LawKa PaLa

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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

Legal Journal on Burma
No. 31 – December 2008 ISSN 1513–9174

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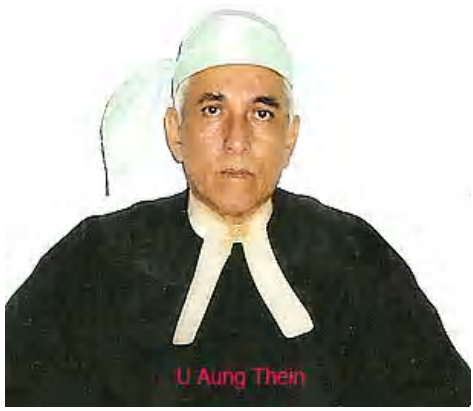
Part A: Persecution of Lawyers

(A . 1)

Burmese Lawyers Sent to Prison for Demanding Fair Trials

For the first time in Burmese history, political detainees and their lawyers are fighting for fair trials, including the right to control defense witness lists, hold private attorney-client meetings and have a trial open to the public. This article describes the courageous struggles, at great personal risk, of some of these lawyers fighting for justice inside Burma.

On November 7, 2008, prominent NLD lawyers U Aung Thein and U Khin Maung Shein were convicted of contempt of court and sentenced to four months in prison while serving as the defense lawyers for several political activists, including monk U Gambira and comedian and activist Zarganar, arrested for their participation in the August 2007 demonstrations against rising fuel and commodity prices. The trial of the political activists was marked by verbal and written complaints from U Gambira and the eleven other defendants that they were not receiving a fair trial. According to articles published in Burmese, the activists openly voiced their opinions that they did not feel they were being treated in accordance with fair judicial procedure, including the fact that their families were not permitted to attend the trial. The charge of contempt of court for the lawyers came after U Aung Thein and U Khin Maung Shein signed their clients' request to dismiss them from their positions as defense counsel.1


U Aung Thein

The lawyers were accused by Hlaing Township Court Judge Daw Aye Myaing of violating Section 3 of the Contempt of Courts Act (India Act XII, 1926)2 on October 30, 2008 and their case was sent to be heard by the Supreme Court. The lawyers argued their case in front of the Supreme Court on November 6, 2008. Sources describing the hearing report that the Justices were holding the lawyers responsible for their clients' opinions voiced in court,

despite the fact that the lawyers remained quiet.3 On November 7, 2008, the Supreme Court issued a judgment order finding U Aung Thein and U Khin Maung Shein guilty and sentencing them to four months in prison. They were arrested in their homes that night.

In a similar case, lawyers Saw Kyaw Kyaw Min and Nyi Nyi Htwe were accused of contempt of court by Judge U Thaung Nyunt of North District Court, Yangon Division. While Saw Kyaw Kyaw Min fled shortly thereafter, Nyi Nyi Htwe was convicted on October 29, 2008 to six months in prison. The lawyers were representing NLD youth Yan Naing Htun, Ko Aung Min Naing (a.k.a. Mee Tway), and Myo Kyaw Zin, who had been arrested for their involvement in the September 2007 demonstrations. As part of their clients' defense and upon their clients' instructions, the lawyers submitted a witness list to the court that included Khin Yee (SPDC police chief) and Kyaw San (Minister of Internal Affairs). When the judge saw the names, he told the lawyers that they could not include the two SPDC officials on the list. The lawyers responded that under Section 211 of the Code Criminal Procedure, their clients had the right to list the witnesses that they wanted to call. The judge then told the lawyers that they had to control their clients and that they should have told their clients not to include the SPDC officials. When the lawyers said that their clients had this right and they must follow their clients' orders, the judge held the lawyers in contempt of court.

The actions of U Aung Thein, U Khin Maung Shein, Saw Kyaw Kyaw Min and Nyi Nyi Htwe, however, cannot reasonably be construed as worthy of the charges and punishments they were given. The clients, not the lawyers, complained of the unfairness of their trial and demanded that SPDC officials be put on the witness list; the lawyers advocated on behalf of their clients, as is their duty, but did nothing to disrupt the courtroom proceedings. Further, in the case of U Aung Thein and U Khin Maung Shein, the clients had a right to dismiss their lawyers when their lawyers ceased to be able to provide an adequate defense. U Gambira and the other activists were of the opinion that they would meet an equally unjust punishment whether they had defense lawyers or not, and therefore dismissed their lawyers.4 U Aung Thein, U Khin Maung Shein, Saw Kyaw Kyaw Min and Nyi Nyi Htwe should not be punished

for fulfilling their duties as advocates and acting in accordance with their clients' wishes.

In addition to the charge being unwarranted, the conviction of the lawyers contravenes both the "Statement of Principles of the Independence of the Judiciary," which was signed by Chief Justice of Burma, U Aung Toe, at the 6th Conference of the Chief Justices of Asia and the Pacific in Beijing in 1995 and the SPDC Judiciary Law No. 5/2000, Chapter II, Section 2. The Beijing Statement explicitly defines one of the judiciary objectives as "to administer the law impartially among person and between persons and the State."5 It further asserts that this requires that "the judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source."6 Similarly, the SPDC Judiciary Law No. 5/2000, Chapter II, Section 2, states that, among other principles, the administration of justice should be based on the principles of "administering justice independently according to law."7 In an authoritarian government such as that in Burma, where the military regime has the power to appoint and dismiss Supreme Court Justices at will, as well as imprison those people it deems to be a threat to the state, the Judiciary can hardly be said to be independent.

