council. The journal contains academic articles relevant to legal and political issues in Burma including: constitutional reform, rule of law, federalism, refugees, judicial independence, martial law, and religious freedom. Articles are written by practising lawyers, academics, and experienced Burmese opposition activists. The views expressed in the articles are those of each author and not of Burma Lawyers' Council. The journal also, where relevant, reproduces copies of important documents relating to Burma, such as statements on behalf of the Burmese parliament. The journal's production is funded by the Friedrich Naumann Stiftung from Germany.

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**The BLC Publication Team**

## Contents

	PAGE
<b>Part A: Focus on Criminal Accountability</b>	
(A.1) Burma Lawyers' Council Report on ICC Campaign	4
(A.2) Special Announcement on the Fifth Anniversary of the Depayin Massacre	7
(A.3) Statement Condemning Extension of Daw Aung San Suu Kyi's Detention	9
(A.4) In Brief: ICC Rules of Evidence and their Relevance to Collection of Evidence in Burma	11
(A.5) The Junta's Criminal Constitution	18
(A.6) Catastrophe in Burma a Wake Up Call to the International Community: Time to End Impunity for Heinous Crimes by the Military Regime	22
(A.7) In the Wake of Historic Resolution 1820 Women of Burma and Lawyers Call to Refer the Situation in Burma to the International Criminal Court	24
(A.8) EU Resolution Urges UK to Use Presidency of the Security Council to Refer Burma to the International Criminal Court	26
(A.9) Excerpts from "Dealing with Burma's Criminal Accountability Issue: Trip Report of the BLC General Secretary to Australia and Japan"	28
<b>Part B: Special Feature</b>	
Responding to the Human Rights Situation in Burma: A UN Framework for Non-Forcible Measures by David I. Fisher, Professor of International Law, Stockholm University.	33
<b>Part C: Referendum and Constitution</b>	
(C.1) 2010 Elections: No Hope for Human Rights	45
(C.2) Activities conducted by the BLC on SPDC constitution and referendum	53
(C.3) Analysis of the SPDC's Constitution from the Perspective of Human Rights	58
(C.4) Letter from United Nationalities Alliance on Political Situation in Burma	66
<b>Part D: The Rule of Law</b>	
(D.1) Response to Kyaw Ye Min regarding Extension of Daw Aung San Suu Kyi's Detention	69
(D.2) Appeal to UN Secretary General to Take Immediate Action for the Release of Zagana	75



## Part A: Focus on Criminal Accountability

### (A . 1)

### **Burma Lawyers' Council Report on the Campaign for Criminal Accountability**

This issue of the *Lawka Pala* focuses largely on criminal accountability. There is overwhelming evidence that under the military regime, the people of Burma have suffered from widespread and systematic atrocities. In September 2007, the Burma Lawyers' Council (BLC) formally teamed up with U.S.-based Global Justice Center (GJC) to begin a campaign to hold perpetrators of these crimes responsible. Since then, many other organizations have endorsed the campaign and joined the BLC and GJC in calling for accountability. This brief report answers some of the most frequently asked questions about the Campaign.

#### *1. What is the Campaign for Criminal Accountability?*

The Campaign for Criminal Accountability is a cooperative effort among concerned individuals, Burmese organizations, international organizations, and nation states to hold perpetrators of heinous crimes in Burma accountable for their acts. The primary campaign strategy is to get the United Nations Security Council (UN Security Council) to refer the crimes to the International Criminal Court (ICC) for an investigation and possible prosecution.

#### *2. Why does the UN Security Council have to refer the crimes to the ICC?*

If Burma were a signatory to the ICC statute, this case could go directly to the ICC. As Burma did not sign the statute, however, the only way to get the case to the ICC is through a UN Security Council referral under its Chapter VII powers. Chapter VII of the UN Charter addresses threats to international peace and security.

#### *3. What are "heinous crimes"?*

"Heinous crimes" are crimes that are atrocious enough to concern all of humanity. They include the crimes over which the ICC has jurisdiction; namely, crimes against humanity, war crimes and genocide. Amnesty International has independently concluded that crimes against humanity have taken place in Burma. The International Committee for the Red Cross, in a rare departure from neutrality, condemned the Burmese government for gross violations of international humanitarian law (war crimes). Numerous other organizations have also been documenting these crimes for many years.



#### *4. Who is participating in the Campaign for Criminal Accountability?*

The Campaign is a cooperative effort among many organizations, led by the BLC, GJC, Network for Human Rights Documentation – Burma, and Women’s League of Burma. Several important Burmese and international organizations have endorsed the Campaign or joined us for the Campaign, including the National Council of the Union of Burma, International Federation for Human Rights, Christian Solidarity Network, and Burma Justice Committee (UK).

#### *5. What have been the Campaign’s most important activities and accomplishments?*

The Campaign’s most important activity has been explaining to individuals, organizations and governments around the world why criminal accountability is important to improving the situation in Burma and how the Campaign is complimentary to, not in opposition with, true national reconciliation. Just as importantly, the BLC and GJC have been seeking the input and opinions of others to strengthen the Campaign strategy and incorporate new ideas.

To this end, members of the GJC and BLC have traveled to England, Belgium, Japan and Australia to hold discussions with Burmese activists, human rights groups, international NGOs, government administration officials, and Members of Parliament.

In cooperation with the Coalition for the International Criminal Court, Union for Civil Liberty and International Federation for Human Rights, in November 2007 the BLC co-hosted a Consultation on the International Criminal Court and the Rule of Law in Burma and Thailand.

In the aftermath of Cyclone Nargis, the Campaign successfully lobbied the European Parliament to include language in its May 22 Special Resolution that called for ICC involvement in Burma.

The Campaign’s primary documentation partner, Network for Documentation – Burma, has been collecting evidence of heinous crimes to be used in connection with a UN Security Council referral and a possible ICC investigation.

The next major effort will be an outreach trip to Japan, Korea, Philippines, and Indonesia. These countries are particularly important to bringing about the support of more Asian countries for criminal accountability in Burma. The trip



is tentatively planned for December 2008 and will include meetings with Burmese groups, NGOs, women's groups, the press, Members of Parliament and government authorities.

*6. Why is it important to get others to support the Campaign?*

For the Campaign to succeed there must be support from the ground up. First the Burmese people both inside and outside the country need to support accountability. This will signal to important international NGOs and governments around the world that the Burmese people want perpetrators to be held responsible and impunity to end. And then, only the pressure from the entire Burmese and international community can convince countries on the UN Security Council, particularly countries like Russia and China, that they have a legal and moral obligation to refer the case to the ICC to investigate heinous crimes that have occurred in Burma.

\* \* \* \* \*



(A . 2)

**Special Announcement on the Fifth Anniversary of the Depayin  
Massacre (30 May 2008)**

**Burma Lawyers' Council Urges the United Nations Security  
Council to Refer the Heinous Crimes in Burma to  
the International Criminal Court**

1. The Burmese people should pay gratitude to the United Nations Secretary-General, Mr. Ban Ki-moon, for visiting Burma, carrying out the task of aiding victims of the cyclone disaster, expressing regret for Daw Aung San Suu Kyi's extended detention, which began in connection with the Depayin Massacre, and insisting that she be released. But that alone is not enough. Her temporary release will only be the latest in the arrest and release cycle. Daw Aung San Suu Kyi has suffered from violations of laws of the International Criminal Court. She has also suffered from violations of United Nation Security Council Resolution 1325 establishing protections for women and girls. Based on these facts, the United Nations Security Council has the grounds and the responsibility to transfer the case of Daw Aung San Suu Kyi to the International Criminal Court to investigate the crimes and prosecute the perpetrators. The Burma Lawyers' Council urges the United Nations Security Council to do so.

2. It has been a full five years since the Depayin Massacre. No effective actions were ever taken on the authorities who committed this crime due to the following facts.

- (1) The inability to unanimously demand action on the Depayin Massacre for fear that it would affect the political dialogue.
- (2) The total absence of freedom in the judicial system and the total control of the system by the ruling military regime.

3. The International Criminal Court was formed on 1 July 2002. Even though the Depayin Massacre occurred on 30 May 2003, after the establishment of the International Criminal Court, actions were never taken due to the above mentioned facts. As a consequence, the offenders boldly and audaciously continued to commit crimes. Under the watchful eye of the world, they violated the existing laws by arresting, oppressing and killing the monks in September 2007. True National Reconciliation will not be achieved without prosecution of the crimes committed by the perpetrators. Sham meetings and superficial national reconciliation will gradually fade away.



4. The likelihood that action will be taken by the International Criminal Court on the heinous crimes that have occurred in Burma is improving. Although Sudan did not ratify the ICC statute, the ICC took action on Sudan through a 2005 referral from United Nations Security Council. On 29 May 2007, the Australian Labor Party (the present governing party) urged that action be taken on crimes in Burma. A similar decision was passed by European Union Parliament on 22 May 2008. These are good examples of taking action at the international level.

5. The present detention of Daw Aung San Suu Kyi is totally different from the previous detentions. She is the only victim of the Depayin Massacre that continues to be detained. Actually, she was not detained under 1975 State Protection Act but as a result of the Depayin Massacre. According to the 1975 State Protection Act, she should be freed after detention for five years but her continued detention would be a consequence of the Depayin Massacre. Her detention will continue year after year until her sentence expires, whether she is alive or dead. If she is freed based on international pressure, a few months after her release she will be detained again. The only way to completely stop the continuous arrests is to act on the matter using international law.

6. In Article 7, Section (1)(e) of the International Criminal Court statute, it is prescribed that crimes against humanity include “Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law”. The detention of Daw Aung San Suu Kyi cannot be considered ordinary. Detaining the National Leader and an internationally well-known person in violation of the existing laws frightens the people in the country and thus commits a great crime and reaches the threshold for invoking international law. There is international jurisdiction for this type of crime.

7. Therefore the Burma Lawyers’ Council urges the justice-loving people, organizations, human rights activists, political leaders and law academicians to mobilize for the release of Daw Aung San Suu Kyi and also to work together to end the cycle of release and arrest by pushing the heinous crimes committed by the SPDC to the International Criminal Court.

For detail information contact:

U Aung Htoo, General Secretary, Burma Lawyers’ Council  
Mobile: 66 (0)81 533 0605

\* \* \* \* \*



(A . 3)



P.O. Box 144, Mae Sod Post Office, Tak Province 63110, Thailand; Tel/Fax (66) 055-542910

E-mail: blcburma@blc-burma.org; blcsan@ksc.th.com; Website: www.blc-burma.org

## **Daw Aung San Suu Kyi's Detention Should Be Added to the List of the SPDC's Crimes Against Humanity**

1) On May 27, the SPDC extended Daw Aung San Suu Kyi's house arrest. She was originally detained in May 2003 pursuant to the 1975 State Protection Act, which has a maximum detention period of five years. The five-year period has expired and thus she must be released immediately. Continuing to detain her is a flagrant violation of the SPDC's own law. Moreover, there is no other applicable Burmese law under which the SPDC can continue to hold her, such as the Penal Code, because she has not committed any crime.

2) Daw Aung San Suu Kyi's detention should also be considered a crime against humanity because it is targeted not only at her, but at the entire Burmese population. She is no ordinary citizen. She is the embodiment of liberty, democracy and human rights in Burma. Her popularity among the people and her undying charisma won her the Nobel Peace Prize. If someone so distinguished and honored can be unlawfully detained, how can common people ever hope to oppose the regime without fearing for their own freedom and safety? The reality is, they cannot. The SPDC knows that the extended detention of Suu Kyi will continue to spread intimidation throughout the country, and fear strengthens their rule.

3) Daw Aung San Suu Kyi's detention fits the technical definition of crimes against humanity. These crimes include "imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law" (Rome Statute, Art. 7, § 1(e)). Suu Kyi's detention is clearly one that violates fundamental rules of international law because she was detained for purely political purposes, not for any wrongdoing.

4) From the legal perspective, some may argue that Suu Kyi's unlawful detention is a single, isolated crime, and therefore does not meet the requirement that it be part of a "widespread" or "systematic" attack. The BLC disagrees



with this position. First, a single detention or other crime can qualify if it is meant to “intimidate the entire civilian population” (Jean Graven, *Les Crimes Contre Humanite*; see also, FRANCISCO FORREST MARTIN, ET AL., *International Human Rights & Humanitarian Law, Treaties, Cases, & Analysis* (“Although it is correct that isolated, random acts should not be included in the definition of crimes against humanity, ... an isolated attack can constitute a crime against humanity if it is the product of a political system based on terror or persecution.”)). Moreover, her detention is a part of the long SPDC campaign to arrest, intimidate, torture and murder civilians. “As long as there is a link between the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity” (*Prosecutor v. Mrksic and other*, International Criminal Tribunal for the Former Yugoslavia, 3 April 1996, IT-95-13-R61).

5) The BLC urges all supporters of peace and justice to continue pressuring the UN Security Council to refer the heinous crimes in Burma to the International Criminal Court.

Burma Lawyers’ Council  
May 28, 2008

For detailed information, please contact:  
U Aung Htoo, General Secretary, 66 (0) 815330605

\* \* \* \* \*

**(A . 4)****ICC Evidence Rules:****Analysis of the Rome Statute and the Rules of Procedure and Evidence  
with Considerations and Recommendations for NGOs Involved  
in Evidence Gathering****Question**

What kinds of evidence will ICC courts admit and how should evidence gathering NGOs use this information?

**Summary**

Understanding these rules of evidence is far more important for prosecutors than for evidence gathering NGOs. Generally, NGOs should keep detailed records of information the prosecutor may find, and how and where the prosecutor may find it. However, NGOs should not usually record detailed witness testimony or remove physical evidence because NGO errors could stop prosecutors from being able to use a witness or evidence at trial. Instead, NGOs should focus on recording details of crimes into a database that the prosecutor can use to conduct an official investigation, and to help the prosecutor understand relevant local cultural issues.

Still, NGOs may benefit from understanding what kind of evidence prosecutors can eventually use at trial. The ICC Rules of Evidence say that the judges may allow any evidence, including hearsay, but they can choose not to allow evidence. Instead, the judges will think about the importance of the evidence before ruling on the evidence's admissibility. While national evidence rules do not apply, national evidence rules might show which evidence judges are more likely to admit.

ICC Rules protect witnesses and victims. ICC Rules give the court and prosecution many options to protect witnesses and victims, including testimony by video, protection of witness identity before trial, and protection of confidential information given to the prosecutor by witnesses.

ICC Rules do not stop prosecutors from using non-admissible evidence in their investigation to find admissible evidence. However, prosecutors must have "a reasonable basis to believe" a crime has been committed before investigating. If the prosecutor thinks they will be able to find admissible evidence, they will be more likely to investigate than if they do not believe they will find much admissible evidence.



## Discussion

### **I. Considerations and Recommendations for NGO Evidence Collection: Detailed Databases Summarizing Cases, Explanations of Cultural Issues, but Not Full Witness Testimony**

While it is important for information gathering NGOs to consider the ICC Rules of Evidence, it is also important that NGOs do not make decisions for the prosecutor, and potentially harm the prosecution's case. Many human rights groups suggest that NGOs should summarize and categorize information that the prosecutor can use to start an investigation, but NGOs should not investigate like a prosecutor because the NGOs might hurt the prosecutor's case.<sup>1</sup> Instead, NGOs should use the strengths of their particular organization to help the prosecutor meet, interview, and protect witnesses and victims.

#### **A. Collect as much detailed information as possible in a database, but avoid making audio, video, or written recordings of witness testimony. The prosecutor should make these recordings.**

When possible, NGOs should give the prosecutor detailed information in the form of a database. There are many pieces of information NGOs should collect and place into categories such as: the incident's location; the time, date, and duration of the incident; the chronology of the incident; the nature of the crime and the methods used to commit the crime; possible reasons for the crime; identity of alleged perpetrators; identity of the victim including name, age, gender, occupation, address, ethnicity, religion, or other relevant affiliation; and a list of other information that may be available to the prosecutors.<sup>2</sup>

However, NGOs should avoid recording witness testimony with much detail if they want to be sure the prosecutor can use the witness at trial. If an NGO records witness statements with too much detail, there is a better chance that slight errors would stop the prosecutor from using the witness during trial. For example, if a statement is incorrectly recorded, and differs from testimony in court, the defense will be able to raise questions about the reliability of the witness. Similarly, witnesses may incorrectly remember some details of an incident, or may not understand it is okay to tell an investigator they do not remember some key facts, and may guess about details. If this happens, and the details of the crimes are unclear, the defense will be able to attack the prosecution's case. Therefore, it is best to summarize information to the prosecutor about possible witnesses, and let the experienced prosecutors record witness testimony.



In some circumstances, there might be exceptions. For example, if someone was the only witness to an incident, and they are unlikely to live until a possible trial, it may be better to record their testimony. Similarly, it is better to let the prosecutor collect physical evidence, but NGOs may need to collect this evidence if it would be destroyed before the prosecutor can get to it. Still, collecting either recorded witness testimony or physical evidence should only be done when absolutely necessary: only when the risk a piece of evidence will be completely lost outweighs the increased risk the evidence will not be admissible when collected by an NGO instead of the prosecutor.

**B. NGOs should use their understanding of an area's customs and cultures to help best connect the victims and witnesses with prosecutors.**

NGOs should remember that what they know about how a region's culture or customs is extremely important to the prosecutor. The prosecutor will not be able to investigate properly without this information, and any evidence submitted to the prosecutor should explain cultural, political, or historical background. With this knowledge, NGOs can also help the prosecutor better protect victims and witnesses.