Rather than fair and impartial, the sentencing of U Aung Thein, U Khin Maung Shein and Nyi Nyi Htwe,8 who are three of only a handful of lawyers working to provide an adequate defense for activists, was politically motivated. The last quarter of 2008 has seen a series of political activist and the lawyers who defend them jailed for political crimes and disrupting the judicial process.9 These incidents are just one more example of the SPDC military regime using the judiciary to intimidate their political opponents. It should also be noted that a charge under The Contempt of Courts Act is rare in the Burmese judicial system and such conduct that disrupts the judicial process is more often disciplined with verbal warnings or suspension of a lawyer's license – rarely are advocates sentenced to prison. Rather than abide by another principle outlined in the SPDC Judiciary Law No. 5/2000 which calls for the aim of justice to be ". . . reforming moral character in meting out punishment to offenders,"10 the prison sentences are acts of revenge and intimidation. Thus, the charges and convictions were rendered, not in an

independent light, but in the light of a regime attempting to quash all political dissidents and those willing to help them.

This injustice has also had the indirect consequence of interfering with the lawyer's right to practice and the defendant's right to representation. Against the 1880 Legal Practitioner Act, Section 811, which gives lawyers the right to take on any case and practice in any court in which they are licensed, this crackdown on the lawyers representing political activists has instilled a fear in lawyers that they too will be punished for fulfilling their duties as advocates. Having witnessed the fate of U Aung Thein, U Khin Maung Shein, Saw Kyaw Kyaw Min, Nyi Nyi Htwe and other lawyers who have spoken out to defend themselves, their clients, and the judicial process, many lawyers are afraid to appear in similarly high-stakes criminal cases. As a result, this case of injustice has had the tragic byproduct of limiting lawyers' right to practice and impeding the right to an adequate defense, guaranteed by the Code of Criminal Procedure, Section 340(1).

The Burma Lawyers' Council calls on other international organizations and interested parties to urge the restoration of justice and the international standards for an independent judiciary in Burma. U Aung Thein, U Khin Maung Shein, and Nyi Nyi Htwe must be released (and the charge against Saw Kyaw Kyaw Min retracted), their judgment repealed, and confidence restored in the ability of lawyers to practice their trade in a fair judicial system.

(Endnotes)

1 "Two More Defense Lawyers Prosecuted," *Mizzima News*, 3 November 2008, and "Nine Political Prisoners Dismiss Defense Lawyers," *DVB News*, 8 October 2008.

2 Burma Code Vol. 1, Section 138, *The Contempt of Courts Act* (India Act XII, 1926). (1 May 1926) Section 3: Save as otherwise expressly provided by any law for the time being in force a contempt of court may be punished with simple imprisonment for a term which may extend to six months, or with fine, which may extend to two thousand rupees, or with both: Provided that the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the Court: Provided further that notwithstanding anything elsewhere contained in any law the High Court shall not impose a sentence in excess of that specified in this section for any contempt either in respect of itself or of a Court subordinate to it.

3 "Describing the Two Lawyers Arguments," (Burmese version) *The New Era Journal*, 6 November 2008.

4 "U Gambira and Zarganar Dismiss their Defense Lawyers," *DVB News*, 21 October 2008.

5 "Beijing Statement of Principles of the Independence of the Judiciary," *6th Conference of the Chief Justices of Asia and the Pacific*, 19 August 1995, Section 10(c).

6 *Id.* Section 3(a).

7 SPDC Judiciary Law No. 5/2000, Chapter II, Section 2.

8 Saw Kyaw Kyaw Min fled and thus was not formally sentenced.

9 See "Lawyer and Activists Jailed for Six Months," *DVB News*, 31 October 2008.

10 SPDC Judiciary Law No. 5/2000, Chapter II, Section 2.

11 Burma Code Vol. XI, *Legal Practitioners' Act*, Section 8, pg. 429.

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(A . 2)

21 November 2008

LAWASIA CONCERNED ABOUT RECENT ARRESTS AND CONVICTION OF MYANMAR LAWYERS.

LAWASIA expresses serious concern about the recent arrest and conviction of lawyers in Myanmar as they attempt to perform their professional duties as lawyers. It understands that U Nyi Nyi Htwe and Saw Kyaw Kyaw Min, lawyers for 11 NLD youth members charged with instigating public unrest, were recently charged under Section 228 of the Penal Code and subsequently convicted each receiving sentences of six months in prison. LAWASIA understands that the arrests followed the submission of a complaint to the courts, by the lawyers and defendants, noting concern that the lawyers had been unable to meet with their clients private as they prepared for trial, not been allowed sufficient time by the trial judge to cross-examine prosecution witnesses and that the defendants' family members had been prevented from attending their trials. LAWASIA is further advised that two lawyers, U Aung Thein and U Khin Maung Shein, were recently charged and convicted under the Contempt of Courts Act and sentenced to four months in prison. It is understood that this followed the action of U Aung Thein and U Khin Maung Shein informing the court of the decision of their clients, several student leaders and activists, to revoke power of attorney to the lawyers in protest of what they felt what unsatisfactory action from the courts.

LAWASIA notes the Basic principles on the Role of Lawyers as agreed by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990 state that:

Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics.

LAWASIA considers that the treatment handed out to U Nyi Nyi Htwe and Saw Kyaw Kyaw Min as described above may be in breach of these universally-accepted principles. Reported circumstances also suggest that lawyers U Aung Thein and U Khin Maung Shein may have been unfairly prevented from carrying out their professional duties as lawyers. Furthermore LAWASIA is concerned that such convictions may lead to fear among lawyers in Myanmar and deter them from acting in high stake cases defending political activists.