Ultimately, NGOs should provide the prosecutor enough information to believe she should open an investigation and information that will help the prosecutor conduct a trial or investigation better. However, an NGO should not think it has to conduct the investigation for the prosecutor.

**II. ICC Rules of Evidence Overview: Broad Court Discretion on Evidence Admission, Witness Protection, and the Prosecutor's Power to Use Non-admissible Evidence to Start an Investigation**

**A. ICC Rules say that any evidence can be admitted at trial. However, this does not mean the court must admit all evidence.**

The ICC Rules say a court can admit or ask for any evidence the court wants.<sup>3</sup> But, this does not mean that the court *will* allow evidence, or that the court *must* allow evidence. The rules say the court should think about the evidence and decide (1) if the evidence is truthful and (2) if the evidence is important to the case.

**1. The ICC Rules probably allow hearsay, but the court must think this evidence is important.**

First, the ICC Rules say the accused can ask witnesses questions (or "examine" witnesses).<sup>4</sup> Second, the ICC Rules also say an ICC court can admit *any* evidence if the ICC court thinks is important.<sup>5</sup> It is important to know if



these rules allow hearsay. Hearsay evidence is when a first person tells a second person some information, and the second person testifies about what the first person said. Although the first rule by itself might not allow hearsay, the second rule probably allows hearsay.

Before the ICC was formed, an international court said that courts can admit hearsay if it is important.<sup>6</sup> The international court also said that courts must think about the "truthfulness, voluntariness, and trustworthiness of the evidence." Together, these words seem to say that the court should think about everything and decide if the witness is telling the truth. If the court thinks the witness is telling the truth, the court can admit hearsay.

**2. National evidence rules do not apply to the ICC. However, national evidence rules may be good guidelines.**

ICC Rules state that national evidence rules do not apply.<sup>7</sup> Because of this, evidence can be admitted at the ICC even if it could not be admitted in Burma. However, national evidence rules might be good guidelines. National evidence rules might show what evidence the ICC is more likely to admit. Therefore, national evidence rules are not binding, but they can be persuasive authority.

**B. ICC Rules require witness protection as a general principle.**

The ICC Rules say the court and the prosecutor will protect witnesses and victims. Generally, the Rules are very broad and flexible to protect the witness. ICC Rules say these witnesses and victims should be protected as a "general principle."<sup>8</sup> This means the ICC will physically protect witnesses and their families. For example, as long as the defense can still question the witness, the ICC will also allow witnesses to testify by video or in another location outside of court where the victim will feel safe.<sup>9</sup>

Also, to protect witnesses before trial, the prosecution may submit a summary of testimony for certain witnesses, but does not have to give information that would put the witness at risk until the actual trial.<sup>10</sup>

**1. ICC Rules say certain groups are even more likely to need protection.**

The ICC Rules say all witnesses should be protected, but they specifically say that courts and prosecutors should carefully consider the need to protect women, children, the elderly, the disabled, and victims of sex crimes. The ICC Rules say that the prosecutor must protect the safety and dignity of all witnesses, and these witnesses are often most vulnerable.<sup>11</sup>



**2. ICC Rules require prosecutors to keep confidential information secret to protect witnesses.**

If a witness gives the prosecutor confidential information, the prosecutor must keep this information and the witness secret. The confidential information is not admissible at trial, but the prosecutor can use confidential information in the investigation to find admissible evidence.<sup>12</sup>

**3. ICC Rules allow prosecutors to force witnesses to testify. However, there are some exceptions, including self-incrimination and testimony about confidential information.**

ICC Rules say that a witness can be forced to testify in court.<sup>13</sup> However, there are several exceptions: (1) witnesses cannot be forced to testify about privileged relationships, such as a lawyer about the lawyer's client<sup>14</sup>; (2) witnesses cannot be forced to incriminate themselves<sup>15</sup>; (3) witnesses cannot be forced to incriminate family members<sup>16</sup>; and (4) witnesses cannot be forced to testify about confidential information.<sup>17</sup> Even if a witness agrees to testify about *some* confidential information, the witness cannot then be forced to testify about other confidential information about which they did not agree to testify.

Also, courts may consider public policy arguments about why a group or individual should not be forced to testify. For example, courts may not make NGOs like the Red Cross testify so that they are not stopped from giving aid to an area where government leaders are afraid anything the Red Cross workers see while working can be used in court.<sup>18</sup>

**C. ICC Rules allow prosecutors to use non-admissible evidence in their investigation. Evidence the prosecutor finds can be admissible even if the evidence used to help the investigation is not admissible.**

ICC Rules do not stop prosecutors from using inadmissible evidence in their investigation to find admissible evidence. However, this does not mean prosecutors will start an investigation with evidence that will be inadmissible in court. To start an investigation, the prosecutor must think the evidence shows "a reasonable basis to believe that a crime...has been or is being committed."<sup>19</sup> If the evidence brought to a prosecutor does not give the prosecutor this "reasonable basis to believe a crime...has been committed," the prosecutor cannot start an investigation. Therefore, evidence does not have to be admissible, but it does have to give the prosecutor this "reasonable" belief that a crime has happened or is happening. Section I of this report describes good evidence collecting in more detail.



**1. *There is no time limit to bringing a case or starting an investigation, but the case must have occurred after the ICC was created.***

There is no statute of limitations,<sup>20</sup> but the ICC does not apply to crimes committed before the Rome Statute became active July 1, 2002.<sup>21</sup> This means crimes can still be prosecuted no matter how much time has passed since they were committed as long as they were committed after July 1, 2002.

## Conclusion

Under ICC Rules, courts can choose to admit or not admit any kind of evidence. Without more specific rules, it may be helpful to consider domestic evidence laws to determine what evidence the court is more likely to admit.

Still, evidence gathering NGOs do not need to submit admissible evidence to the prosecutor. Instead, NGOs should collect data giving prosecutors a reasonable basis to believe a crime has been committed, and that an investigation into the crimes would reveal significant evidence.

While the NGOs should keep certain kinds of detailed information that will help the prosecutor conduct an investigation, NGOs should also be careful not to harm a potential investigation or trial by incorrectly recording testimony or improperly removing physical evidence. Ultimately, NGOs should provide the prosecutor with information to understand the complexity and seriousness of the situation, but not conduct the investigation for the prosecutor.

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### (Endnotes)

<sup>1</sup> See Human Rights Watch, *The International Criminal Court: How Nongovernmental Organizations Can Contribute to the Prosecution of War Criminals* (Sep. 2004) ([http://www.iccnw.org/documents/HRW\\_iccProsecutions\\_0904.pdf](http://www.iccnw.org/documents/HRW_iccProsecutions_0904.pdf)); Human Rights First, *The Role of Human Rights NGOs in Relation to ICC Investigations* (Sep. 2004) ([http://www.iccnw.org/documents/HRF-NGO\\_RoleInvestigations\\_0904.pdf](http://www.iccnw.org/documents/HRF-NGO_RoleInvestigations_0904.pdf)).

<sup>2</sup> Human Rights First, 15-16.

<sup>3</sup> Rome Statute, Art. 69(3).

<sup>4</sup> R.S. Art. 67(1)(e).

<sup>5</sup> "The Court shall have the authority to request the submission of all evidence that it considers necessary for the determination of the truth." R.S. Art. 69(3). "The Court may rule on the relevance or admissibility of any evidence, taking into account...the probative value of the evidence and any prejudice that such evidence may cause..." R.S. Art. 69(4).

<sup>6</sup> *Prosecutor v. Tadic*, Decision on Defence Motion on Hearsay (August 5, 1996).

<sup>7</sup> R.S. Art. 69(8).

<sup>8</sup> Rules of Procedure and Evidence, Rule 86.

<sup>9</sup> R.P.E. Rule 67.

<sup>10</sup> R.S. Art. 18(1)

<sup>11</sup> R.S. Art. 68(1).



<sup>12</sup> R.S. Art. 54(3)(e) and (f), R.P.E. Rule 46.

<sup>13</sup> R.P.E. Rule 65.

<sup>14</sup> R.P.E. Rule 73.

<sup>15</sup> R.P.E. Rule 74.

<sup>16</sup> R.P.E. Rule 75.

<sup>17</sup> R.P.E. Rule 82.

<sup>18</sup> Human Rights Watch.

<sup>19</sup> R.S. Art. 53(1)(a).

<sup>20</sup> R.S. Art. 29.

<sup>21</sup> R.S. Art. 12 and 13.

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(A . 5)

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## The Junta's Criminal Constitution

(by Janet Benshoof and U Aung Htoo)

**Burma's military dictators** now say Nobel laureate Aung San Suu Kyi, under house arrest or in prison for 12 of the past 18 years, can cast her vote in the May 10 constitutional referendum—a bitter irony if ever there was one. Ms. Suu Kyi and her National League for Democracy are calling on voters to reject the military-backed constitution, calling it “undemocratic.” Meanwhile, the U.N. Security Council perpetuates the charade that the referendum is legitimate by asking the ruling junta to respect “fundamental political freedoms” at the polls.



The junta, led by Gen. Than Shwe, continues to deploy torture, rape, forced labor, murder and imprisonment as tools to consolidate its absolute power. Emboldened by impunity, Than Shwe is now trying to transform his rule by crime into a constitutional right by inserting criminal immunity for himself and his cohorts into the constitution. It is beyond discussion that blanket amnesties for all crimes—much less one issued via fiat, by a dictator, for himself—violates international law.

What's clear here is that the international community must stop engaging with the junta over their May referendum. The farcical constitutional process, now on its 15th year, is part and parcel of Than Shwe's “delay and deceive” tactics. These include periodic promises of reform, which Burma's trading partners are able to use to avoid grappling with the ruthless crimes being perpetrated in plain view. The “get out of jail free” passes for Gen. Than Shwe and his friends are typical provisions of a constitution that attempts to legitimize permanent military rule.

Further, the constitution, simply put, is possibly the worst ever drafted in regard to women in modern history. This road map for gender apartheid requires military experience for all positions of power, thus effectively disqualifying women from holding major government offices, including the



presidency and from participating in the block of military-only legislative seats. Countries like Russia who have praised the junta for this constitution should speak to the women in their countries.

What then, can be done with Burma? First and foremost the global community must uphold its obligations under international law and end the impunity enjoyed by Than Shwe and his henchmen. Although Burma is not a party to the treaty establishing the International Criminal Court (ICC), the Security Council can and should refer Burma to the ICC.

Unlike the U.N. Security Council Resolutions setting up the tribunals for Rwanda and the former Yugoslavia, such a referral to the ICC is a milder form of humanitarian intervention. First, it only serves to trigger the ICC Prosecutor's independent investigation into heinous crimes, genocide, crimes against humanity, and war crimes. Second, the ICC, unlike the other Tribunals is a back up court which can only take cases if the prosecutor can demonstrate that Burmese national courts are unwilling and unable to prosecute such crimes. Even then, States are given another opportunity to step up to the plate and try them at the national level. Finally, in response to concerns by State Parties that an ICC investigation may impinge on any parallel peace negotiations, the Security Council has the power to call for a one-year moratorium.

The ICC statute makes sitting head of states and top generals criminally liable as do the Genocide and Geneva Conventions which Burma ratified in 1956 and 1992 respectively. Under these treaties Burma has pledged to fully prosecute criminal violations, and consented to the Security Council's role as the ultimate treaty enforcer. Given this voluntary consent to a limit on sovereignty, the junta would be hard pressed to raise any legal objections to a simple referral to the ICC.

Advocating for an ICC referral is daunting only if the Security Council is viewed as a purely political entity. Fortunately, this is not the case. The Security Council's increased willingness to look past state sovereignty when confronted with lawless States is part of the growing consensus that perpetrators of heinous crimes are a threat to peace and security and must be punished.

Any Security Council Resolution on Burma must be narrowly drafted to request only action on heinous crimes. There is now a consensus that such crimes, unaddressed, constitute a "threat to peace." This was first evidenced by Resolution 688 in 1991 in reaction to Saddam Hussein's genocidal acts against the Kurdish people.

The Rome Treaty itself and the separate agreement between the Security Council and the ICC together frame the Security Council's legal commitment to promoting the ICC. In addition, a Security Council referral in



the case of Burma is even more compelling given four “legal triggers” any one of which arguably supports a presumption of a “threat to peace”:

- The International Committee of the Red Cross (ICRC), the global monitor of International Humanitarian Law (IHL), in a highly unusual move issued a global alert on Burma in June 2007. After following a set of legal guidelines detailing how the ICRC should respond to a violation of IHL, they condemned the regime’s “systematic abuse” of its own people. The ICRC announced that all confidential bilateral dialogue with the junta had broken down, that IHL violations had been documented based on thousands of interviews and personal observations of the ICRC delegates, and that these crimes are likely to continue. Most importantly, the ICRC rang a “clarion bell,” reminding the international community of their obligations “to respect and to ensure respect for the [Geneva] Conventions.” Could the international community have prevented the terror and killings of some 31 monks in October 2007 by a rapid response?
- A referral to the ICC, under the Security Council strongest Chapter VII powers, provides the critical legal response to the junta ignoring all efforts of the General Assembly. Since 1989 Than Shwe and his predecessors have flouted some 30 General Assembly and Human Rights Council resolutions, including those which called for an independent investigation of such crimes as the Depayin Massacre in 2003 and the rapes by the military of ethnic women. Some seven U.N. envoys dispatched to Burma have reported defeat, or as put more diplomatically by Special Envoy Ibrahim Gambari in March, his trips have “yielded no tangible outcome.” An ICC referral will serve to make dealing with the regime less savory and at the minimum, deter future Than Shwe wannabes.
- The third trigger is the historic milestone for women, Security Council Resolution 1325 (SCR 1325), passed in 2000 to address women’s inequality during and post conflict and to guarantee criminal accountability for gender crimes. SCR 1325 is binding law on the Security Council itself and the credible reports of the rapes of ethnic women by the military in Burma should create a presumption for Chapter VII review.
- Finally, Burma is a critical test for the Security Council pledge in Resolution 1674 to enforce the Responsibility to Protect Doctrine (R2P). R2P obligates the Security Council to take action when national authorities are unable or unwilling to protect their citizens in conflict situations. And an ICC referral is the ideal first step.



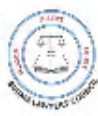
For over 40 years the people of Burma have been ruled by terror. Despite efforts by the global community Than Shwe and his gang of thugs are richer and more powerful than ever. It is time to fight crime by enforcing the law. By referring Burma to the ICC the Security Council will take a step to further the global justice system and will send a signal heard world-wide that military might can never trump legal rights.

*Ms. Janet Benshoof is president of the Global Justice Center. U Aung Htoo is general secretary of the Burma Lawyers' Council.*

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(A . 6)



*With the support of*  
**fidh**  
 International Federation  
 for Human Rights

22 May 2008

FOR IMMEDIATE RELEASE

## **Catastrophe in Burma a Wake Up Call to the International Community: Time to End Impunity for Heinous Crimes by the Military Regime**

Senior General Than Shwe's denial of international humanitarian aid to the victims of Cyclone Nargis should come as no surprise to the international community. This negligence and refusal of access is part and parcel of the criminal nature of the regime and reflects their fear that the entire world will see first hand the results of decades of systematic human rights violations, crimes against humanity and war crimes. Today, the Parliament of the European Union made an important statement in the Joint Motion for Resolution on the tragic situation in Burma and recognized that those responsible for the crimes committed in Burma should be brought before the International Criminal Court. We applaud this step forward, however, any referral to the International Criminal Court must include the on-going use of torture, gang rape of ethnic women, forced labour, murder, mass imprisonment, and abduction of children to fill military quotas.

The European Parliament Resolution reflects the growing international consensus that impunity for state perpetrators of heinous crimes threatens global peace and security. The actions of the military regime go far beyond a repudiation of democracy; they are criminal violations of international humanitarian and human rights law including crimes against humanity, war crimes and possibly genocide. *We urge the Security Council to use its Chapter VII powers to end the impunity for state sponsored heinous crimes in Burma.*

Despite the October 2007 Presidential Statement by the Security Council condemning the violent repression of the peaceful "Saffron Revolution", the arbitrary arrests, detention and torture by the regime continues to undermine the credibility of the United Nations and the international legal system. In fact, all efforts to engage with the junta at the regional or international levels over the last three decades have failed, including some 30 condemnatory resolutions by the General Assembly and Commission on Human Rights. There have been



seven envoys to Burma since 1990. Razali Ismail, who served from 2000 to 2006, and made twelve visits to Burma, stated on his resignation, “It is best to conclude that I have failed.”

The Security Council’s actions addressing state-sponsored international crimes were consolidated with the condemnation of Iraq’s repression of civilians as a threat to international peace and security in 1991 and continued with the establishment of international criminal tribunals, and the referral of the situation in Darfur, Sudan to the International Criminal Court. Resolution 1325 on women, peace and security, which applies to the Security Council itself, supports a Chapter VII resolution given the well documented ongoing gender crimes of sexual violence in Burma. An additional instrument attesting to the Security Council’s commitment is Resolution 1674 on the Protection of Civilians in Armed Conflict endorsing the “Responsibility to Protect” Doctrine.

A Security Council Resolution under Chapter VII addressing the criminal accountability of perpetrators of international crimes in Burma is a moral and legal obligation of the world community. Ending such impunity enforces the most fundamental rights of victims and the people of Burma and represents to the world of a constructive commitment to international justice.

**Contact : Gaël Grilhot**

Tel : +33-1 43 55 90 19

Web: <http://www.fidh.org>

Email : [ggrilhot@fidh.org](mailto:ggrilhot@fidh.org)

**Contact: Andrea Friedman, Esq**

Tel: 212-725-6530 x203

Cell: 617-970-9168

Web: [www.globaljusticecenter.net](http://www.globaljusticecenter.net)

Email: [afriedman@globaljusticecenter.net](mailto:afriedman@globaljusticecenter.net)

**Contact: U Aung Htoo**

Cell: 66 (0) 81 533 0605

Web: [www.blc-burma.org](http://www.blc-burma.org)

Email: [blcsan@ksc.th.com](mailto:blcsan@ksc.th.com)

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(A . 7)



Karen Women's Organization



June 20, 2008

FOR IMMEDIATE RELEASE

**In the Wake of Historic Resolution 1820 on Sexual Violence in  
Armed Conflict Women of Burma and International Lawyers Call on  
the Security Council to Refer the Situation in Burma to  
the International Criminal Court**

The United Nations Security Council took a historic step with the passage of Resolution 1820 on Sexual Violence in Armed Conflict. Resolution 1820 recognizes the importance of full implementation of Resolution 1325 on women, peace and security and reaffirms the Security Council's commitment to end sexual violence as a weapon of war and a means to terrorize populations and destroy communities. For this commitment to be meaningful, the Security Council must provide justice for victims of sexual violence in armed conflict even when it is not politically convenient. As Resolution 1820 states:

*Recalling the inclusion of a range of sexual violence offenses in the Rome Statute of the International Criminal Court...,*

*Notes that rape and other forms of sexual violence can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide...and calls upon Member States to comply with their obligations for prosecuting persons responsible for such acts, to ensure that all victims of sexual violence, particularly women and girls, have equal protection under the law and equal access to justice, and stresses the importance of ending impunity for such acts as part of a comprehensive approach to seeking sustainable peace, justice, truth, and national reconciliation;*

There is substantial documentation that sexual violence is used by the military junta against ethnic women as a means to consolidate military rule and destroy ethnic communities. Virtually none of the perpetrators have been brought to justice. Three concrete examples of this sexual violence include:



- October 23 to November 4, 2004 - four Mon women held by SPDC troops at their base and repeatedly gang raped (*Catwalk to the Barracks*, Mon Women's Organization, 2004)
- October 9, 2006 – Palaung woman raped, her skull cracked open and stabbed four times in her left breast (*Burma Human Rights Yearbook*, Human Rights Documentation Unit, 2006)
- October 10, 2006, three naval cadets raped a 14 year old girl, none of the cadets were punished and the girl was forced to marry one of her rapists. (*Burma Human Rights Yearbook*, 2006)

These crimes are part of a systematic strategy for destroying ethnic communities in Burma and are a threat to international peace and security. Security Council Resolution 1325 specified the need to affirm the link between women and peace and security and to address sexual violence against women in conflict. This was reaffirmed in Resolution 1674 on the protection of civilians in armed conflict, which endorsed the Responsibility to Protect Doctrine. In Resolution 1820, the Security Council resolved to take action to end the impunity of those responsible for sexual violence in armed conflict once and for all. For Burma, politics must give way to justice. The Security Council should use its Chapter VII powers to refer the military junta to the International Criminal Court.

**SPDC leaders who should be investigated for systematic sexual violence in Burma include:**

- **Senior-General Than Shwe**, Chairman and Commander-in-Chief of Defense Services
- **Deputy Senior-General Maung Aye**, Vice Chairman and Deputy Commander-in-Chief of Defense Services and Commander-in-Chief (Army)
- **General Thura Shwe Mann**, Joint Chief of Staff of the Army, Navy and Air Force

**Andrea Friedman**  
**Global Justice Center**  
 Tel: 212-725-6530 x203  
[www.globaljusticecenter.net](http://www.globaljusticecenter.net)  
[afriedman@globaljusticecenter.net](mailto:afriedman@globaljusticecenter.net)

**U Aung Htoo**  
**Burma Lawyers' Council**  
 Tel: 66 (0) 81 533 0605  
[www.blc-burma.org](http://www.blc-burma.org)  
[blcsan@ksc.th.com](mailto:blcsan@ksc.th.com)

**Aye Nang**  
**Palaung Women's Organization**  
 P.O Box (40), Mae Sot P.O  
 Tak, 63110 Thailand  
 Tel: 66-89-43-42-841  
[lwayayenang@gmail.com](mailto:lwayayenang@gmail.com)  
[www.plaungwomen.org](http://www.plaungwomen.org)

**Naw Zipporah Sein**  
**Karen Women's Organization**  
 P.O. 19, Mae Sariang, Mae  
 Hong Son, 58110, Thailand,  
 Tel: 66-53-682572  
[www.karenwomen.org/](http://www.karenwomen.org/)  
 Email: [kwo@loxinfo.co.th](mailto:kwo@loxinfo.co.th)

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(A . 8)



With the  
support of:



May 27, 2008

## **EU RESOLUTION URGES UK TO USE PRESIDENCY OF THE SECURITY COUNCIL TO REFER BURMA TO THE INTERNATIONAL CRIMINAL COURT**

The United Kingdom should follow the recommendation of the Parliament of the European Union and use the presidency of the UN Security Council to press for justice and accountability for the people of Burma by referring Senior General Than Shwe and his military regime to the International Criminal Court. The denial of humanitarian aid to the victims of Cyclone Nargis should serve as a wake-up call to the international community to the brutality and indifference of a military regime that for four decades has systematically used torture, gang rape of ethnic women, slavery, murder, mass imprisonment, and child soldiers to consolidate its power.

In its Resolution of 22 May 2008 on the tragic situation in Burma, the Parliament of the European Union recognized that those responsible for the crimes committed in Burma should be brought before the International Criminal Court. The UK, a leader in the global effort to end impunity for international humanitarian violations, should heed the EU Resolution and use this opportunity to address these crimes and establish rule of law in Burma.

*“The European Parliament,...*

(Article 5) Reiterates that the sovereignty of a nation cannot be allowed to override the human rights of its people as enshrined in the UN principle of 'responsibility to protect'; calls on the Government of the United Kingdom, which holds the May Presidency of the UN Security Council, to take urgent action to put the situation in Burma on the agenda of the Security Council ...

(Article 11) Takes the view that, if the Burmese authorities continue to prevent aid from reaching those in danger, they should be held accountable for crimes against humanity before the ICC; calls on the



EU Member States to press for a UN Security Council resolution referring the case to the Prosecutor of the ICC for investigation and prosecution;...”

The actions of the military regime go far beyond a repudiation of democracy; they are criminal violations of international humanitarian and human rights law, including crimes against humanity and war crimes. The International Committee of the Red Cross (ICRC), the monitor of international humanitarian law, issued a rare public statement on 29 June 2007 verifying criminal violations of the Geneva Conventions by the regime that were personally observed by ICRC delegates, and added that the crimes were likely to be ongoing.

The commitment of the UK to ensuring accountability for the most serious crimes was demonstrated by its support of Security Council Resolution 1325 on women, peace and security. In her statement to the Security Council, Karen Pierce, Deputy UK Permanent Representative to the United Nations, stated, “[i]n Burma, Mr. Pinheiro, the United Nations Special Rapporteur on human rights, has reported on the systematic sexual violence used by the military, police and border guards as part of the Government’s anti-insurgency tactics. The Council has a duty to listen to, but also to act upon, such reports.”

The evidence of crimes is overwhelming; the UK’s commitment to holding perpetrators responsible is well-established. **The United Kingdom should use the Presidency of the Security Council to lead the effort to end impunity for crimes against humanity and war crimes in Burma by referring the situation in Burma to the International Criminal Court.**

Andrea Friedman, Esq.  
Global Justice Center  
Tel: 212-725-6530 x203  
[www.globaljusticecenter.net](http://www.globaljusticecenter.net)  
[afriedman@globaljusticecenter.net](mailto:afriedman@globaljusticecenter.net)

U Aung Htoo, Esq.  
Burma Lawyers’ Council  
Cell: 66 (0) 81 533 0605  
Website: [www.blc-burma.org](http://www.blc-burma.org)  
[blcsan@ksc.th.com](mailto:blcsan@ksc.th.com)

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**(A . 9)**

*[Following are excerpts from the BLC General Secretary's Report on his trip to Australia and Japan. For a copy of the full report, please contact the Burma Lawyers' Council.]*

**Dealing with Burma's Criminal Accountability Issue  
Trip Report of the BLC General Secretary to Australia and Japan  
(April 30 to May 16, 2008)**

**Introduction**

With the invitations of the Joint Action Committees in Australia and Japan, I made trips there, as the General Secretary of the BLC. I was in Australia between April 30 and May 4 and in Japan between May 7 and May 15, 2008. Joint Action Committees are the political alliances of all Burmese democratic and ethnic organizations in their respective countries. The objective of their invitation was to gain knowledge on the constitution and referendum from the BLC. While sharing such knowledge in a series of meetings attended by the activists and political leaders from Burma in those countries, I took advantage to conduct advocacy on Burma's criminal accountability issue, with the objective of creating legal and political pressure on the UN Security Council for a possible referral of the situation of Burma to the International Criminal Court. This is my trip report.

**Trip to Australia**

My stay in Sydney, Australia lasted for only four days. Dr. Aye Kyaw, the chairperson of the NLD (LA) Australia and coordinator of the JAC, took responsibility for all logistic issues of my meetings in Australia, including my convenient stay in his mother's house. I appreciate it.

On May 1, the Sydney Morning Herald, which is one of the top newspapers in Sydney interviewed me. In addition to constitution and referendum affairs, Burma's background was introduced with the issue of criminal accountability. I made a reference to the statement issued on May 29, 2007, by Australia Labor Party while it was in opposition, pushing the UNSC to refer the situation of Burma to ICC. I suggested that the Labor Party, now in power, should keep remain committed to its former position.

On May 2, the Sydney Morning Herald reported my interview. (Later, the same newspaper wrote an article on criminal accountability issue of Burma again on May 24.) On May 2, along with Dr. Aye Kyaw, I visited Burma Office and discussed with Dr. Myint Cho, its Director, and U Tin Htut, a MP elect in 1990 May election. Dr. Myint Cho is currently taking responsibility as a member



of Foreign Affairs Committee of the NCGUB. I elaborated on, inter alia, the criminal accountability issue of Burma with them again, criticizing the unreasonable concerns of some political leaders of Burma that political dialogue may not take place if our democratic movement emphasizes the criminal accountability issue. I elaborated that if we cannot take effective action on perpetrators who committed and have been committing heinous crimes, a genuine democratic transition may never occur; and, to the contrary, the human rights situation of Burma will deteriorate gravely. If we keep on exchanging ideas with them, centering on criminal accountability issue, it is expected that some educated Burmese activists in Australia may become core actors for Burma's criminal accountability project.

On the same day, under the arrangement of JAC, along with Dr. Aye Kyaw, Dr. Myint Cho, U Tin Htut and U Maung Maung Than, I visited Parliament House and met Mr. John Kaye, member of the Legislative Council, and his comrades. I briefly explained BLC's analysis on the SPDC's constitution and its fabricated referendum. In addition, I introduced Burma's heinous crime issue, with reference to the Labor Party's position. John is usually active on the issues of Burma and he mentioned that he would raise the question to the government in regard to their former commitment on criminal accountability.

On May 3, with the attendance of about 65 activists from different organizations, a symposium conducted by JAC was held and I took responsibility as the main speaker. I was, to some extent, able to encourage those activists so that they can keep on struggling for our just cause.

...

I highlighted [criminal accountability] again when Australian Broadcasting Center interviewed me on the same day. The next day it was broadcast on ABC channel on television.

That evening, I met Ko Ye Htut (a.k.a.) Mr. Philip Smyte, who took responsibility as Joint General Secretary of the BLC between 1999 and 2001, along with U Myo Win, who is one of founding members of the BLC in Sydney. Ko Ye Htut is now practicing again as a lawyer there. I encouraged him to work with the BLC again, using his legal and language skills, and explained about our criminal accountability project. He generally agreed to work on that and cooperate with other Burmese activists in Australia. I also met about 20 ABSDF activists in Sydney and explained the current activities of BLC with background legal issues of Burma.

...

### **Trip to Japan**

I made a trip to Japan on May 6. On May 7, in Tokyo, with the arrangement of JAC, I talked at a Symposium along with other Japanese lawyers,



Mr. Shogo Watanabe and Ms. Yuki, and a Burmese leader of JAC. Over 100 participants and activists, both Burmese and some Japanese, attended. The major topic was constitution and referendum. Burma's criminal accountability issue was introduced a bit. Then, for the coming days, our Japanese lawyer friends, mainly Ms. Kazuko Ito, Secretary General of Human Rights Now, made arrangements for a series of meetings for me.

During my trip, I met the following Japanese MPs:

1. Mr. Kousuke Ito, Member, House of Representatives
2. Mr. Masaharu Nakagawa, House of Representatives, Democratic Party, Shadow Cabinet Minister of Finance
3. Mr. Azuma Konno, Member, House of Councilors
4. Mr. Tadashi Inuzuka, Member, House of Councilors
5. Mr. Toru Matsuoka, Member, House of Councilors
6. Mr. Kiyohiko Toyama, Member, House of Councilors

Meeting with Mr. Tadashi Inuzuka and Mr. Toru Matsuoka, held on May 9, was particular. These two senators played a crucial role in persuading the Japanese government to ratify the Rome Statue. Having asked some questions on the situations of Burma to me, they expressed their interest to support our efforts for seeking criminal accountability in Burma. Then, Mr. Inuzuka extended his invitation to me to attend a meeting of Parliamentarians for Global Action to be held on May 14.



I also met a famous lawyer in Japan, Mr. Akira Kawamura, now taking responsibility as the Secretary General of International Bar Association (IBA). He was generous. He mentioned that individually he supports our efforts and suggested that I contact the human rights section of the IBA.

...

We met Mr. Kohki Abe, Professor of Law, Kanagawa University School of Law, Yokohama. Prof. Abe is one of the two most prominent international law professors in Japan. He commented that, from the perspective of the international human rights law, it is worth trying to raise the situation of Burma by putting pressure on the UNSC and "it is not impossible".

On May 9, the meeting with Mr. Kiyohiko Toyama, Member, House of Councilors and Chairperson, Committee on Judicial Affairs, was also significant. In that meeting, three Japanese lawyers, Mr. Shogo Watanabe, Ms. Yuki and Ms. Kazuko Ito and a Burmese activist accompanied me. Mr. Toyama was an Attorney at Law and law lecturer in a university in Tokyo. He got his doctorate in peace studies from the UK. His main concern was the position of China



which may use a veto in the UNSC meeting. With reference to the Sudan case, when I explained that China may abstain in the motion if we can create huge international legal and political pressure on China, highlighting the status of the regime as 'criminals', he agreed upon it. He suggested that, to create international legal pressure, in addition to Japanese legal community, we should organize the Minbyan, a powerful law group in Korea, in which former Presidents of Korea are its members.

I also visited the office of Morrison & Foerster, the biggest law firm in Tokyo and met the following lawyers:

- (1) Peter J.Stern
- (2) Kazuyuki Fujii
- (3) Yuko Ino
- (4) Hiromi Furushima



They expressed their interest in our criminal accountability project from the aspect of the international human rights law. However, they responded that, as they are not much familiar with the laws on ICC, they need time to observe it and, later they may attempt to cooperate with us.

In the evening of May 9, at the meeting hall of the Japan Federation of Bar associations, I gave a press conference in the presence of the Asahi Shimbun, The Yomiuri Shimbun, Kyodo news, Jiji Press and Human Rights Watch.

On May 11, I met about 30 Burmese leaders of the Joint Action Committee, comprising 30 democratic and ethnic organizations, which invited me to Japan. I encouraged them to form a legal team, as a working group of JAC, which will mainly observe and study legal issues of Burma and make advocacy within the political and legal community of Japan, focusing on the criminal accountability issue of Burma. They generally agreed upon it. We need to follow up with JAC and continue to push them to implement it. I also encouraged some Burmese lawyers who are now in Japan and who have submitted their applications to become members of the BLC to cooperate with JAC for formation of a legal team.

In the evening of May 12, People's Forum on Burma, an association of Japanese MPs, Japanese lawyers and some Burmese activists, organized a meeting. About one hundred participants, both Burmese and Japanese, participated in the meeting. There, I was the only speaker and mainly elaborated on Burma's background of heinous crimes and the importance of the criminal accountability issue. U Shwe Ba, a Japanese writer and journalist, took responsibility as interpreter. I answered all relevant questions and the audience expressed their interest. My explanation was recorded on television by PFB; it is expected that more numbers of Japanese MPs and responsible governmental authorities may observe it following that meeting. After my return, I learned



that the Japanese media has started to report about Burma from the aspect of heinous crimes issues and a possible referral of the UNSC to the ICC. Anyway, I presume that a lot of hard work is still required to organize the Japanese legal and political community as they mainly focus on domestic affairs, instead of international issues.