LAWASIA calls on Myanmar authorities to quash immediately the sentences imposed on all lawyers and to release them without delay. It also urges Myanmar authorities to take immediate steps to ensure that lawyers are allowed to represent their clients and carry out their work without let, hindrance or intimidation.

Glenn Ferguson
PRESIDENT

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(A . 3)

19 November 2008 FOR IMMEDIATE RELEASE

Unlawful Convictions of Burmese Political Prisoners are Crimes Against Humanity – U.N. Security Council Should Refer Burma to the International Criminal Court

Certain judges in Burma, acting under the orders of Chief Justice U Aung Toe and Senior General Than Shwe, are themselves criminally liable as co-conspirators to crimes against humanity for their acts in "trying" and "convicting" 60 political activists last week. "These acts are the latest from the junta which uses the judiciary as one of its key weapons to commit grave crimes," says Global Justice Center President Janet Benshoof. Judges including those listed below are criminally culpable and must be referred to the International Criminal Court.

- Chief Justice U Aung Toe
- Daw Aye Myaing, Hlaing Tha Yar Township Court, Yangon Division
- U Thaun Nyunt, North District Court, Yangon Division
- Daw Soe Nyan, Western District Court, Yangon Division
- Daw Than Than, Tamwe Township Court, Yangon Division
- Daw Nyunt Nyunt Win, Kyauktadar Court, Yangon Division
- U Tin Htut, Western District Court, Yangon Division

On November 11th approximately forty pro-democracy dissidents received prison sentences of up to 65 years. On November 13th twenty more activists were sentenced to terms ranging from 4½ to 9½ years. The convicted include members of the '88 Generation Students, labor rights activist Su Su Nway, musician Win Maw, HIV/AIDS activist Than Naing, blogger Nay Phone Latt, and members of Daw Aung San Sui Kyi's party, the National League for Democracy. Even the defendants' lawyers were not immune from the regime's revenge; in October defense lawyers Nyi Nyi Htwe, Aung Thein and Khin Maung Shein were sentenced to between four and six months imprisonment for submitting a complaint about the unfair trial conditions of eleven NLD activists.

Judges did not allow the defendants to question prosecution witnesses, many defendants did not have legal representation and those that did were not permitted to meet with their lawyers in private. Burma Lawyers' Council General Secretary U Aung Htoo stated, "Rule of law in Burma cannot even be dreamt of when the judiciary has become an instrument of political oppression, exercised by the SPDC military junta."

United Nations Special Rapporteur on Human Rights in Burma, Tomás Ojea Quintana, said this past week in reference to these convictions, "There is no independent and impartial judiciary system [in Burma]." However, the judges actions go much further; these prison sentences are crimes under the Rome Statute of the International Criminal Court, including violations of Article 7(1)(e) "Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law" and 7(1)(h) "Persecution against any identifiable group or collectivity on political, racial, ethnic, cultural, religious, gender…or other grounds".

GJC President Benshoof noted that top judges in Hitler's criminal regime were convicted as co-conspirators of crimes against humanity and, more recently, in the *Dujail*[1] decision, the Iraqi High Tribunal found Judge Awad Hamed al-Bandar jointly criminally liable for crimes against humanity committed with Saddam Hussein because he used the façade of "judicial authority and law" to "try" and then "execute" civilians. Burma Lawyers' Council and Global Justice Center urge the international community to expose the regime's criminal partnership with members of the judiciary and to join the call for a UN Security Council referral of all grave international crimes in Burma to the International Criminal Court.

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(A . 4)

Struggle of Democracy Activists and Lawyers in Burma to Achieve Fair Trial Rights and Justice During Unjust Court Proceedings

[The following is a transcript of court proceedings in Burma in which democracy activists were convicted of serious crimes. This transcript was obtained by the Burma Lawyers' Council from sources inside Burma.]

Time: 12:30 p.m.
Date: 24 October 2008
Place: **Special Tribunal** at Insein Prison

The trial took place at the Northern District Court presided over by two judges. The layout of the court had been changed. About 30 uniformed policemen were seated behind the area reserved for the '88 students, not on either side of the students as usual (the policewomen were dressed in civilian clothes). Four trucks loaded with policemen bearing shields were placed around the court. Fifteen minutes later, the '88 students appeared in the court.

When all the students arrived, the judges took their places. The law officers (prosecutors) then took their places. The plaintiff, the Deputy Police Commander Zaw Min Aung, also took his place in the witness box. The trial for criminal cases nos. 90/91/92/93 and Electronic Act 33–a then began.

One of the student leaders stood up and said, "Previously the District Court allowed family members to appear at the hearing and this court is the same rank with the District Court and the judges must act according to the law, not simply as they wish. Now this permission for family members to appear in the court has been withdrawn. The court must reflect the dignity of Burma and not make any one-sided decisions. The judges' salaries are from the taxes paid by the family members and the public."

Ko Zay Ya
"We are working for democracy and we are suffering from violations of human rights and citizen rights."

Ma Thin Thin Aye
"I demand to meet with my family members before the trial because I heard that meeting them was not barred."

Ko Thet Zaw

"My family's dignity must be respected and I demand a transparent and fair judiciary system for the dignity of the whole nation."

Ko Jimmy

"I demand that the court stops the proceeding. The court should observe the case from our side as well. We are democracy activists and are able to obey the law. What about the dignity of the court? Is this trial one-sided or is this an open court? We did not express anything about the issue of hand-cuffing previously. After the presence of family members at the trial has been solved, the hand-cuffing issue must be considered. We are all working for national reconciliation."

Law Officer

"The present special tribunal was created under Criminal Procedure Code Section 1781. In the course of this special proceeding, given that the case is particular in accordance with Criminal Procedure Code Section 3522, I am applying for an order to prevent the public from entering the court."

Ko Ko Gyi

"Honorable Judge, we have been detained for 14 months. The authorities enjoyed to charge us under many sections of the laws, connect unrelated people to the cases and invite many unfamiliar people to the trial. There was no arrest warrant, no authorized remand and whatever they like has been done. They permit family members to appear in the trial, handcuff the student leaders when coming to the trial and say that having the family members attend means it is an open court. Why doesn't the prosecutor read the sections mentioning the court as a special tribunal beforehand instead of reading them now? U Nyan Win mentioned that the process shall be participatory for all in the presence of the international community and your regime also said that Daw Aung San Su Kyi was not arrested but detained for security. You have to reflect on your own dignity. U Win Aung is now in the prison because he said 'reflect on your own dignity' and also Colonel Khin Maung Cho is in the prison. You must choose between 'I will do whatever I like' or 'dignity' or 'courage'."

Ko Myo Aung Naing

"Who has withdrawn the permission for the family members to be present at the trial, as was allowed before? Can you say whether your court is independent and a just court or not during the period of transition to democracy as you declared to the international community?"

Ko Mya Aye

"You said you are not barring the guests and also sitting individually at the trial and sentencing was by the order of higher authorities. Then you should decide whether you are a staff or a slave."

Ko Nyan Lin

"When conducting the sentencing process you should aim to meet the democratic process of the nation. We arrived here by solving the answer of politics. We were arrested during the process of checking guest lists and the authorities did not submit the case to the court within 24 hours and remand was made in January and submitted to the court on August 27. These processes are violating the law. After violating a variety of laws, the case was submitted to the court. The judicial principle is to adjudicate the cases in public. There will be a problem if you act out of fear and so you must consider it from the basis of democracy. We need to have the appearance of democracy."

Lawyer U Khin Maung Shein

"The prosecutor has quoted the law. Section 352 states that the hearing of any offence shall be done in open court, to which the public shall have access. Section 2(e) of the Judiciary Act of 2000 prescribes the administration of justice in public. The Code of Criminal Procedure does not override the Judiciary Law. We propose that you decide on sentencing only after considering these facts."

Ko Ko Gyi

"The guest matter was confirmed in the first appearance in the court. A guest can visit on Saturday and Sunday. What is extraordinary in this case? Tell us the peculiarities that led to restrictions according to the law."
(The judge is preparing for sentencing.)

Judge U Thaung Nyunt – "Let's start sentencing."

U Than Zaw Aung (a young lawyer)

"Judge, do not make the sentencing. I have to address something. I am Higher Grade Pleader Than Zaw Aung and I have the Power of Attorney authorized by Ko Htay Kywe, Ko Hla Myo Naung and Ko Aung Thu. Concerning the presentation of the prosecutor …
(Judge interrupts the argument.)
The judge – Mention your name.

U Than Zaw Aung

My name is Than Zaw Aung. This is the second time I am saying my name. I have the Power of Attorney. My HGP license number is 23801. The prosecutor said that this case is particular. What are the particularities? These types of cases are usually tried at the ordinary courts. Paragraph 8 of the directive on judges to avoid wrongful conduct signed by U Aung Toe on 6 October 2008 mentions that 'the judges have to consider with sympathy'. The Article 10 of the International Declaration of Human Rights states that 'Everyone is entitled to a public hearing.' My argument is to consider sentencing with this in mind."

Ma Thin Thin Aye

"This court examines the old case by changing the case number. This court has already issued an order and so it is not necessary to add another order."

Ko Min Ko Naing

"Then the judge is acting like the palm of a hand (always changing). I don't think I am coming to the court because I saw many riot-dispersing forces outside the court and it looks like a battlefield. Using many threats, the authority of the court is saying many things, one after another. Why is the prosecutor so active? A vocabulary was written as army dog. A man in the room with a black Myanmar jacket was granting the remand. We were sentenced in the military tribunal by the man with a Burmese turban under the flag. Now sitting with a satisfied manner under the flag, the man with the Burmese turban is threatening. Orders were being given (by anonymous persons) behind the court."

Ko Aung Thu

"What you are doing is deviating from policy when the country is on the brink of collapse. Reconsider the Constitution. While the state is enjoying protection with reference to the Constitution, the citizens are lacking such protection under the same Constitution. Is the court really the court in essence? It is necessary to temporarily suspend all courts. Reconsider the forced judiciary. A resistor is needed. We, politicians, are using the state judiciary as a platform for national reconciliation. I demand that the court suspend the order and make sentencing only after consideration."

Ko Hla Myo Naung

"As soon as a battle is commenced, the 'truth' is lost. There have been deviations from the original principles. A reporter of Newsweek magazine asked the Prime Minister of China, Wan Ja Poung, about the political reformation of China whose population is 1,300 million.

It is usually realized that independent and just elections and the government for which people desire are needed in order to achieve democracy. It is also

recognized that the existence of a judiciary which applies reasonable judicial norms is required. The question, however, is, will everything be achieved only if we have a fully operating judiciary?

The existing laws will be finished with this judiciary. The students here were in prison for more than 15 years. The criminals they encountered there were more than the number of the accused the sitting judges met. Only when a fully operating judiciary exists; it is not sufficient for the emergence of civilized society that values human dignity.

A prestigious country will not be achieved if there is no social capital. Due to the threat of security guards, the judges and the lawyers from both sides are lacking social capital. Except those who were too emotional, there was no violence in the country at the time of the August 1988 uprising, which lasted more than 40 days. The impact of this non-violence was that the people deserve democracy. The violence was due to the negligence of the undutiful Burma Socialist Program Party. Today human ethics have disappeared.