On May 14, I was invited to a PGA meeting by Senator Inuzuka, which was held at Conference Room No. 4, National Diet. The title of the meeting was "Strategy Meeting on the International Criminal Court (ICC) and the Responsibility to Protect the Civilian Population in Durfur and Tibet". It was attended by 10 MPs, including Ms. Yoriko Kawaguchi, former Minister of Foreign Affairs, and Ms. Mayumi Moriyama, former Minister of Justice, diplomats and some academicians. I attended accompanied by a Burmese activist, Min Htet Zaw from Burma Democratic Action Group.

Opening remarks were made by Mr. Satsuki Eda, President, House of Councilors, PGA members. Dr. David Donat Cattin, Director of the International Law and Human Rights Programme, PGA, talked about the Intervention of the International Criminal Court in Durfur. He worked to promote the universality and the effectiveness of the Rome Statue of the ICC in approximately 80 countries. Despite that, an agenda on Burma was not included. With the permission of the meeting, I asked Dr. David to make a brief comparative analysis between Sudan and Burma as to whether the possible referral can be made by the UNSC to ICC. He responded that, from the legal aspect, it is quite possible; even though previous crimes were not considered, the ignorance of the military regime on the atrocities of several thousand people after the Nargis storm has constituted a crime against humanity.

While I was in Japan, Maykha Media shot me on television; and there, I explained to our Burmese audience focusing on the Burma background of heinous crimes and criminal accountability issues. I recognize the hospitality of all members of BDA Group, led by U Than Swe, for all of their facilitation so that I could conveniently stay in their office and make local trips in Tokyo for meetings. I also appreciate the contribution of U Myint San, a former lawyer and economist, who assisted me with Japanese translation, and accompanied me in some meetings, coming down from Nagoya. I left Tokyo on May 16 and got back to the Thai Burma border on May 17, 2008.

Your comment and suggestions are welcome.

Thanks for your attention.

Aung Htoo

General Secretary

May 30, 2008

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## Part B: Special Feature

### Responding to the Human Rights Situation in Burma: A UN Framework for Non-Forcible Measures

*David I. Fisher\**

#### 1. Introduction

The United Nations, among whose proclaimed objectives is the universal promotion of human rights,<sup>1</sup> has long endeavored to address gross and systematic violations of the same by Burma's ruling military regime. After years of valiant but mostly futile UN efforts to improve the overall situation for human rights in Burma, hopes were raised in September 2006, when the issue of human rights and democracy was for the first time placed on the agenda of the Security Council, a body invested with broad powers of enforcement. However, subsequent efforts to pass a Security Council resolution addressing human rights violations in Burma, though supported by a sizable majority of the Security Council's members, was defeated by veto. Events in Burma since then, such as the violent suppression of the Saffron Revolution, the refusal at initial (and thus critical) stages of the deastation caused by Cyclone Nargis to permit international relief efforts and the extension of Aung San Suu Kyi's detention, have added urgency to the need for an effective international response to the human rights situation in the country.

Given the negative outcome of efforts to obtain a Security Council resolution on Burma, there is reason to query whether other UN bodies, namely the Human Rights Council and the General Assembly, could set the stage for a coordinated multilateral response involving non-forcible measures (i.e., economic, political and diplomatic sanctions). This article will therefore examine what role these organs could play to bring about concrete state action and what parameters would govern such action under international law. Beyond the scope of this article are other conceivable responses to human rights violations in Burma,



such as humanitarian intervention or referral of responsible individuals for prosecution before the International Criminal Court (ICC).<sup>2</sup>

## **2. The Security Council: Failed Attempts for a Resolution on Burma**

The Burmese regime's long-standing record of gross and systematic human rights violations prompted efforts in January 2007 to obtain a Security Council resolution calling upon the regime to stop such violations. The proposed resolution, jointly sponsored by the United Kingdom and the United States, took as its premise that the human rights situation in Burma amounted to a "threat to international peace and security," a precondition under Chapter VII of the UN Charter for the Security Council to exercise its authority, including its (ultimate) power to decide on enforcement measures. The proposed resolution was however vetoed by China and Russia.<sup>3</sup>

The proposal was largely based on a report entitled "A Threat to the Peace: A Call for the UN Security Council to Act in Burma."<sup>4</sup> The report, commissioned by Nobel laureates Vacláv Havel and Desmond Tutu, outlined the factors that had previously resulted in Security Council intervention vis-à-vis countries which, like Burma, were in a state of internal conflict. Among the factors applied in those cases were the overthrow of a democratically elected government; internal armed conflicts; widespread breaches of human rights and humanitarian law within the country; large-scale refugee outflows; and other cross-border problems (e.g., drug production and trafficking).<sup>5</sup> The report also cited Security Council resolution 1308 (2000), which had labeled the spread of HIV/AIDS as a threat to international security (which was evident in the transborder spread of HIV/AIDS through the heroin trade originating in Burma).<sup>6</sup>

The report recommended that a resolution be adopted under Article 41 of the UN Charter, which authorizes the Security Council to decide on measures not involving the use of force.<sup>7</sup> In the event that the Security Council were to find such (non-forcible) measures to be inadequate, Article 42 authorizes that body to take action involving the use of force. The report however stopped short of recommending armed force, deeming non-forcible measures to suffice.<sup>8</sup> In line with the report's recommendations, the draft resolution refrained from



embracing measures involving force or any other form of external coercion, calling instead for self-correction, and co-operation with the UN (including the Secretary-General's "good offices" mission).<sup>9</sup> Thus, Burma was called upon to cease military attacks on civilians in ethnic minority regions, to permit international humanitarian efforts to be carried out without restriction and to take concrete steps to allow the full exercise of political freedoms, including the free operation of political parties, such as the National League for Democracy (NLD). (Had the draft been adopted but not heeded, the Security Council could have, as appeared above, decided on measures involving the use of force under Article 42).

The vetoes of China and Russia were joined by the negative vote of non-permanent member South Africa. In essence, these countries asserted that the situation in Burma did not amount to a threat to international peace and security.<sup>10</sup>

### **3. The Human Rights Council: A New Tack to Take in the Burma Question?**

Against the background of defeat of the proposed resolution in the Security Council and the ongoing deterioration of the human rights situation in Burma since then, there is reason to query what role the UN Human Rights Council could play to bring about a coordinated international response to Burma. Such a call to action has been made by the Special Rapporteur on the situation of human rights in Myanmar, Paulo Sérgio Pinheiro, who, in a statement post-dating the negative vote in the Security Council, cited "an urgent necessity to better coordinate the different approaches among member states to find ways to contribute to the process of transition towards democracy." He called specifically on the Human Rights Council "to consider ways and means of initiating an effective collaboration with Myanmar."<sup>11</sup> What is more, various Security Council members, including some of those voting against the proposed resolution, considered that the Human Rights Council had a role to play in addressing the critical human rights issues posed by the situation in Burma.<sup>12</sup>

The Human Rights Council was established by General Assembly Resolution 60/251 in 2006 as part of the larger goal to reform the institutions of the United



Nations, to make them more effective and credible. Then UN Secretary-General Kofi Annan saw the Council as “a great new chance for the UN, and for humanity, to renew the struggle for human rights.”<sup>13</sup> Even the United States, which voted against the resolution creating the Council, has since pledged to cooperate to make the Council as strong and effective as possible.<sup>14</sup>

The Human Rights Council, a subsidiary organ of the General Assembly, replaced the by then discredited UN Human Rights Commission. In its latter years, the Commission’s work had been undermined by the dubious human rights credentials of some of its members; its members’ frequent inability to place the effective protection of human rights before their economic and security interests; working procedures poorly adapted to deal with upcoming and ongoing human rights violations (including the Rwanda genocide); and selectivity with regard to the countries chosen for investigation and ultimate condemnation. Alas, the Human Rights Council itself has not been entirely immune from criticism, including complaints of selectivity of the kind that plagued its predecessor.<sup>15</sup> Decisive action by the Human Rights Council on Burma, and for that matter on human rights situations elsewhere in the world that call for urgent attention, would thus bring it closer to fulfilling its promise as an effective mechanism of human rights protection.

The Human Rights Council seems in fact well placed to contribute to a coordinated international approach to the Burma question. The Council has already demonstrated its will and capacity to provide credible information about the ongoing human rights violations in Burma through its Special Rapporteur on the subject.<sup>16</sup> The findings and recommendations of the Special Rapporteur form the basis of the Council’s resolutions, most recently in March 2008, in which the Council condemned “ongoing systematic violations of human rights,” including violations committed as part of the violent suppression of the September 2007 demonstrations. The resolution also called upon the Burmese Government to implement the (no less than seventeen) recommendations of the Special Rapporteur, including a call to release all persons taken into custody for the peaceful manifestation of their political beliefs.<sup>17</sup>



The pattern of fact-finding and recommendations by the Special Rapporteur followed by the Human Rights Council's endorsement of such recommendations and condemnation of the prevailing human rights situation has no doubt had its value, not least as a means of keeping the Burma question in international focus. However, as evidenced by the deteriorating situation for human rights in Burma, there is now reason to query whether the Council is empowered to expand its approach so as to recommend concrete measures to be implemented by the international community. We note in particular that Resolution 60/251 mandates the Council to "promote the full implementation of human rights obligations undertaken by States" and to "[m]ake recommendations concerning the promotion and protection of human rights."<sup>18</sup> Given the acute nature of the human rights situation in Burma, there is also reason to note the Council's mandate to "respond promptly to human rights emergencies."<sup>19</sup> Such a recommendation could help bridge the gap between states in their approaches to Burma (as proposed by the Special Rapporteur, *supra*); the present lack of a coordinated approach has seen some states choosing total inaction while others have been directly or indirectly supportive of the regime while yet others have applied sanctions. Measures recommended by the Human Rights Council could, without more, be immediately implemented by states. Ideally, however, the recommended measures would be incorporated into a resolution of the UN body most representative of the international community as a whole, namely, the General Assembly, as discussed below.

#### **4. The General Assembly – Recommending Non-Forcible Measures under the UN Charter**

Actually, the General Assembly has adopted many a resolution on the Burma question, not least in 2005, when the regime was called upon to "end [its] systematic violations of human rights."<sup>20</sup> More recently, the General Assembly has condemned Burma's suppression of the 2007 demonstrations, requesting it to fully implement human rights.<sup>21</sup> Regrettably, these and other resolutions of the General Assembly, all of which have called upon Burma *itself* to comply with human rights, have been undercut by the regime's evident lack of will to do



so. Therefore, the General Assembly should urgently consider a resolution, preferably incorporating measures recommended by the Human Rights Council (as presented above), calling for action by the outside world.

Such a resolution would not be the first time the General Assembly called upon the international community to take measures against gross and systematic violations of human rights by a Member State. In this regard, there is the precedent of Apartheid South Africa. Thus, despite its lack of enforcement powers under the UN Charter, the General Assembly requested UN Member States as early as 1962 to undertake a broad range of measures, including the curtailment of trade, transportation and diplomatic relations. The measures were to be undertaken separately and collectively, in conformity with the UN Charter, “to bring about the abandonment of [Apartheid] policies.”<sup>22</sup> That language bore close resemblance to the wording of Articles 55 (c) and 56 in which all Member States pledge to take *joint and separate action* in cooperation with the UN to promote, *inter alia*, universal respect for human rights.

As in the case of Burma, there was a longstanding lack of political will in the Security Council to act decisively on South Africa and it was thus not until 1977 that the Council was able to muster a weapons embargo against the regime, and then only after the bloody suppression of the Soweto uprising had shocked world opinion.<sup>23</sup> To its credit, the Security Council did ultimately adopt a recommendation to the Member States to impose sanctions on South Africa<sup>24</sup> and by the late 1980s, twenty-five countries had enacted laws imposing various trade sanctions and divestment policies.

As the example of Apartheid South Africa illustrates, a General Assembly resolution calling on Member States to take non-forcible measures would not encroach on the Charter-based powers of the Security Council. Although Article 41, as may be recalled, is fully sufficient to activate the Security Council’s powers to take measures not involving the use of armed force, it does not exclude the General Assembly’s power to recommend states to take such



measures in situations where the Security Council is not exercising its functions (cf. Article 12 [1]). Thus, save cases of Security Council action, Article 10 empowers the General Assembly to discuss any question or matter within the scope of the Charter and to make recommendations to the Member States on any such question or matter. In matters of human rights protection, the authority of the General Assembly to make recommendations is expressly recognized in Article 13 (1). Thus, until such time as the Security Council takes action on Burma, there appears to be no obstacle to a General Assembly recommendation in the matter.

Assuming that the Burma question is deemed by the General Assembly to be an “important question” under UN Charter Article 18 (2), a resolution on Burma would require a two-thirds majority of the Member States present and voting; if the question is instead found to rank among “other questions,” a simple majority of those voting and present would suffice under Article 18 (3). Thus, at most a two-thirds majority is required and, unlike the Security Council, there is no power of veto. Given the gravity and scope of human rights violations in Burma, as not least confirmed by recent events, attaining a simple majority, or alternatively a two-thirds majority, should not be an insurmountable task. It may be recalled that even the failed 2007 Security Council draft resolution on Burma had received the support of nearly two-thirds of the Council’s members.<sup>25</sup>

## **5. International Law Parameters for State Action**

As appeared above, the General Assembly is authorized under the UN Charter to adopt resolutions containing recommendations to the Member States in the field of human rights. The conformity with international law of the recommended measures cannot however be derived from the resolutions themselves; some independent basis in international law is thus required. A General Assembly resolution on Burma of the kind envisioned here could thus embrace non-forcible state measures falling into one or both of the following international law categories: a) retorsion, in which the state taking measures does so without suspending any international law obligation owed by it to the



targeted state; and b) reprisals, in which the state taking measures suspends international law obligations owed by it to the targeted state. Thus, reprisals (unlike retorsion) comprise measures which under normal circumstances would entail a breach of an international law obligation (e.g. a treaty obligation) on the part of the state taking such measures. For example, responding to a state's violation of human rights by suspending a trade agreement with that state would constitute a reprisal, whereas exercising the prerogative not to grant a loan to that state, would not be a reprisal (but would be retorsion).<sup>26</sup>

As concerns *retorsion*, there is no requirement that the state against which measures are undertaken has committed any breach of international law. Thus a state desiring to take retortive measures against Burma for non-respect of human rights will not be precluded from doing so on the ground that Burma is not bound by a particular treaty to respect the human rights in question. This may be significant given that Burma is party to very few such treaties. Similarly, any argument along the lines that Burma is not bound by international customary law to respect the right(s) in question would be immaterial (even if there is ample evidence of Burma's breaches of international customary law in the realm of human rights, especially regarding breaches of *jus cogens*, as addressed below). Perhaps retorsion, more so than reprisals, could fill a special function vis-à-vis third states who through their trade, joint infrastructure projects, political support, etc., prop up the Burmese regime and thus indirectly perpetuate human rights violations in the country.<sup>27</sup>

To the extent that a General Assembly resolution recommends *reprisals*, international law would require such measures to be a proportionate response to the breach of an international obligation (e.g., breach of a human rights obligation stemming from a treaty or customary law). The purpose of the measures shall be to induce the wrongdoing state to end its breach; thus, reprisals are not permitted as a form of retaliation or as a means to gain undue political or diplomatic advantage over the targeted state.<sup>28</sup> As the purpose is thus to restore compliance with international law obligations, the measures have to cease upon termination of the breach.



In order to undertake reprisals, a state has to be *aggrieved* by the breach of the wrongdoing state. This generally means that the rights of the state taking such measures have been violated by the failure of the targeted state to comply with its obligations under a treaty (to which both states are parties) or under international customary law. A state's breach of its obligations under a human rights treaty should thus give rise to a right on the part of the other states to the treaty to undertake reprisals, with the possible exception of human rights treaties containing a compulsory mechanism for dispute settlement.<sup>29</sup>

As to the breach of obligations to uphold human rights under international customary law, the aggrieved state will generally be that of the human rights victim's nationality. In Burma, violations of human rights are of course primarily committed against the country's own nationals (or against its many stateless inhabitants); it is therefore necessary to examine how the prerequisite of the aggrieved state is to be fulfilled in cases where human rights victims lack the protection afforded by a foreign nationality. Regarding such cases, we may note that certain human rights fall within a special category of customary law norms from which no derogation is allowed, i.e., the norms of *jus cogens* (mandatory or peremptory norms). *Jus cogens* prohibits slavery (including forced labor), torture, racial discrimination and the arbitrary taking of life (not least genocide). Breaches of *jus cogens* norms are considered so serious that the violating state is deemed to have breached its obligations *erga omnes*, i.e., vis-à-vis the international community as a whole. Thus, *all other states* qualify as aggrieved states.

Concerning the question of *jus cogens* violations in Burma, we may refer to reports filed by Special Rapporteur Pinheiro with the Human Rights Council. Dr. Pinheiro stated in February 2007 that during the course of his mandate (which began in December 2000),<sup>30</sup> he had received reports of widespread and systematic human rights violations that included summary executions, torture, forced labor practices, sexual violence and the recruitment of child soldiers.<sup>31</sup> Similarly, in connection with the violent suppression of the September 2007 demonstrations, he found the use of unnecessary and disproportionate lethal



force against civilians; the death of persons held in custody; cruel, inhuman and degrading treatment; torture; and other violations.<sup>32</sup> It is submitted that most, if not all, of these practices constitute human rights violations on the level of *jus cogens*. Thus, with regard to Burma's most egregious violations of human rights, i.e., of the *jus cogens* type, all states would qualify under international law as *aggrieved*, and therefore entitled to undertake reprisals.