The students in the court have not participated in an election after 1988 and have been in prison. After the release from prison in 2005 they were charged under various sections of the Act for all of their activities, except eating and sleeping. When they were out of prison they realized that no progress had been made in society and they decided to sacrifice by becoming involved in the disagreement between the government and the opposition. They attempted to raise a flag on national reconciliation and encouraged dialogue, aiming to achieve democracy. Unfortunately, they were criminalized under various laws that were unconcerned with the present aim of establishing a nation. An independent judiciary as prescribed in the law is necessary. The prosecutor is the state. The trial should be conducted in public if you have courage. You stop granting our rights only at the stage of the meetings of the families. Give judicial transparency and if not, declare it publicly. Otherwise do not continue the proceedings."

Ko Thet Zaw

"The issues should not be dealt with under the camouflage of the judiciary to have resulted in the situation that the judiciary in dispute is violating. It is not true that I am articulating given the fact that I dare not live in the prison. Try to act with dignity. Apply the trial procedures fairly and openly. You can do as you like but maintain the national prestige."

Ko Ko Gyi

"I am not pleading for opportunities. We do not want to face the court in this form. We arrived here because of differences in ideas. We arranged to discuss things with authorities at a higher level than this. It is the period of reconciliation. When we were released in 2005, the government claimed that we were

incorrectly detained by National Intelligence. A person, imprisoned for 16 years, was compensated only with the expression of the government in one sentence. Is that right?"

The media asked us in the prison about our living conditions and we didn't answer back in order to promote national reconciliation. One example was when the USDA threw us into trucks and Swanar Shin put us in Dyna cars, with a crowd of people. We were not criminals. We expressed our opinions. Did U Zaw Min Aung (a plaintiff – deputy Police Commander) sue us by himself? The effective laws were abrogated or cancelled by staging a military coup. Tell me whether I am right or wrong."

There are many things to say from the perspective of the law. The declaration of Printing Act 17(20), forgetting the confrontation in politics and laws announced by one party dictators of 1962, is an example. We were going toward democracy and have buried our bodies in the prison brick walls. What is happening to society that our people are ashamed in our country and abroad? Did the present display of ceiling fans, flags and the materials match with democracy? Any condition we are welcome. [sic]"

Ko Aung Thu

"Section 446 of the 2008 constitution states that the existing laws shall remain in effect until and unless they are repealed or amended by the Pyidaungsu Hluttaw. The prosecutor pointed out that we were opposing the constitution and the development of *lawka pala*, (the principle which prevents the world from falling into chaos). I am not arguing for the release during the dispute period. However, I am advocating for national reconciliation."

Advocate U Aung Thein

"I am advocate U Aung Thein and my license number is (_____). The Code of Criminal Procedure does not override the judicial principle. Rejecting the judicial principle, you are pointing out the criminal procedure; implying that the condition and time are neglected."

Lawyer Daw Khin Htay Kywe

"It is against the Judiciary Act of 2000, which provides that the administration of justice shall be done in public except those prohibited by law. The term "those prohibited by law" refers to sexually oriented cases such as rapes."

The judge (in a soft tone)

"According to the exception of Criminal Procedure Code 352, I ordered that the presence of outsiders be disallowed except for security personnel, prosecutors and defendants' lawyers."

Ko Ko Gyi

"The presumption of innocence is the principle which should be enjoyed by the suspects. The plaintiff said that the families were allowed to meet. On 5-9-2008 an order was announced that there were people related to defendants and were allowed to enter the court."

The judge

"Previously it was one judge sitting in the court but now two judges are sitting."

Ko Mya Aye

"The judgments of the court were not those rendered by pedestrians randomly, in an irregular manner. Having rendered judgment, they should not be converted from *ka,gyi* to *ya-pet-let* (court orders should not be "inverted" or "turned upside down"). If your judiciary can be put to the test, I demand that justice be made in public."

Prosecutor

"The statements of the accused damage not only the judiciary of the state but also the dignity of the outsiders. Their statements violate Penal Code section 228. As such, they legal action shall be taken against them, I apply."

Ko Myo Naing Aung

"Objection in using the term 'accused'."

Prosecutor

"The accused means the one who is under the administration of justice."

Ko Htay Kywe

"If you want to send someone to prison, recite the multiplication table. I reached this office 17 years ago and there were three men wearing uniforms. The sentencing was the same as the bench of Mayangon's judge. The laws practiced by the administrative authorities were not just laws but were unjust laws. We objected to handcuffing but it was rejected. We asked for an open court but it was also ignored. If it is merely an unjust proceeding, there is no need to cooperate."

Ko Myo Aung Naing

"It is kidnapping during the day." (At that time, the judge gave a date, 27-10-2008, and left the bench.) (Ko Myo Aung Naing narrates what happened next.) "A police man with two stars on the shoulder of his uniform led the shouting, 'Stand up and pull them!' The students told each other to keep sitting and the police showed that they were going to threaten them."

Date: 27-10-2008
Place: Northern District Court
Law: Electronic Act (33-A)

Prosecutor

"I apply to take action against Min Ko Naing, Ko Ko Gyi, Hla Myo Naung, Htay Kywe, Mya Aye, Pyone Cho, Aung Thu, Myo Aung Nang and Nyan Lin under Penal Code Section 228, charge them separately, and withdraw the previous cases filed under Criminal Procedure Code Section 494. Continue examining the plaintiff deputy Police Commander Zaw Min Aung."

(Giving date of 29-10-2008.)