## 6. Concluding Remarks

The Security Council's missed opportunity to influence the human rights situation in Burma does not rule out initiatives by other organs of the UN. A recommendation by the General Assembly (or by the Human Rights Council) could provide states with the moral impetus to participate in concrete and coordinated action on Burma. Although it would not be realistic to expect all states to participate in the recommended action, the example of UN recommendations regarding Apartheid South Africa indicates that formidable results can be achieved even without universal participation. States professing a commitment to human rights and democracy, including some of Burma's own neighbors, might be willing to join other states in taking measures that they would not be inclined to take on their own. Needless to say, any measures recommended to states would have to be carefully devised so as to minimize potentially negative effects on Burma's population. In that regard, perhaps targeted sanctions along the lines applied by e.g., Australia, the US and the EU could serve as a model.<sup>33</sup> In any case, the world need not wait for the next time the Security Council is ready to act on Burma; as discussed above, a UN framework for the formulation and recommendation of non-forcible measures exists already today and states who implement such measures will have the backing of international law.

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### (Endnotes)

\* Professor of International Law, Stockholm University.

1. UN Charter, Art. 1 (3) and Art. 55 (c).

2. The question of humanitarian intervention in Burma received renewed attention following the Burmese Government's apparent indifference to the needs of its population in the wake of Cyclone Nargis. See e.g., Gareth Evans, "Facing Up to Our Responsibilities," *The Guardian* 12



May 2008. With regard to international criminal responsibility, the European Parliament called on EU members to press for a Security Council referral to the ICC in the event the Burmese authorities continued to prevent aid from reaching those in danger. "European Parliament resolution of 22 May 2008 on the tragic situation in Burma," P6\_TA-PROV(2008)0231.

3. UN Security Council draft resolution, SC/8939 Security Council 5619th Meeting (PM). The vote was as follows - in favor: Belgium, France, Ghana, Italy, Panama, Peru, Slovakia, UK, US; against: China, Russia, South Africa; abstaining: Congo, Indonesia, Qatar (U.N. Doc. S/PV.5619 p. 6). The draft resolution and explanation of votes is published at [www.un.org/News/Press/docs/2007/sc8939.doc.htm](http://www.un.org/News/Press/docs/2007/sc8939.doc.htm). Although two of the Council's permanent members, China and Russia, voted against the question being placed on the agenda, this did not suffice to defeat the item, given that the question was at that stage a question of procedure rather than substance. Cf. UN Charter, Art. 27 (2).

4. "A Threat to the Peace" is published at [www.unscurma.org/Report.htm](http://www.unscurma.org/Report.htm).

5. *Id.*, pp. 51-56.

6. *Id.*, p. 57.

7. *Id.*, p. 59. Actually, Article 41 authorizes a host of measures of a more coercive nature than those recommended by the report (or included in the draft resolution), e.g., the interruption of economic relations, interruption of various means of communication and the severance of diplomatic relations.

8. *Id.*, p. 65.

9. This function has been filled by UN Special Envoy Dr. Ibrahim Gambari, who has in recent years made several missions to Burma, including one in November 2007 (after the violent crackdown on the Saffron Revolution) and most recently in March 2008. Gambari's persistent pleas for human rights and democracy are generally considered to have fallen on deaf ears.

10. See verbatim statements explaining their negative votes at U.N. Doc. S/PV.5619: China (pp. 2-3), Russia (p. 6) and South Africa (pp. 3-4).

11. See transcript of statement at <http://burmalibrary.org/docs4/2007-03-SRM-oral.pdf> (p. 3). More recently, the role of the Human Rights Council has been confirmed (albeit in a different way) in Pinheiro's post-uprising report "Human Rights Situations that require the Council's attention." Report of the Special Rapporteur on the situation of human rights in Myanmar, Paulo Sérgio Pinheiro, mandated by resolution S-5/1 adopted by the Human Rights Council at its 5<sup>th</sup> Special Session. U.N. Doc. A/HRC/6/14 (7 Dec. 2007).

12. The UK "welcomed agreement amongst all Security Council members that there were serious issues of concern in Burma. Some believed the appropriate UN body to take forward action on Burma was the Human Rights Council. We therefore look forward to working with its members to address this profoundly disturbing situation." **"FCO Minister Challenges UN Human Rights Council to Give Voice to the Voiceless" 13 March 2007: [www.britainusa.com](http://www.britainusa.com)**. Likewise, the South African delegate said that the situation in Burma was a matter best left to the Human Rights Council. U.N. Doc. S/PV/5619 p. 3. That the Human Rights Council should continue to act is also supported by various non-governmental organizations dealing with the Burma question. See e.g., Yvonne Terlingen, "The Human Rights Council: A New Era in UN Human Rights Work?" UN Non-Governmental Liaison Service, 9 July 2007: "The case of Myanmar will be an immediate test for the Human Rights Council's resolve to address such serious situations... This once more illustrates that the Human Rights Council cannot postpone acting on these and other serious country situations any longer. [www.un-ngls.org/site/article.php3?id\\_article=332&var\\_mode=calcul](http://www.un-ngls.org/site/article.php3?id_article=332&var_mode=calcul)."

13. "The Secretary-General's address to the Human Rights Council," 19 June 2006 published at [www.un.org/apps/sg/sgstats.asp?nid=2090](http://www.un.org/apps/sg/sgstats.asp?nid=2090).

14. US Ambassador to the UN John Bolton, "Explanation of Vote on the Human Rights Council Draft Resolution" 15 March 2006 published at [www.state.gov/p/io/rls/rm/63143.htm](http://www.state.gov/p/io/rls/rm/63143.htm). (The US cast a negative vote based on its objections to procedures established for election and removal of Council members).



15. For example, UN Secretary-General Ban Ki-moon expressed disappointment at the Council's decision to single out only one specific regional item (by implication Israel). See "Ban Emphasizes Need for Human Rights Council to Consider all Rights Violations" at United Nations Radio 21 June 2007, published at <http://radio.un.org/story.asp?NewsID=7223>. See also, Human Rights Watch, "U.N.: Mixed Start for New Human Rights Council – Body Must Be Even-handed in Addressing Rights Crises," 30 June 2006 published at [www.hrw.org/english/docs/2006/06/30/global13685.htm](http://www.hrw.org/english/docs/2006/06/30/global13685.htm).
16. The Special Rapporteur for Burma had been established by the Human Rights Commission in 1992 and has continued under the Human Rights Council as one of its "special procedures." Cf. U.N.G.A. Res. 60/251 para. 6.
17. U.N. Doc. A/HRC/7/L.36 28 March 2008. See the report of the Special Rapporteur at U.N. Doc. A/HRC/6/14, 7 Dec. 2007.
18. Para. 5 (d) and (i).
19. Para. 5 f.
20. Resolution. 59/263, U.N. Doc. A/res/59/263 17 March 2005.
21. Resolution 62/222, U.N. Doc. A/res/62/222 28 Feb. 2008.
22. U.N.G.A. Resolution 1761 (1962).
23. Security Council Resolution 418 (1977). It was also in this resolution that the Security Council for the first time referred to the policies of the Apartheid regime as a threat to international peace and security. Later attempts in the Security Council to impose binding sanctions on South Africa met however with the vetoes of the United States and the United Kingdom (who asserted that the sanctions would be counter-productive). Security Council Official Record S/PV. 2797 p. 19 (8 March 1988). [http://findarticles.com/p/articles/mi\\_m1309/is\\_n2\\_v25/ai\\_6621234](http://findarticles.com/p/articles/mi_m1309/is_n2_v25/ai_6621234).
24. Security Council Resolution 569 (1985).
25. See voting record, *supra*, n. 3.
26. On retorsion, reprisals and sanctions, see generally Antonio Cassese, *International Law*, 2<sup>nd</sup> ed., pp. 299-300 & 310-313, Oxford University Press, Oxford 2005.
27. This is not to rule out that such support could *in certain cases* amount to a human rights violation on the part of the third state, thus giving rise to a right of reprisal against such a state.
28. Cf. A. Cassese, *supra*, n. 26, p. 312.
29. *Id.*, p. 302.
30. Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled "Human Rights Council." Report of the Special Rapporteur on the situation of human rights in Myanmar, Paulo Sérgio Pinheiro. U.N. Doc. A/HRC/4/14 12, p. 11, 12 Feb. 2007.
31. *Id.*, p.2
32. See "Human Rights Situations that require the Council's attention," *supra*, n. 11, paras. 29-62.
33. For Australia, see [www.dfat.gov.au/un/unsce\\_sanctions/burma.html](http://www.dfat.gov.au/un/unsce_sanctions/burma.html); for the EU, see "Council Regulation EC (No 194/2008) of 25 February 2008 renewing and strengthening the restrictive measures in respect of Burma/Myanmar . . ." at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:066:0001:0087:EN:PDF>; and see an overview of US sanctions at <http://www.treas.gov/offices/enforcement/ofac/programs/burma/burma.pdf>.

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## Part C : Referendum and Constitution

(C . 1)



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

### **“The 2010 Election in Burma — A Hopeless Avenue for Human Rights”** (June 25, 2008)

Burma’s military junta, the State Peace and Development Council (SPDC), recently approved *The Republic of the Union of Myanmar Constitution* in a sham referendum held on May 10 and 24, 2008. According to the SPDC’s roadmap, elections will be held in 2010 to provide for a “discipline-flourishing genuine multiparty democracy” as outlined in the Constitution. The Burma Lawyers’ Council contends that any optimism about the election’s prospects is ill-founded for two reasons:

- (1) the elections will be held in accordance with the constitution, which was produced and passed by the regime in an undemocratic drafting process and illegitimate referendum; and
- (2) the Constitution’s provisions demonstrate the government’s blindness to the entitlement of the people of Burma to their basic human rights – providing more reason to weep than to hope.

This paper asserts that the Constitution and the pretense of elections are an attempt to proliferate the SPDC’s harsh military rule under the guise of a constitutional democracy, providing no hope for human rights or democratic governance in Burma.

#### **Part I.**

#### **An Analysis of SPDC’s Constitution Making Process**

Article 21 of the Universal Declaration of Human Rights provides that the will of the people shall be the basis of the authority of government. It follows logically



from this provision that, in any nation, the will of the people should be reflected in the constitution which forms the foundation of government. It follows, too, that the manner and extent to which a nation includes the people in the production of its constitution signifies the importance that nation gives to the pivotal role of the process of constitution making. A free, fair and inclusive constitution making process – one which accurately reflects the will of the people – is certainly likely to guarantee a lasting constitution.

Contrary to the provision laid down by the Universal Declaration of Human Rights, the constitution making process in Burma was controlled by the ruling military junta with complete disregard to what the peoples of Burma might wish to contribute. Law No 5/ 96 proclaimed in 1996 is the existing law of Burma. Under its provisions, the people are prohibited from participating in the constitution making processes and any infringement of the law is punishable by a minimum of five to a maximum of twenty years imprisonment.

It will be helpful to explore the background to this situation more fully.

It is universally recognized that the National League for Democracy (NLD) won a massive landslide victory in the May 1990 elections in Burma. Despite this fact, the military junta ignored the expressed will of the people of Burma and refused to transfer political power to the legitimate democratic government. Instead, they issued a declaration (No 1/90). Article 20 of that declaration provided, among other things, that:

... The responsibility of the elected representatives is to draw up the constitution of the future democratic state.

However, the military dictatorship did not transfer power to the elected representatives to implement that declaration. Instead, the military attempted to add a further layer of artificial legitimacy to justify holding on to power through the setting up of a National Convention to draft its constitution. To ensure the dominant role of the military in politics, it formulated a National Convention Procedural Code which tightened control of the constitution making process.

When the National Convention held its first session in January 1993, in attendance were 703 members representing eight nominal delegate groups. The Procedural Code provides no indication as to how the delegates were chosen. Article 2 simply states that delegates “from the groups mentioned below are to attend to the National Convention”. The total number of delegates from each group was determined by the NCCC. Several of the groups are ambiguously defined such as “peasants”, “workers” and “appropriate persons”. Seven of the eight delegate groups did not exist as separate and independent organizations capable of nominating delegates to the National Convention.



In reality, the SPDC was free to nominate delegates to the National Convention in any manner it considered desirable, and took the opportunity to do so.

Despite SLORC's declaration No.1/90 that provides the elected representatives with "the responsibility to draw up the constitution of the future democratic State", only 99 positions were allocated by the NCCC to the elected representatives out of a total of 703 delegates. Furthermore, most of these elected representatives had later been dismissed, been disqualified or had resigned from the National Convention.

The constitution making process was controlled absolutely by that sham National Convention. No public meetings on the constitution were allowed, no suggestions from the people were collected and no comments from the people were printed in the media.

Once a session of the National Convention commenced under the chair of the SPDC's nominee, each delegate had very limited speaking rights. Delegates only spoke before the commission if he or she had permission of the National Convention Convening Work Committee (NCCWC) (art. 5(c), 16(c) & 37). In practice, delegates had to submit their discussion papers to the NCCWC for its approval prematurely. Delegates were permitted to speak in accordance with the discussion paper (art. 45(j)), which was edited and prepared extensively by the NCCWC.

All "discussions" (i.e., recitation of the discussion paper) during the National Convention were limited to the aims set out in Article 1 of the Procedural Code (art. 5(c)). This prevented effective discussion of issues essential for the development of a lasting democratic constitution in Burma, such as the causes of civil war and the instability in Burma and the failures of the 1947 and 1974 constitutions. Delegates were not permitted to analyze alternative constitutions or constitutional principles from around the world. The rights of ethnic minorities, human rights and genuine democratic principles could not be discussed. Through the NCCWC, the SPDC used these powers of censorship strictly to control all discussion at the conference. This eliminated any possibility of democratic leanings or criticism of the military. Any contravention of the SPDC's rules was dealt with harshly. One delegate, Dr Aung Khin Sint, was arrested and sentenced to 20 years imprisonment for distributing a paper among delegates.

All information in relation to the National Convention was strictly controlled by the SPDC. The NCCWC and Presidium could declare any discussion paper as "secret" (art. 47(f), 16(h)). These secrets were not allowed to be discussed, distributed or published in any manner (art. 47(f)). All "news" in relation to the National Convention was released merely by the NCCWC and was to be regarded as confidential up until the time of its release (art. 8(j)).



The control of the flow of information highlights another important feature of the National Convention. The delegates were not actually charged with the responsibility of achieving anything. They were simply asked to talk. The National Convention had no actual authority to lay down principles or to draft a constitution.

Delegates to the National Convention had no right to vote on any topic. There were no voting procedures in the Procedural Code. Delegates had no right to pass motions. Delegates had no right to approve or express any opinion, as a collective group, in respect of the principles on which a constitution was to be based, or on a draft constitution itself. The delegates had no role in the actual drafting of the constitution.

The control of all information emanating from the National Convention allowed the SPDC to complete the drafting of its constitution and to announce through the NCCWC that the new constitution had been drafted and endorsed by the National Convention.

Given the absolute usurpation of control over the constitution making process by the SPDC, 85 out of the 99 elected representatives, members of the National League for Democracy (NLD) led by Daw Aung San Suu Kyi, chose to withdraw from the National Convention.

The Constitution making process highlights the unacceptable means by which the Constitution was fabricated. Moreover, the fact that the referendum which passed the Constitution was entirely undemocratic is a further demonstration of its illegitimacy. In threatening, forcing and manipulating the Burmese people during the recent constitutional referendum, the SPDC showcased its abhorrence for democratic procedures. Elections to be held in accordance with the Constitution will simply be a continuation of the illegitimate and undemocratic methods of the SPDC.

## **Part II.**

### **A Critique of SPDC's 2008 Nargis Constitution**

#### **Introduction to the Status of the SPDC's 2008 Nargis Constitution**

A constitution defines the relationship between the individual and the state. It should place limits on the government's power for the protection and promotion of fundamental individual liberties. Yet the SPDC's Constitution fails to provide important foundational principles such as democratic governance, a separation of powers, checks and balances, judicial independence and the protection of individual rights. Instead of limiting and defining the role of the state, the Constitution confers significant powers to the military elite, with the



name of “National Security and Defense Council”, seeking to justify and enshrine its hegemony within a constitutional framework.

### **1. Denial of Popular Sovereignty**

Like a thread that binds the Constitution together, the powers conferred to the military elite are woven throughout each section of the Constitution. Of the six primary aims and objectives outlined at the beginning of the Constitution, one actually aims “for the Tatmadaw (or) armed forces to be able to participate in the national political leadership role of the State.” In guaranteeing 25% of all seats in both national assemblies and in each state legislature to the Tatmadaw, the military has secured significant representation in all legislative chambers – contrary to any definition of democratic governance; perhaps this is the meaning of a democracy that is “discipline-flourishing”. Actually, it is against the concept of popular sovereignty which constitutes a major component of constitutionalism. Contrary to popular sovereignty, in the SPDC’s constitution, the concept of military supremacy is exercised mainly by the military elite, led by the Commander-in-Chief of Defense Services.

### **2. The Constitution grants the Commander-in-Chief significant powers**

The military’s involvement in national politics however, is not limited to legislative representation – it permeates each corner of the constitutional framework. The President for example, is not elected directly by the people. Instead, an unaccountable “presidential college” has the choice of selecting amongst three candidates for the presidency; one candidate being appointed by the Commander-in-Chief of Defense Services is guaranteed at minimum a position as Vice-President. Furthermore, the President must appoint army personnel selected by the Commander-in-Chief of Defense Services to certain positions in the executive, including the ministries of defence, security/home affairs and borders affairs. In fact, the Constitution grants the Commander-in-Chief significant powers, assuming all powers of the President during certain “states of emergency”, and unlike the President, there is no process for impeachment or accountability of the Commander-in-Chief’s position.

### **3. The Lack of Judicial Independence: The Constitution Fails to Provide Checks and Balances**

The Constitution also fails to provide the checks and balances that are necessary for democratic governance. To protect the rule of law, the judiciary must be able to scrutinize the legislature and the states must be able to scrutinize the acts of the federal government. The Constitution however, confers significant executive control over the judiciary by allowing the President to exert full control over the appointment of the Chief Justice. The judiciary’s subservience to the



executive is also highlighted in its whimsy impeachment process for judges, adverse to judicial independence.

The Constitution states that the judiciary is to “administer justice independently, according to law”. The current laws however, provide ample means for abuse and avenues to violate human rights. The SPDC’s Constitution allows these current laws to remain in force past the 2010 elections. Therefore, the judiciary can use these laws to justify violations of human rights, provided they do so “independently” and in accordance with the injustice of the laws. There is no institutional independence in the constitution.

#### **4. Rigid Centralization Fails to Provide the Right to Self-determination**

The Constitution provides extensive control, allowing the military elite, led by the army chief of staff, to pervade all state and municipal institutions. The constituent units, in terms of states and regions, are provided minimal powers and the military elite can encroach on these minimal powers as it pleases. This makes the constituent units defenseless against the power of the military elite, rigidly exercised in the position of the central government. In the Constitutional structure, any notion of the right to self-determination, claimed by various ethnic nationalities, is therefore absent as it does not exercise the principle of division of legislative, executive and judicial powers within the framework of the federal union.

#### **5. No Possibility for the Emergence of New Laws to Promote Human Rights**

In conferring significant powers to the military elite, it is hard to imagine the emergence of new laws for the promotion of human rights. In the 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.

#### **6. “Exception Clauses” to Justify the Infringement of Basic Human Rights**

The chapter titled Citizenship, Fundamental Rights and Duties of Citizens, which is hidden at the back of the lengthy Constitution, provides a limited scope for rights and freedoms. The abundance of limitation clauses and those rights that must be “prescribed by law” before becoming a legal reality provide ample avenues to infringe basic human rights. Section 10 for example, which ‘grants’ the fundamental freedoms of expression, assembly and



association, are “subject to the laws enacted for State security, prevalence of law and order, community peace and tranquility or public order and morality.” This broad limitation clause can be employed to rationalize almost any infringement of these fundamental freedoms – particularly with the military’s hands directing each branch of the government.

## **7. The Continuation of Previous Laws that Infringe Fundamental Freedoms**

The Constitution not only prohibits the emergence of new laws to safeguard human rights, it also permits the continuation of previous laws that have infringed fundamental freedoms. For instance, the *1975 State Protection Law* is 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 charismatic leader, Daw Aung San Suu Kyi, is currently being held under house arrest pursuant to this law. Even if the SPDC’s Constitution comes into force, this law and other similar oppressive laws will remain to continue to deny a person’s right to a fair trial and the right not to be held in arbitrary detention.

## **8. The Continued Suppression of Freedom of Expression**

In allowing the existing laws of Burma to remain in force following the elections, the Constitution extends the injustice of the past far beyond 2010. Law No. 5/96, as one example among the many, allows the government to imprison any person who incites, demonstrates, delivers speeches, or makes oral or written statements that are counter to state “tranquility”. Such a law greatly undermines freedom of expression, yet will continue to remain in force following the 2010 elections. Even if it can be cancelled with the power of the people’s movement before 2010 elections, there is no provision in the constitution at all to prevent the emergence of similar laws, which will extremely limit freedom of expression, association and assembly, in the future.

A state that limits freedom of expression and the marketplace of ideas cannot possibly purport to be democratic. Freedom of expression is one of the cornerstones of democratic governance and basic human rights. Law No. 5/96 and similar laws will likely be rationalized by the military under the limitation clause of the constitution, justifying the silencing of people’s voices and the false imprisonment of those who have the courage to speak.

## **9. Lack of Institutional Mechanism to Promote or Protect Human Rights**

The Constitution not only provides guidelines to allow human rights infringements, it also fails to provide necessary guidelines for their protection. As has been stated, while the judiciary is forced to be subservient to the



executive, there are no other institutional mechanisms to promote or protect human rights. In a country like Burma, where the rule of law has been abused for decades and the violation of human rights is the norm rather than the exception, the constitution must provide institutional safeguards – such as a human rights commission or other independent commissions - to check the powers of government from abuse and advance the basic rights of the people. The absence of institutional mechanisms demonstrates the absence of any real effort to advance human rights in the Constitution.

## **10. Lack of Process to Ratify or Facilitate International Human Rights Laws**

Further to its silence in regards to institutional mechanisms, there is also no mention of the ratification or facilitation of international human rights law or norms. The Constitution provides no evidence of attempting to meet international human rights standards. In fact, it violates them in many areas, including its rigid citizenship rules and its many attempts to quell dissidence in its firm commitment to “national solidarity”. So while a Constitution ought to protect human rights from the whims of a legislature, the Constitution provides more mobility to violate individual rights than mechanisms to safeguard their protection. It empowers the authority of government at the expense of empowering the people, limiting citizens’ agency and fundamental rights.

## **Conclusion**

The 2010 elections and the illegitimate Constitutional structure are simply attempts by the military junta to solidify its power under the guise of democratic constitutionalism. The Constitution promotes the powers of government and the military elite, while terribly limiting the rights of people, contrary to liberal democracy, the rule of law and the foundational principles of constitutionalism. The ill-fated prospects of the 2010 elections are reinforced by a broader examination of the socio-political context in Burma. During the aftermath of the destruction caused by Cyclone Nargis, the SPDC focused on manipulating its people through a sham referendum rather than aiding its victims after a tragic disaster. Any hope that the 2010 elections will be any different is quickly admonished by the Constitution and its blatant disregard for democracy and the rule of law. Despite the people’s entitlement to their basic human dignity, the 2010 elections will be yet another democratic façade. They are a hopeless avenue for the promotion and protection of human rights in Burma.

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(C . 2)

## **Activities conducted by the Burma Lawyers' Council on SPDC Constitution and Referendum**

### **Introduction**

In response to the SPDC's announcement of the May 10 constitutional referendum, the Burma Lawyers' Council undertook an intensive campaign to educate, prepare and energize eligible voters on why they should vote "no" to the constitution. This article summarizes some of the BLC's primary activities.

### **1) Booklets on Constitution and Referendum, with illustrations**

The BLC wrote the text and hired an artist to draw illustrations for cartoon booklets regarding the constitution and referendum. These booklets were written in Burmese language and distributed to 108 democratic organizations and individuals, which then redistributed the cartoons inside Burma and along the Thai border. Booklets reached, for instance, Karenni State, Shan State, Karen State, Phuket and Maha Chaing, Thailand, and Kachin State.

A total of 1,258 cartoon booklets on the constitution containing 61 pages were distributed. Some of the main themes were:

- The rights of the people and restrictions on the power of the government. The illustrations also show how the SPDC constitution restricts the rights of the people and gives more power to the government.
- The provisions in the SPDC constitution specifying the qualifications for the President, the 25% representation of the military persons in the parliament and the power of the President to appoint Ministers. As a result of these provisions, the army will always have a leading role in governing the country.
- The absence of rights for the ethnic nationalities and the lack of equal treatment in the SPDC constitution. The illustrations also show what genuine equality really looks like.
- How government civil servants cannot participate in politics or run for election but exceptions are made for SPDC officials and their favored civil servants.





- The continued use of laws to oppress the people and violate their human rights.
- The ability for the SPDC to choose members of the legislative bodies, such as USDA members and National Unity Party members. Also included is the army's ability to silence the voices of parliament members.
- The life of an ordinary peasant family will become miserable due to the exclusion of the people's participation in drafting the constitution.
- The army personnel use their followers in the Swan Arr Shin to forcibly prevent the people from expressing their opinions in the constitution.

The referendum booklets were 76 pages long. Some of the major points were:

- The necessity of forming the National Referendum Commission with persons unrelated to the authorities.
- The independence between the judiciary and the Referendum Commission.
- The rights of the public to complain about the cheating and other dishonest behavior by the Commission.
- Encouraging the people to convince the Commission members to support the public even though they are the subordinates of SPDC.
- The issuing of temporary registration cards by the authorities -- a person can have four or five temporary registration cards in hand and can cast supporting votes in different polling boots.
- The possible dishonesty of the polling booth authorities.
- Counting the votes -- no rules govern how and when the SPDC must announce the results.
- The public was warned about people changing 'No' ballots to 'Yes' ballots.
- Observation of the referendum by Burmese people, without relying on international groups to reveal the truth.

Examples of the cartoons are included in this *Lawka Pala*.

## **2) Educational program on the referendum and constitution broadcast on television by the Democratic Voice of Burma**

The BLC produced a taped educational program on the referendum and constitution which was broadcast on television by the Democratic Voice of Burma. The DVB made five programs, each 15 minutes in duration, broadcast into Burma for 5 consecutive days before the referendum. The DVB program showed Burmese voters how to cast their ballot and how to identify SPDC tricks and methods to change the votes. Members of the BLC Board and some of the senior BLC staff held a discussion on matters such as the experience with the 1973 referendum and weaknesses of the SPDC draft constitution and referendum process. The BLC also conducted several interviews in which they discussed the effect of the constitutional provision granting amnesty for



crimes in connection with transitional justice, the Depayin Massacre, the September 2007 uprising, and the relocation of Karen villages.

### **3) Educational video-CDs regarding constitution and referendum**

The video-CDs contained the DVB programs and an analysis on the constitution and referendum. 600 VCDs were produced and 592 were distributed, often with the cartoon booklets described above, both inside Burma and along the Thai-Burma border. The video-CDs were approximately 45 minutes long.

### **4) Training workshops regarding the referendum and constitution**

Members of the BLC staff held two one-day trainings for Burmese migrant workers on May 4 and May 11 regarding the constitution and referendum. The BLC trainers presented the characteristics of a constitution and referendum generally, the strengths and weaknesses of the SPDC draft Constitution and referendum, a film presentation on the referendum in East Timor, a study on other countries' referendums, and how to vote during the Burma referendum (during this last topic, the migrant workers practiced voting correctly).



A one-day workshop was held on April 23, 2008, led by BLC Board Members U Thein Oo, U Aung Htoo, and U Myint Thein. They pointed out the weaknesses of the SPDC constitution, explaining how the constitution favored a group of leading military generals, not the people and army personnel. The workshop was videotaped, put on VCDs by the HREIB and distributed within Burma.

On April 10, the BLC General Secretary provided training on the constitution and referendum to eight journalists who left the country legally. U Aung Htoo elaborated on the flaws of the SPDC constitution and possible cheating methods by the military regime in its referendum.

BLC Executive Board Member U Myint Thein also provided trainings on the referendum and constitution in Chiang Mai, Thailand. These trainings focused on the ways in which the SPDC was using the constitutional process to legitimize their unlawful power, the flaws in the Constitution that could be exploited by the SPDC to infringe on people's rights, the dangers in voting "yes" in the Referendum, and the possible ways the SPDC would manipulate the Referendum results.



Briefly, as an extra activity, the BLC sent a staff lawyer inside Burma to closely observe the referendum process.

## 5) Radio Programs and Interviews

At the request of the BBC, the BLC General Secretary provided written legal suggestions for its special weekly program on the constitution for five consecutive weeks. These programs were broadcast in April and May 2008 under the following titles:

- (1) Provision of civil rights in the constitution
- (2) Rigid centralization and the checks and balances system in the constitution
- (3) The role of the army in the constitution
- (4) Protection of ethnic rights in the constitution
- (5) Amendment of the constitution

In program (1), the General Secretary highlighted that civil rights are not guaranteed in the SPDC's 2008 constitution (at that time, draft constitution) and compared the 2008 constitution with the 1947 constitution, in which basic



rights of people were guaranteed with the establishment of an independent judiciary. Program (2) elaborated on the practice of rigid centralization by the executive and also highlighted that out of three constitutions –1947, 1974 and the SPDC's 2008 constitution -- the last one created the most rigid centralization, which will negatively impact the practice of people's liberty.

Program (3) explained the civilian supremacy concept and criticized the military supremacy concept indoctrinated in the SPDC's 2008 constitution. Program (4) elaborated on the concept of equal rights and self-determination, which should be enjoyed by various ethnic nationalities in the union of Burma, and criticized this aspect of the SPDC's constitution. Program (5) highlighted the amendment section in the SPDC constitution, which implies that the constitution can never be amended by the people, as the amendment procedure is too difficult to apply practically.

The BLC General Secretary was invited to participate in a special edition interview by Voice of America on the SPDC Constitution and its effect on the 1990 elections. The General Secretary explained how the 1990 elections were not disputed, and thus must be honored and implemented. The elected officials are the ones who should be drafting the country's constitution, not the military regime. Announcement 1/90, paragraph 20, which established this right, is still effective law. Furthermore, the SDPC must invite international observers to the referendum to ensure that acceptable election procedures are used. If the constitution is approved and elections are held in 2010, the power of the SPDC



will be confirmed, legitimizing their rule and giving them extended life. This must not happen.

The General Secretary also participated in three radio interviews with Network Media, moderated by Ko Aung Naing and broadcast on Radio Free Asia. In these interviews, he expressed that the SPDC Constitution is a systematic arrangement used to extend SPDC power. He added that the Referendum was flawed because there was no regulation on how many votes were needed to approve the Constitution. A small number of "yes" votes could conceivably approve it; for example, if there are 100 eligible voters, 51 of them vote, and 26 support the Constitution, it is approved. This is true even though only 26% of all eligible voters approved.

## **6) Symposiums and Statements on Constitution and Referendum**

The BLC General Secretary also held symposiums on the Constitution and Referendum in Australia and Japan. Excerpts from his report are printed separately in this *Lawka Pala*. The BLC also published and distributed a large number of legal statements regarding the Constitution and Referendum. These have been reprinted in this and the previous *Lawka Pala*.

## **7) BLC's Participation in Referendum Watch activity with political alliances**

The Director of the BLC Legal Aid Section is a member of the NCUB Referendum Watch team. He is responsible for legal matters on the team. He researches and analyzes whether the SPDC has violated an applicable government order or procedure, or an international legal principle. The Referendum Watch team has released statements that address, among other things, the ways in which the government forced people to vote early, how the SPDC Constitution is inconsistent with democratic principles, and how the cyclone created poor voting conditions, yet the SPDC still held the Referendum.

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(C . 3)

## **Analysis of the SPDC's Constitution from the Perspective of Human Rights**

U Aung Htoo

General Secretary, Burma Lawyers' Council

### **A Brief Introduction to the SPDC's 2008 Constitution**

A constitution that reflects the will of the people, addresses the underlying issues of the respective state, fulfills the particular needs of society and is underpinned by equality before the law, can be valued as the supreme law of any respective state, which will lay down the foundation for the rule of law. However, the constitution, drawn up and approved forcefully by the military junta, known as the State Peace and Development Council (SPDC), in Burma in May 2008, has never had these qualities.

The regime totally neglects the will of the people. It has prohibited the people from participating in the constitution making process by enacting an abusive law, namely Law No 5/96, with a penalty of twenty years imprisonment. In addition, the regime never endeavors to address the underlying issues of Burma. The delegates, handpicked by the regime to produce constitutional principles in its sham National Convention, were not allowed to discuss the problems encountered by the people such as land confiscation, environmental degradation, corruption, HIV/AIDS, poverty alleviation, power abuses by the authorities, lack of the rule of law, etc.

To be worse, the essential requirements of Burma, the particular needs of society, have never been fulfilled given that the constitution keeps silent on the implementation of the results of the 1990 May election, which is still valid and whose legitimacy has as yet not been abrogated even by the regime itself, officially and publicly, while ignoring the application of rights of 'self-determination' for various ethnic nationalities in Burma. In addition, the Constitution denies the equality principle to be practiced among citizens, which is an intrinsic value enshrined in Article (1) of the Universal Declaration of Human Rights, by formulating a military elite, as a privileged class.

With this background scenario, this compilation attempts to scrutinize the status of the SPDC's 2008 Constitution from the perspective of human rights, centering on the right to liberty and basic freedoms.



## **The Relationship between Human Rights and Constitution**

The Preamble in the Universal Declaration of Human Rights provides, *inter alia*, as follows:

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law;

The abovementioned provision will become a reality only when the rule of law prevails in any society, centering on the effective application of the constitution, as the supreme law of the land, while it is essential that the constitution itself guarantees basic human rights. In this respect, the UDHR, in its preamble, continues to elaborate as follows:

----- every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

With reference to the term 'national and international' in connection with the magnitude of the rule of law provided for in the aforementioned paragraph, Lowis Henkin, Professor Emeritus at Columbia University, New York, USA, and human rights icon, elaborated that human rights may become a reality only when national laws – the constitution as a centerpiece and its organic laws - in every nation state adopt the concept of human rights and make it applicable. In terms of the current and future society of Burma, it is worth considering how international human rights law concepts can be incorporated into national laws, centering on the constitution to be applied as the supreme law of the land.