Date: 29-10-2008
Place: Northern District Court
Law: Electronic Act (33-A)

The judges took their places at the trial. The students were not produced to the court. A Burmese turban and books were put on the lawyer's desk and the lawyer went out. After coming back, the books and the turban box were sent outside and a police officer said there is a trial and lawyers are not allowed to enter. The nine students were presented to the court. Divisional Judge U Win Myint and two prosecutors entered but their voices could not be heard since they were far away. A little later the judge and the prosecutor went out and the nine students were called away.

1:00 PM – 14 students including Ko Jimmy were presented to the court. Ko Jimmy and the rest of the students withdrew their power of attorney.

Date: 30-10-2008
Place: Northern division court
Law: Electronic Act (33-A)

Twenty-three suspects including Min Ko Naing were presented to the court. Ko Min Ko Naing and nine students were wearing blue prison uniforms. Ko Min Ko Naing said, "Yesterday Judge U Win Myint came and asked three times whether we were guilty or not and when no answer was given, he said silence means agreement and ordered 6 months imprisonment under Penal Code Section 228."

Date: 31-10-2008

Ko Min Ko Naing and nine students were transferred to Maubin Prison between 6:00 and 7:00 a.m.

(Endnotes)

1 Notwithstanding anything contained in section 177, the President of the Union may direct that any cases or class of cases committed for trial in any district may be tried in any sessions division:
Provided that such direction is not repugnant to any direction previously issued by the High Court (* * * *) under this Code, section 526.
(The original provision of section 178 has been included by the Burma Lawyers' Council for reference.)

2 The place in which any criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed an open court, to which the public generally may have access, so far as the same can conveniently contain them.
Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of inquiry into, or trial of, any particular case, that the pubic generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.
(The original provision of the section 352 has been included by the Burma Lawyers' Council for reference.)

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Part B: Rule of Law

(B . 1)

Conclusive Recommendations of the General Secretary of the Burma Lawyers'Council at the 21st Conference of LawAsia

(held in Kuala Lumpur, Malaysia, from October 29 to November 1, 2008)

On October 14, 2007, the Chairperson of ASEAN, the Singapore Foreign Minister, raised the issue of stability in Burma, mentioning his concern with anarchism, with reference to the existence of various ethnic armed organizations in Burma, seemingly supporting the military might of the SPDC army.

Our democratic movement and the people in Burma are really upset about his comment. Standing here, let me respectfully respond to him as well as to ASEAN.

Cause and Effect

He is ignoring the cause and effect theory. He did not exert efforts to realize the causes of destabilization in Burma, including why the ethnic nationalities are taking up arms. Instead, he focuses only on the effect, in terms of his concern about destabilization which may lead to anarchism. Actually, oppression of the regime and its denial of the right to self-determination of the ethnic nationalities are the causes of destabilization.

Stability, Justice and Sustainable Development

Without justice and sustainable development, we will never achieve genuine stability of a society. The military regime usually forces stabilization of the country by using military might at the expense of justice and sustainable development of the people, resulting in serious violations of human rights.

In contrast, if justice and sustainable development for the people can be achieved, society will certainly stabilize.

Rule of Law and Constitution

He also did not initiate ASEAN's encouragement of the SPDC regime to resolve the rule of law aspect of ethnic issues of Burma, centering on the emergence of a democratic constitution which guarantees the right to self-determination of the ethnic nationalities.

Those countries which seek stability, justice and sustainable development may have a constitution in which:

(1) A rights protection mechanism, particularly the existence of an independent judiciary, is instituted.
(2) Inclusiveness of individual citizens, social strata and racial groups is guaranteed in governance.
(3) Decentralization of power is exercised.

The SPDC's 2008 Constitution lacks all these foundations. The Judiciary is totally under the control of the Executive in which the military leaders mainly operate under the name of the National Defense and Security Council.

The Constitution, as the supreme law of the land, should at minimum reflect the two principles of the rule of law:

1. Every person shall be equal before the law.
2. Perpetrators who commit crimes shall be accountable under the law.

However, Burma is encountering these two rule of law issues. Equality before the law has never become a reality while seeking criminal accountability is totally denied. The SPDC's 2008 Constitution lacks this rule of law foundation. For instance, Article 445 of the Constitution provides self-amnesty to the SPDC military government for all crimes that they committed previously.

With the background of the 2008 Constitution, the SPDC's 2010 election is a ploy to perpetually deny justice for the people and the right to self-determination of the ethnic nationalities which will actually lead to destabilization. It is the result of the lack of the rule of law.

A possible way to restore the rule of law in Burma is to take action on the perpetrators who committed heinous crimes by using international justice mechanisms, particularly the International Criminal Court.

I call upon our comrade lawyers, leading legal academicians and honorable justices.

1. With the background of the rule of law, let's work together to seek justice, sustainable development and stability in this Asian region.

2. The issues on the restoration of the rule of law in Burma may not be regarded as an internal affair of a respective state.

3. You may use your wonderful legal knowledge to reduce the plight of our ethnic nationalities in Burma.

* * * * * * * * *

(B . 2)

Victims, Representation, Remedies, Legal Status, and Accountability: Key Legal Questions and Concerns Raised by the Suffocation of 54 Burmese Migrant Workers in Ranong Province, Thailand[1]

Legal Aid Section of BLC

The suffocation of 54 Burmese migrant workers in the back of a truck while being transported to work in Phuket is both horrific and yet sadly indicative of systemic problems plaguing migrant laborers in Thailand. Without major reform of the ways in which Thai society interacts with Burmese migrant workers, incidents such as this will certainly continue to occur. Among the many systemic problems underlying the tragedy, 5 key concerns are (1) the tendency to treat the migrant victims as criminal violators of immigration law rather than as victims of tragic crime, (2) the inadequate representation of victims throughout the process, (3) the inadequacy of the remedies available to the injured victims, (4) the impact of Thai migrant labor laws on the tragedy, and (5) the problem of adequate criminal prosecution in the transnational context.