Unfortunately, during the overall constitution making processes of the SPDC military regime, which have taken about 14 years, from 1993 to 2007, the term 'human rights', even as a vocabulary, never appeared in any formal discussion of the National Convention.

When the issue on drawing up a constitution is to be dealt with from the perspective of human rights, there are two extremes: one is that all human rights norms, which have been adopted by the international community, should be reflected in the national constitution of a respective state; and, another is that the constitution is a national law of the state and as such, it should address



only the national issues and values of a respective society, without the necessity of having to reproduce human rights concepts. Both extremes should be avoided.

A reasonable middle path is that the constitution of a nation state should, at minimum, guarantee basic rights, in terms of liberty and basic freedoms of individual citizens, out of those enshrined in the UDHR, while addressing societal values, essential needs and underlying issues of a respective state. An analysis on these aspects shows that, in spite of superficially having the relevant provisions, almost none of the basic rights in the SPDC's 2008 Constitution can be enjoyed by individual citizens because they include exception clauses which enormously limit the basic rights in their application.

### **Limitation of rights and application of limited limitation**

Despite the UDHR's enshrinement of all rights without any limitation intrinsically, provision for limitations of rights can be observed in Article 29 (2) as follows:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations **as are determined by law** solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

The above mentioned provision can be simplified as follows:

Limitations can be made in accordance with law:

- to protect the rights and freedoms of others;
- to promote morality;
- to maintain public order; and
- to foster the general welfare in a democratic society

It can also be construed that although rights can be limited in accordance with law, the legislative bodies of any state cannot enact a certain law, which greatly deprives the basic rights of individual citizens, simply because they have power to do so if that state agrees to adopt the human rights concept primarily. Furthermore, the governments which are authorized to enforce the laws shall not interpret the constitutional provisions as they wish, transcending over the legal framework of each and every article of the constitution, and apply laws to oppress their own people and to stifle the democratic opposition, particularly in such countries ruled by authoritarian regimes, including Burma.

In spite of the fact that limitations of rights are acceptable, limitations in the constitutional provisions should be comprehensive enough; they should be in line with the Article 29(2) of UDHR but not for other purposes; and more



importantly, the concept on limited limitation should be applied. Only then, the power of government which may intervene in the individual freedoms of people can be circumscribed within the precise scope of law while power abuses of governmental authorities, invoking the controversial and inexplicit provisions for limitation in the constitution, may be shunned.

## **Comparison between the 1947 Constitution and SPDC's 2008 Constitution**

In regard to application of liberty and basic freedoms of individual citizens in practice, a comparative study can be made between the two constitutions of Burma: the first one is the 1947 constitution which was effective after independence of Burma; and, the second one is the SPDC's 2008 constitution. Both constitutions exercise the concept of limitation.

For the provisions relevant to liberty and basic freedoms of individual citizens, Article 17 of the 1947 Constitution provided as follows:

17. There shall be liberty for the exercise of the following rights *subject to law, public order and morality*:-

- (a) The right of the 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. Any association or organization whose object or activity is intended or likely to undermine the Constitution is forbidden;
- (d) The right of the citizens to develop their language, literature, culture they cherish, religion they profess, and customs without prejudice to the relations between one national race and another, or among national races and to other faiths.

Article 354 of the SPDC's 2008 Constitution can also be observed as follows:

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 the 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 relations between one national race and another, or among national races and to other faiths.

Contrasting the two articles, it is discerned that, exception clauses in Article 17 of the 1974 Constitution and Article 354 of the SPDC's 2008



Constitution commonly provide the terms - *public order and morality*, and they are virtually in line with Article 29(2) of the UDHR. The remaining parts of those exception clauses, nevertheless, are no longer identical. In accordance with the 1947 Constitution, the citizens were able to enjoy basic rights as the constitution modestly mentioned the term '**law**' as a required framework when those rights were applied in practice. Contrary to this, the SPDC's 2008 Constitution magnifies the scope of law, by using the term - *the laws enacted for State security, prevalence of law and order, community peace and tranquility* - with enormous vagueness and ambiguity.

If effort is exerted to construe the abovementioned difference, in terms of an exception clause, it is required to observe a brief background of the two constitutions. When the 1947 Constitution was approved by the Constituent Assembly to apply it after independence of Burma, there existed no draconian law which blatantly deprived liberty and basic freedoms of individual citizens. When the SPDC's Constitution was approved by its sham national referendum held in May 2008, a number of draconian laws including the "1975 Law to Safeguard the State Against the Dangers of Those Desiring to Cause Subversive Acts (hereinafter to be known as the 1975 State Protection Act)", which conspicuously restricts liberty and basic freedoms of individual citizens, had already become effective.

### **The Existence of the 1975 State Protection Law Which Deprives Liberty and Basic Freedoms of Individual Citizens**

The 1975 State Protection Act authorizes the executive body or government to impose wide-ranging restrictions on individuals: anyone suspected of having committed, or who is committing, or who is about to commit any act which endangers the sovereignty and security of the state or public peace and tranquility, can be ordered by the Council of Ministers to be imprisoned for up to five years without trial.<sup>1</sup>

With regard to a detainee or a suspect, the internationally accepted fundamental principle regarding criminals is the right to be presumed innocent until proven guilty in accordance with the law.<sup>2</sup> The national principle in Burma, inherited from common law tradition, bestows that it is better that several guilty persons escape than one innocent person suffer.<sup>3</sup> This is mainly to protect the liberty of an individual citizen who becomes a suspect. The State Protection Law gives insufficiency of evidence a premium to hold a person's liberty ransom.

Admittedly the Law refers to detention of a person without trial in circumstances that there is no sufficient evidence to make a legal charge or secure conviction by legal proof, but may still be sufficient to justify



detention in the interests of national security. It is left to the understanding of the arresting authority to determine what **sufficient** means.<sup>4</sup>

After five years of consecutive detention under this law, the SPDC military regime has not yet released Daw Aung San Suu Kyi and extended the detention period again invoking the same law, the State Protection Act. Detention pursuant to the State Protection Act is now a continuous process; Daw Aung San Suu Kyi may continue living under detention one five year term after another until death, if effective pressure on the regime is not in place.

Detention under the State Protection Law is an inverted death sentence without charges and without trial. For instance, Si Thu Ye Naing and Aung Kyaw Moe were both detained in Tharawaddy Prison under the State Protection Law. Both of them died while under detention.<sup>5</sup>

### **Arbitrary Detention and the Relevant Provision in the SPDC's 2008 Constitution**

Article 376 of the SPDC's 2008 Constitution provides as follows:

No citizen shall, *except [for] 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.

In the abovementioned provision, it is noteworthy that the scope of the exception clause, mentioned in italics, is greatly expanded. There, the main provision - "No citizen be held in custody for more than 24 hours without the remand of a competent magistrate" - applies to ordinary offenses specified in the penal code and other criminal laws, especially for the crimes committed by one citizen against another citizen or citizens. However, for others whose actions might be criminalized by the government through accusations that the suspect or suspects endeavor to threaten the security of the State, as provided for under the aforementioned exception clause, the limitation of a 24 hour detention period will assuredly not be applicable.

More importantly, the exception clause mentioned in Article 375 can be read with the similar one provided for in Article 354. The connection between the two exception clauses will be discerned and then it can be construed that arbitrary detentions under the draconian laws, including the 1975 State Protection



Act and others, will continue taking place thereby denying the right to a fair trial of every individual citizen in Burma.

## **The Right to a Fair Trial**

From a fair trial perspective, the protection of human rights for a defendant needs to be taken into account not only at the trial or hearing stages, but also throughout pre-trial and post trial events. After being arrested, the detainee is not allowed to communicate with the outside world or seek the assistance of legal counsel. In the event that the detainee suffers from mental or physical torture during the pre-trial stage detention period, he or she will not be able to defend his or her case effectively and efficiently.

Detention can be simply defined as: a person restricted to a confined area of a lockup or detention center in which freedom of movement is deprived. As soon as this situation takes place for any individual, the concept of a 'fair trial' should be applied.

In every society, detention is a necessary measure to take effective criminal action against the perpetrator of a crime. This measure is intended to prevent further crimes and other human rights violations from being repeated. Whenever justice is sought for victims whose rights are violated by a perpetrator's criminal offense, detention is a beginning step in furtherance of prosecution and a hearing at a formal trial. In theory, by so doing, impunity for perpetrators is supposed to be denied, and justice for victims is supposed to be promoted. The question remains: How can arbitrary detention<sup>6</sup> against innocent victims be avoided? Arbitrary detention leaves detainees vulnerable to torture and inhuman treatment at the hands of law enforcement authorities,<sup>7</sup> setting the stage for a denial of a fair trial.

### **SPDC's 2008 Constitution:**

#### **Hopeless for protection of liberty and basic freedoms of individual citizens**

On countless occasions, innocent people are detained as suspects; and human rights violations inevitably take place, particularly for the powerless and poor people in Burma. Invoking the effective draconian laws and aiming to harass the democratic opposition, the ruling military junta in Burma has been detaining several thousand people arbitrarily, as a common practice, for several decades, resulting in serious damage to liberty and basic freedoms of individual citizens while denying the right to a fair trial.



So long as such draconian laws continue to exist, people cannot dream of protection and promotion of human rights in Burma. Unfortunately, the provisions in the SPDC's 2008 Constitution cannot be invoked by the people to abrogate such laws. To the contrary, more numbers of draconian laws will come to existence under the provisions mentioned in the exception clauses of the SPDC's 2008 Constitution.

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### (Endnotes)

<sup>1</sup> Chapter 3, Article 7 of the 1975 State Protection Law

<sup>2</sup> Article (14)(2) of ICCPR.

<sup>3</sup> U Phoe Thar. (Third Publication), Commentary of evidence act. Rangoon; Gondoo Press, p. 269.

<sup>4</sup> Gutter, P., and Sen, B.K., Burma's State Protection Law; Bangkok, Burma Lawyers' Council, December 2001. p. 38-39.

<sup>5</sup> Ditto

<sup>6</sup> Article (9) of UDHR and ICCPR.

<sup>7</sup> Gutter, P., & Sen B.K. Burma's state protection law: An analysis of the broadest law in the world. Published in Bangkok by the Burma Lawyers' Council, (December 2001). p. 44.

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**(C . 4)**

*[The following letter was written by the United Nationalities Alliance. It is being reprinted in its original form without edits.]*

To: Mr. Ibrahim A. Gambari  
Special Adviser to the Secretary-General Mr. Ban Ki-moon  
United Nations Organization  
New York, U.S.A

From: United Nationalities Alliance (UNA)  
Rangoon, Burma.  
Date; August , 2008.

**Subject: Submission of Suggestions on Political Situation in Burma.**

Your Excellency,

We, United Nationalities Alliance (UNA), have the honor to present this letter of suggestions to help you work out for future political processes which comply with the mandates of the United Nations Organization and real desires of people of Burma/ Myanmar and international community. Our organization (UNA) is a coalition alliance of (12) ethnic nationalities political parties which have contested and won (67) seats altogether in 1990 general elections. The political objective of our organization (UNA) is to set up a genuine Federal Union in which democracy, equality, self-determination and human right are prevailed among all nationalities.

Your Excellency,

The junta (State Peace and Development Council-SPDC) had claimed on (29-5-2008) by Notification No.(7/2008) that its draft constitution was approved by the 92.48% of the voters in the referendum which was held on (10-5-2008) and (24-5-2008). But our organization (UNA) has strongly apposed the conducts of the junta upon the processes of this constitution since the beginning and we have issued a statement on (2-6-2008) against ratification of it because of the following reasons:

- (1) The National Convention, which drew the draft constitution almost about 14 years, had not included the real representatives elected in 1990 general elections.
- (2) All of the representatives in the National Convention were the handpicked of the junta.



- (3) Even the ceased-fire groups, most of them are ethnic nationalities but not standing as legal political parties, are not legitimate groups and they can not represent the ethnic nationalities.
- (4) This constitution does not guarantee democracy, human rights and national reconciliation.
- (5) This constitution has been written against the will of people of the country and international community. And it is leading to a militarized – authoritarian dictatorship rule to suppress the people of the country.
- (6) And finally, this constitution has been one-sidedly ratified through the referendum by force and fraud.

Your Excellency,

We, United Nationalities Alliance (UNA), firmly believe that there will be no peace and tranquility in Burma/Myanmar until a genuine tripartite dialogue is materialized and national reconciliation is reconstructed. So, we would like to suggest you the following points to be implemented in the course of Secretary-General's good offices mandate by putting some appropriate pressure on the junta that;

- (a) The recent ratification of the constitution is null and void as it has been conducted against the will of the people of the country and lack of international norms.
- (b) To respect the Presidential Statement of the United Nations Security Council issued on (11-10-2007), resolutions laid down by the General Assembly and follow the Secretary-General's messages.
- (c) To release all political prisoners immediately and unconditionally.
- (d) To undertake a tripartite dialogue among the junta, democratic forces led by Daw Aung San Suu Kyi and representatives of ethnic nationalities it has been resolved in consecutive General-Assemblies.

We thank Your Excellency very much indeed and wish for Your Excellency's well being and success.

With regards,

United Nationalities Alliance (UNA)

Contact Persons:

(1) Pu Chin Sian Thang  
Member of Presidium, Spokesman  
No.34, First Floor, 52nd Street  
Botataung T/S, Rangoon.  
Ph: 293585

(2) Nai Ngwe Thein  
Member of Secretariat, Spokesman  
Room No.27, Building No.221  
Yankin T/S, Rangoon.  
Ph: 555180 (Ext:280)



## TRANSLATION

- Statement upon the Result of Referendum.

We, United Nationalities Alliance (UNA), hereby issue a statement.

1. The junta (State Peace and Development Council-SPDC) had held the referendum to ratify the constitution, which was written with its own accord one-sidedly and grossly lack of the essence of democracy, neglecting the sorrows of people suffered by the cyclone Nargis which caused the loss of million lives of people and inestimable properties.
2. We view this referendum is not free and fair at all, as the junta's puppets of regional authorities and departments, member of Union Solidarity and Development Association-USDA and Swan Ahr Shin (Master of Strength) and authorities of polling booths had committed many sorts of riggings such as misleading, coercion and fraud.
3. At present, we are well informed that people from every state and division of the country are submitting such riggings to the United Nations Organization every day with sufficient documentary evidence as well as verbal statement to be known by the international community.
4. We hereby claim that we strongly disapprove the referendum as it was not free and fair; and we also urge the people for further revealing of sufficient and precise facts and figures through verbal statements and documentary evidence.

- Shan Nationalities League for Democracy (SNLD)
- Mon National Democratic Front (MNDF)
- Zomi National Congress (ZNC)
- Arakan League for Democracy (ALD)
- Chin National League for Democracy (CNLD)
- Kayin National Congress for Democracy (KNCD)
- Kachin State National Congress for Democracy (KNCD)
- Kayah State All Nationalities League for Democracy (KSANLD)
- Kayan National Unity and Democratic Organization (DOKNU)
- Mra People's Party (MPP)
- Shan State Kokant Democratic Party (SSKDP)
- Arakan People's Democratic Front (APDF)

Date; June 2, 2008.

Rangoon.

\* \* \* \* \*



## Part D: The Rule of Law

### (D . 1)

## Response to Kyaw Ye Min regarding the Extension of Daw Aung San Suu Kyi's Detention

On 11 June, the state-run *New Light of Myanmar* published an editorial by Kyaw Ye Min, defending the SPDC's continued detention of Daw Aung San Suu Kyi. Min, however, should be viewed as a mouthpiece of the regime, and his editorial must be interpreted as a policy statement from the SPDC itself. The proper media for such a message is a government office such as the Attorney General's Office and not the *New Light of Myanmar*. The argument insists that Daw Suu's six-year-old house arrest is the proper application of a valid and just law. With dangerously flawed reasoning, the regime indicates that any law is defensible so long as it serves the good of the nation. Using a disturbing comprehension of legal principles, the SPDC then attempts to show that Daw Suu's house arrest follows the *1975 Law to Safeguard the State Against the Dangers of Those Desiring to Cause Subversive Acts* (also called the *1975 State Protection Act* or simply the *Act*) to the letter. Curiously, the argument concludes by pointing to controversial and widely condemned legislation elsewhere as proof that the SPDC is following the example of other jurisdictions. The following is a rebuttal to the *New Light of Myanmar* editorial that wholeheartedly condemns both the *Act* itself and the illegal restriction of Daw Suu's liberty.

### The SPDC's Flawed Legal Premises

The editorial is premised on the notion that a government is justified to "take action" that will satisfy its responsibilities of "safeguarding sovereignty and independence of the nation as well as ensuring community peace and the rule of law." While one would be hard-pressed to argue that governments do not take on such responsibilities, the SPDC neglects to mention that a state's capacity to act in this regard is bounded by the rights of its citizens. National security is of the utmost importance and any government is obliged to protect its citizens to the best of its ability. However, nothing can justify the arbitrary restriction of an individual's liberty. By prioritizing the state without safeguarding the individual, the editorial follows the same utilitarian calculus that rationalized the great atrocities of the twentieth century – from Holodomor to the Holocaust to the Great Leap Forward – and triggered a human rights paradigm in response. A state's right to self-defence is crucial but it is not absolute, and various



international standards specify that laws enacted to protect the state must take into account the inalienable rights of the individual.