The Aftermath of April 9:
When Victims Became Criminals and Criminals Went Free

On May 19, 56 of the 66 survivors returned to Burma under the uncertainty of the "Memorandum of Repatriation" signed between the two countries. Though local Kawthaung officials claimed the returning victims would not be prosecuted, the national Burmese government had removed the stipulation that they would not prosecute the returning victims "under any circumstances" or violate any of their basic human rights and instead replaced it with an agreement to follow the protocols of repatriation under the UN Convention against Transnational

Organized Crime.[2]

In fact, the majority of these victims have already been jailed by Thai authorities for being unable to pay fines for immigration violations, and remained in an immigration detention facility prior to their release.[3] A representative of the Thai Lawyers Council criticized the callous treatment and rapid deportation of the victims, particularly police failure to question most women and children in the back of the truck. Instead, just 10 survivors had been held as witnesses.[4] Shortly thereafter, these 10 survivors were also returned Burma.[5]

Ultimately, the Law Society of Thailand ("LST") arranged small settlements with the truck's driver's insurance company on behalf of the survivors and families of the deceased. Still, it is unclear whether all the victims and their families will receive these payments. Likewise, other victims claim they do not want the money—seemingly fearful that accepting any remedy for the crime committed against them will lead to their own punishment.

In Thailand, victims of human trafficking have the right to sue those responsible for damages, but police ruled the case was not trafficking but smuggling. As an AHRC editorial in the Prachathai English News on April 24 noted, the police ruling is suspect. Not only would such questions of legal interpretations be better left to courts, but police have the ability to declare cases as trafficking rather than smuggling where the smuggled are exploited. Furthermore, the editorial noted that opening such an investigation would almost certainly show the complicity and even the involvement of police authorities at various stages in the crime.[6] Ultimately, Thai authorities charged just six people in connection with the crime.[7]

In Burma, authorities recently responded by arresting nine people accused of involvement in trafficking, though none of these people have been accused of involvement in smuggling any of the Ranong victims. Furthermore, authorities arrested an additional 200 people searching for employment in Thailand.[8] This response fails to hold any of the crime's actual perpetrators accountable, and perpetuates the *status quo* of blaming victims as scapegoats for those who committed crimes against them.

Legal Analysis

I. The Criminalization of Victims: Narrow Views towards the Realities of Exploitation

The suffering of the migrant workers has been compounded by their treatment as criminals rather than victims. This criminalization has already resulted in jail time for most, fear of future punishment in Burma, and limited options for recourse against those responsible for the suffering. While new

anti-trafficking legislation has been enacted, the new legislation does not necessarily solve the key problem of recognizing Burmese migrant workers as exploited based on the political and economic crisis they fled.

A. The Law on April 9: Smuggling vs. Trafficking, Consent vs. Exploitation

In spite of the suffering and exploitation they endured, and the widespread outrage voiced in numerous media outlets, the migrant workers were not generally recognized as victims by government officials. In fact, these victims were criminalized. Unconscious survivors awakened among the bodies of the deceased only to be jailed for immigration violations.[9]

Police steadfastly claimed that tragedy had been the result of the victims' choices, and that they did not deserve the full protection available under the law. These officials claimed that there was no evidence workers were headed to any specific workplace, or to any specific workplace where they would be exploited. Additionally, the police argued that if immigration violators were treated as victims, the immigration laws would become unenforceable.[10]

Quoted in a June 1 editorial in the *Bangkok Post*, Chulalongkorn's esteemed Prof. Vithit Muntabhorn criticized the position of police authorities, accusing them of an overly-narrow interpretation of human trafficking. Based on Thai laws effective on April 9, Prof. Vihit argued that exploited women and children are victims of trafficking whether or not they may have given consent at any time. He explained that the entire experience they had endured was filled with exploitation as they were transferred from truck to truck by members of organized criminal networks. They were never asked whether they consented to being locked in the back of a refrigerated truck. They were given no options. Prof. Vihit explained, "They became slaves."[11]

B. Recent Legal Reform: The Continued Problem of "Exploitation"

On June 5, Thailand's new Anti-Trafficking in Persons Act became law, though its effect remains unclear. While the law expanded to include men in addition to women and children, more clearly defined certain crimes as indicative of human trafficking, and increased potential fines and imprisonment for committing a violation, the law retains "exploitation" as the key determinate of an act of trafficking. This standard remains open to interpretation. While this law could adapt to include a greater number of incidents as trafficking, it could also continue to shield those complicit in smuggling and trafficking networks from investigation. Though the law allows victims to attach a claim for damages to a criminal prosecution against perpetrators, this is irrelevant until the victims of exploitation are truly recognized as victims.

1. The Crisis in Burma and the Realities of Limited Migrant Bargaining Power

Rather than applying narrow interpretations of exploitation for the purpose of protecting government officials and organized crime bosses, the political and economic crisis in Burma necessitates a broad and expansive understanding of exploitation. Burmese laborers daily flee forced labor, slavery, and other repression to take dangerous jobs in Thailand at half the minimum wage. The crisis in Burma has caused a total failure in the market for labor along the Thai-Burmese border—a market failure that emphasizes the migrant workers' complete lack of bargaining power. This lack of bargaining power fuels the brutal international network of human cargo, and fosters exploitation every step of the way. Considering this fact, it is clear that authorities should treat this case and future cases like it as exploitative human trafficking rather than human smuggling.