In delineating its obligations, the SPDC proposes a paternalistic characterization of the relationship between citizen and state in which “[t]he government and the people are like the parents and their children.” This analogy is a poor one. Whereas the relationship between parent and child is born of a natural duty that exists between the former and the latter, citizens are not born from, and raised by, the state. State power and authority, rather, are derived from the will of the people. The SPDC has continuously ignored the will of Burma since free elections took place in 1990. Accordingly, the junta lacks the legitimate authority to rule, let alone to restrict individual liberties in order to further its skewed conception of the common good.

### **The Illegality of Daw Suu’s Detention in Burmese and International Law**

The heart of the editorial is an attempt to demonstrate that Daw Suu’s house arrest is proper application of Burmese law. Pointing to evidence no one has ever seen or heard, it informs the reader that Daw Suu and her allies “were corresponding with insurgents who are engaged in armed insurgency against the government, and were posing great threats to the national security, receiving cash and kind from insurgent groups and foreign governments.” The SPDC adds that “[d]ue to the crimes they have committed, they well deserve flogging punishment as in the case of naughty children,” and lauds itself for having restrained itself in the interests of national reconciliation.

This argument might have held an ounce of credibility if the regime sponsored a legal system that followed due process. The junta’s legal track-record of *in camera* trials, confessions given under duress, and a complete lack of transparency, however, means that such claims cannot be trusted. Further, Article 9 (e) of the *Act* stipulates, “If sufficient facts for filing a lawsuit have been gathered, the person against whom action is taken shall be handed over to the judicial authorities immediately.” The SPDC’s failure to comply leads one to believe that no such evidence, in fact, exists.

It is far more likely that Daw Suu has been detained because, as the symbolic leader of Burmese democracy, she represents a genuine threat to the SPDC’s hold on power. The *Act* is designed to remove dangers posed to Burma as a whole, an objective entirely different from protecting against a challenge to the generals’ rule. The SPDC sees the nation’s interests as the same as its own, and this is insufficient cause to violate Daw Suu’s human rights. Preventative detention is punishment for intent alone. While this – a serious infringement of the principles of fundamental justice – might be justified in cases of extreme danger to national security, it cannot be equated with the far less



pressing danger of a challenge to the continuation of the SPDC's illegitimate rule.

This identification, by security agencies, of their interests as identical to the nation's interests happens in various countries; Burma is exceptional, however, because unlike elsewhere its courts are incapable of overseeing this process. The landmark Singaporean case of *Chng Suan Tze v. Minister of Home Affairs*, for instance, emphasized that the executive's powers to detain are subject to judicial review and stated, "All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power." A similar statement has emerged from the New Zealand courts. In 1998, a Court of Appeal judge in that country ruled, "[T]he Courts will be astute to ensure that the misuse of power is not cloaked by claims of national security... [S]ecret organisations of this kind from time to time misuse their powers in relation to individuals and institutions...[and therefore] it is essential that the judicial process be exerted...firmly, to keep the organisations and the officers within the law."

The editorial suggests the *Act* allows for six years of detention without trial, as opposed to the consensus of legal experts in civil society and the international community that the law should be read as providing at most for a five year maximum. The six year interpretation relies on a contentious reading of the word "continued" in Article 14 of the *Act*, and one that has conveniently emerged only after Daw Suu's detention has entered into its sixth year. The SPDC's statutory interpretation, however, is a moot point because Daw's Suu's house arrest is illegal regardless of the wording of Article 14.

Article 9 of the *Act* includes the following provisions:

- (b) Only necessary restrictions of fundamental rights shall be decided;
- (c) The duration of such restriction shall be kept to a minimum...
- (g) When any threat ... has ceased to exist, the restriction order shall be annulled immediately.

Even if assumed that, in 2003, the SPDC had reasonable cause to place Daw Suu under house arrest, it is implausible that this remains the case today. If Daw Suu had been involved in anti-government plots at the time of her arrest, she cannot conceivably have remained part of those plots after more than five years of isolation. The necessary and logical conclusion of the above is that any pressing and substantial reason that may have existed for the detention of Daw Suu has expired, thereby eliminating any legal justification for her house arrest.



The continued detention of Daw Suu is an abuse of the *Act* and a violation of international legal principles including rights against arbitrary detention, cruel and unusual punishment and the rights to the presumption of innocence and liberty of the person. Such principles are included in the *Universal Declaration of Human Rights*, which the Burmese Minister of Foreign Affairs specifically endorsed at the 54<sup>th</sup> United Nations General Assembly: “We fully subscribe to the human rights norms enshrined in the Universal Declaration of Human Rights. Here, I wish to underscore that the government does not condone any violations of human rights, and the type of democracy we envision will guarantee the protection and promotion of human rights.” These rights are further reinforced in other international treaties, such as the *International Covenant for Civil and Political Rights*, which even without Burmese ratification represent generally accepted international standards.

The restrictions placed upon Daw Suu are not only illegal, but also fit the *Rome Statute*’s technical definition of crimes against humanity. Article 7 §1(e) provides that these crimes include “imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law”. Daw Suu’s detention violates fundamental rules of international law because she was detained for purely political purposes, not for any wrongdoing. The *Rome Statute* stipulates that for an act to constitute a crime against humanity, it must be “part of a widespread or systematic attack directed against any civilian population...” Sufficient evidence has been gathered by both UN organizations and NGOs to demonstrate that the SPDC’s human rights violations have been both “widespread” and “systematic” (see, e.g., *Report of the Special Rapporteur on the situation of human rights in Myanmar*, Paulo Sérgio Pinheiro. U.N. Doc. A/HRC/4/14 12, p. 11, 12 Feb. 2007).

### **The Example of Other Jurisdictions**

The editorial attempts to exculpate the excesses of the SPDC by pointing to statutes in other countries that are functionally similar to the *Act*. The laws referred to – specifically those passed by Malaysia, Singapore, the United States and the United Kingdom – are all controversial attempts to address the tension between national security and individual freedoms. The widespread criticism that each has faced should make it clear that none has satisfactorily resolved this tension, and that, collectively, they represent neither a trend nor a new development in customary international law.

The Malaysian and *Singaporean Internal Security Acts* (ISA) are both sourced in a 1960 law passed before Singapore’s withdrawal from the Malay Federation. Both are anachronisms that have outlived their intended purpose – the suppression of Communists – and have for decades invited the scorn of the international community. At the time of the ISA’s codification



Malaysia's first Prime Minister, Tunku Abdul Rahman, attempted to allay fears by declaring: "I gave solemn promise to Parliament and the nation that the immense powers given to the government under the ISA would never be used to stifle legitimate opposition and silence lawful dissent." Sadly, the governments of neither Malaysia nor Singapore have lived up to the Rahman's promise, and the ISA has become a tool of suppression used over the years to arrest religious minorities, trade unionists, human rights activists, journalists and political opponents.

Called "an abbreviation which strikes fear and stifles the development of a just and equitable society" by the Malaysian Bar Association, the ISA continues to form a backdrop for arbitrary detention, torture and custodial death. At best, these practices deviate from those generally endorsed and upheld by the international community; at worst, they constitute gross violations of human rights. The Asian Human Rights Council and Amnesty International have associated the law with the violation of a plethora of international human provisions, from the right to a fair trial to freedom of expression. Singapore's 32-year detention (23 in prison and 9 under house arrest) without trial of Chia Thye Poh, cited specifically, is perhaps the most infamous incident of abuse perpetrated under the aegis of the ISA. He was eventually released, having never been charged. Poh's experience has been likened to that of Nelson Mandela, with the Singaporean regime taking on the role of apartheid South Africa. In sum, the only example that the SPDC seeks to follow is that of an international human rights pariah.

Looking beyond Southeast Asia, the editorial cites – not without satisfaction – post September 11 counterterrorism laws in the US and UK as further evidence that countries sacrifice individual rights for the sake of national security. While it may be true that these jurisdictions, along with several other Western liberal democracies, have enacted such measures, the editorial offers only a biased, one-sided analysis of the situation.

The PATRIOT Act is one of the most controversial laws ever passed in the US. The American Civil Liberties Union describes the PATRIOT Act as a threat to "the bedrock values of liberty, equality and government accountability on which the nation was founded." The law has also been criticised by the United Nations. The editorial fails to mention that, unlike the SPDC, the US government permits the criticism of its laws and policy in a free press and subjects the PATRIOT Act to the checks and balances of its democratic institutions. Various US Court decisions have considered the legality of the US's security laws. Telling in this regard is the fate of another US counterterrorism law, the Military Commissions Act (MCA). On 12 June 2008 (a day after Min's article was published), the US Supreme Court, in the case of *Boumediene v. Bush*, deemed Section 7 of the MCA to be unconstitutional for



its denial of habeas corpus to the detainees of Guantanamo Bay. The decision effectively rendered void the MCA.

The democratic institutions of the UK act similarly to serve as a check on executive power. *The Anti-terrorism Crime and Security Act 2001*, passed in the aftermath of September 11, was rendered invalid by a 2004 House of Lords decision, which deemed it to be incompatible with the *European Convention of Human Rights* (ECHR). Likewise, the law's replacement, the *Prevention of Terrorism Act 2005*, itself the creation of bi-cameral Parliamentary debate, was deemed to be in partial breach of the ECHR in a subsequent Court of Appeal Judgment. Furthermore, former Prime Minister Tony Blair experienced his first defeat in the House of Commons when he attempted to pass a bill that would permit the detention of terror suspects for up to 90 days without charge. Blair's successor, Gordon Brown, recently – and narrowly – passed a similar bill that extended the length of detention to 42 days, a decision which has been criticised as unnecessary by various policing and security officials in the UK. The law's passage is likely to come at a great political cost to Prime Minister Brown.

By evoking terror laws in the US and the UK, the SPDC inadvertently draws a comparison that shows Burma's flaws to be systematic and deep. The laws passed in these two Western jurisdictions are genuine but imperfect attempts at reconciling national security with individual liberty. Laws in Britain and the United States, however, are subject to the oversight of democratic institutions, such as a free media and independent judiciary. In Burma there is no discourse, but rather a silence that allows the SPDC to act in impunity. It is one thing to fail to strike a proper balance between the needs of the state and those of the individual; it is quite another to propagate a system of governance that necessarily precludes the realization of personal freedoms. In a sense, the *Act* is an outgrowth of an inherently flawed political system designed to perpetuate the power of a few. The SPDC may argue the legality Burma's laws but it cannot begin to defend them as valid and just.

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(D . 2)



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

(Open Letter)

To/  
Mr. Ban Ki-moon  
Secretary General  
The United Nations  
June 5, 2008

**Subject: To take immediate action for the release of comedian Za Ga Na and to propose that the Security Council refer the situation in Burma to the International Criminal Court**

Dear Sir,

Warm greetings from the Burma Lawyers' Council! With deep concern, we are writing to you with a request for help regarding the detention of comedian Za Ga Na, victim of a crime against humanity.

On June 4 2008, Za Ga Na was arrested at his home by ten local authorities who then searched his home and seized various items including a tape recorder and \$US 500. No official statement has been made by the SPDC regarding Za Ga Na's detention, but there can be no doubt that his arrest is linked to his recent attempts to provide aid for victims of the Cyclone Nargis. On 25 May 2008, government authorities threatened to charge the comedian with sedition (Myanmar Penal Code Art. 124A) if he continued the humanitarian efforts that he had been organizing along with other prominent actors. This is Za Ga Na's second arrest in less than a year: he was detained in September 2007 after urging people to join the protests taking place that month.

The detention of Za Ga Na should be characterized as a crime against humanity. It is the latest in a series of SPDC actions to demonstrate the junta's contempt



for its own civilian population. Za Ga Na's incarceration has far-reaching consequences and should be considered in a wider context than the deprivation of a single man's liberty. The most immediate impact of the arrest is that it deprives the victims of Nargis of the urgently needed aid that was being provided by Za Ga Na himself. Furthermore, this action was designed to send a message to prominent members of Burmese society and is sure to deter others from taking similar humanitarian action. Finally, the seemingly arbitrary arrest of a well-known figure in civil society has further contributed to the climate of fear and intimidation present in Burma. The imprisonment of Za Ga Na satisfies the legal definition of a crime against humanity included in the Rome Statute. This, the founding document of the International Criminal Court, provides that "[i]mprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law" (Rome Statute Art. 7 §1(e)) constitutes such a crime. Za Ga Na's arrest and the search and seizure of his property occurred in absence of a warrant and in violation of due process. It must, therefore, be considered to have infringed the fundamental rules of international law.

Za Ga Na's incarceration is all the more egregious when considering the direct and indirect impact it will have on the victims of the Cyclone Nargis. The humanitarian efforts that were being provided by Za Ga Na and his associates have been compromised in order to further the political interests of the junta. The prioritization of SPDC's agenda will necessarily cause further death and suffering amongst the civilian population. It, therefore, constitutes the crime against humanity in the form of "[o]ther inhuman acts ... intentionally causing great suffering, or serious injury to body or to mental or physical health" (Rome Statute Art. 7 §1(k)). It can also be characterized as extermination, defined as "the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population" (Rome Statute Art. 7 §2(b)).

The SPDC's most recent illegal act should not be viewed in isolation but in the context of the many criminal acts preceding it. The junta's deplorable response to the Cyclone Nargis is not an aberration. Rather, it is consistent with the Generals' policy of sacrificing the well being of the Burmese people in order to cling to power. The junta's attacks upon the civilian population must be conceptualized as "widespread" and "systematic" and, thus, are in keeping with the definition of a crime against humanity (Rome Statute Art. 7 §1). The detention of Za Ga Na is part of the SPDC's persistent campaign – which



includes the continued and illegal detention of Daw Aung San Suu Kyi – to arrest, intimidate, torture and murder civilians.

That this arrest is a single, acute incident does not preclude its characterization as a crime against humanity. A single detention can qualify if it is meant to "intimidate the entire civilian population" (Jean Graven, *Les Crimes Contre Humanité*). In addition, it has been argued that "an isolated attack can constitute a crime against humanity if it is the product of a political system based on terror and persecution" (Francisco Forrest Martin et al, *International Human Rights & Humanitarian Law, Treaties, Cases & Analysis*). This is a claim supported by international criminal precedent: "As long as there is a link between the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity" (*Prosecutor v. Mrksic and other*, International Criminal Tribunal for the Former Yugoslavia, 3 April 1996, IT-95-13-R61).

The arrest of Za Ga Na occurred in breach of due process and must be conceptualized as a crime against humanity. His illegal detention violates his human rights and has served to impede the humanitarian effort taking place in the aftermath of Cyclone Nargis.

The SPDC has a long history of deceiving, delaying and tricking both the UN and the international community. While we applaud the use of your good office to press the SDPC into allowing more aid to reach cyclone victims, it is our concern that the regime's partial concessions are but another stall tactic designed to relieve international pressure. For instance, after the September 2007 "Saffron Revolution", the SPDC told Ibrahim Gambari, UN Special Envoy, that the government would engage in a meaningful dialogue with Daw Aung San Suu Kyi. Any subsequent talks took place only with low-level officials and have since ceased altogether without producing results. Mr. Gambari's trips to Burma are generally considered to have been a failure. Significantly, after each of these UN visits, the SPDC's tactic of partial and empty concessions has successfully resulted in a decrease in international pressure allowing the media, foreign governments, and many international NGOs to shift their attention onto another global crisis.

Eleven days after the announcement, made by you as UN Secretary General, that Burma had agreed to accept foreign aid, the Thai newspaper *The Nation* reports today, June 5 2008, "Despite the promises of millions of US dollars worth of humanitarian aid for the cyclone victims in Burma, only a few small



organizations are actually working at the scene. Inaccessibility can be blamed, because Burma's xenophobic junta is reluctant to open the door wider for international aid workers." Given that, as of now, the victims of the cyclone cannot rely on the assistance of the international community, the aid of local actors such as Za Ga Na contributes significantly to their survival. The detention of Za Ga Na and the future detention of local contributors that is likely to ensue will surely augment the plight of cyclone victims.

In keeping with the above, we respectfully request that Secretary General Ban Ki-moon make every effort for the immediate release of Za Ga Na and propose that the Security Council refer the situation of Burma to the International Criminal Court as a crucial step to establishing the Rule of Law in Burma. The longer justice is delayed the more difficult it will be to alleviate the distress caused by Cyclone Nargis. The time for justice is now.

Respectfully Yours,

Aung Htoo

M.A. ( Human Rights ), R.L.

General Secretary

Burma Lawyers' Council

P.O. Box 144, Mae Sod 63110, Tak Province, Thailand ;

Email : [aughtoo@csloxinfo.com](mailto:aughtoo@csloxinfo.com) ; Website : [www.blc-burma.org](http://www.blc-burma.org)

Tel ( Cell ) : 66 ( 01 ) 533 0605 ; Tel/ Fax ( Off ) : 66 ( 055 ) 542 910 ;

\* \* \* \* \*

# **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.

**BURMA LAWYERS' COUNCIL**

**P.O Box 144 Mae Sod, Tak, 63110 Thailand**

**Email: [blcsan@ksc.th.com](mailto:blcsan@ksc.th.com), Website: [www.blc-burma.org](http://www.blc-burma.org)**