2. Smuggling Containers as Evidence of Exploitation: The Legislative Guide to the UN Smuggling Protocol

Compliance with the UN Convention against Transnational Organized crime would have required Thailand to consider the case of the migrants more seriously. The Legislative Guide accompanying the supplemental Protocol against Smuggling Migrants emphasizes that domestic law makers should include stipulations that cases of smuggling in which particular aggravating circumstances have occurred are taken more seriously. The Guide explicitly mentions that cases in which victims have been transported in shipping containers must be treated as a crime of greater severity even if the case only otherwise meets the standards for smuggling and not trafficking.[12] Consequently, even if current Thai law does not recognize this case as trafficking, or if local officials failed to use their discretion to recognize this case as trafficking, international protocols

to which Thailand aspires would require Thai law and Thai officials to recognize the case of these workers transported in a sealed food container as a greater crime than human smuggling.

II. Inadequate Representation under Burmese Law: The Failure to Provide Legal Counsel and Other Forms of Assistance

Under the Burmese Anti-Trafficking in Persons Law, the government is required to provide aid to victims of human trafficking, including the arrangement of rehabilitation into society. Additionally, the law directs Burmese government officials to work with foreign governments to provide necessary aid to victims of trafficking, as well as to aid victims in filing suit against their traffickers.

Here, it is clear the Burmese government has completely and totally failed in their obligation to provide necessary relief for the victims. The government failed to provide legal representation for victims while in Thailand. Instead, LST provided limited representation for the victims in an attempt to secure a settlement with the truck driver's insurance company. Given the severity of the situation, the victims deserved the full representation of legal counsel paid for by the Burmese government to defend the victims against any charges against them, to help the victims file civil suits against all those responsible for their injuries, and to aid Thai prosecutors to file criminal charges against the traffickers on behalf of the victims.

Not only has the Burmese government failed to provide the victims with the required rehabilitation, including educational trainings noted in the applicable law, but the government itself was a significant hurdle to the resettlement of the victims. Evidenced by the fact that the Burmese government rejected terms of initial repatriation agreements that prevented prosecution of the victims, the Burmese government has added to the victims' suffering through fear, and is in direct violation of its own domestic laws designed to protect its citizens.

III. Inadequate Remedies under Thai Law: Current Policies, Current Problems, and Potential Reform

In the immediate aftermath of the tragedy, the LST arranged a settlement between the truck driver's insurance company and the survivors and their families.[13] While some victims have begun receiving payments,[14] others have not yet received these payments and might never. Regardless, the remedies offered and the even the total remedies available fall woefully short of compensating victims for their suffering, and highlight the need for new and better approaches.

A. The Problem of Calculating Remedies Based on Injuries

The Thai Commercial and Civil Code provides for compensation to victims for their injuries.[15] For deceased victims, the Code provides for compensation including (1) funeral expenses, (2) medical expenses prior to death, and (3) compensation to those who may have lost "legal support" due to the death, likely including spouses and children who depend on the deceased person.[16] For injured individuals, this compensation includes monetary and non-monetary damages, but not punitive damages.[17]

While Thai civil injury law provides for a remedy based on actual injury, the practical result of this standard is a drastically insufficient remedy. Here, LST has arranged for the driver's insurance company to pay 35,000 baht in damages to the families of the deceased and 65,000 baht to survivors.[18] The fact that the negotiated settlement awarded survivors more money than the deceased immediately raises questions as to how death is considered a lesser injury. Furthermore, even if the physical and economic damage caused by injuries were calculated with perfect accuracy, the result would still be insufficient. Conditions under the oppressive military regime in Burma have contributed to a complete failure in the market for migrant labor, and have fostered artificially low wages. When based on these wages, injury as loss of earning potential does not even remotely compensate individuals or their families already living on the edge of subsistence.

1. The Exception of Criminal Liability from Comparative Fault

Additionally, it is important to note that any possible criminal charges filed against the migrant workers should not impact any civil settlement. While Thai law reduces damages proportionally based on the victims' contribution to their own injury, the determination of liability is not affected by criminal law liabilities or verdicts in a criminal law court.[19] Furthermore, the victims tried to alert the driver about their condition, and there does not seem to be any other reason why driver or police could accuse the victims of being "contributorily negligent."[20]

Unfortunately, the criminal charges against the migrant workers may have impacted the settlement in various forms, including the possibility that workers may have been intimidated, that the workers feared further prosecution if they asked for more damages, and the fact that they were rapidly expedited from the country without making full statements.

B. The Policy of Enforcing Remedies as a Cost of Doing Business: Holding Liable for Injuries All Those Who Profit

Under Thai law, employers are responsible for injuries caused by their employees in the course of doing business. Worldwide, many legal systems have similar laws, and scholars frequently explain that the public policy theory underlying an employer's liability for their employees is that injuries caused by employees during the course of business should be recognized as a cost of doing business.[21] In this case, it does not appear the remedies met their law and economics goals. As the settlement was arranged between the victims and the driver alone, it failed to assign costs of the migrants' injuries to the greater criminal network. Not only might this have limited the money available to use for victims' compensation, but it allows the majority of those involved in the criminal enterprise to avoid liabilities that would have been assigned to those involved in legitimate business.

1. Further Considerations on the Cost of Doing Business: Considering the Benefit to and Duty of Society as a Whole

Given the beneficial impact cheap migrant labor has on the Thai economy, there is a strong argument that Thai welfare services have both the duty and the best ability to compensate injured migrant workers within Thai borders. Various estimates suggest up to 2 million Burmese migrants work in Thailand, accepting jobs many Thais will not do and working at a fraction of the minimum wage. This labor fuels many sectors of the Thai economy, and provides a higher quality of life for Thais at a reduced cost. Given this tremendous benefit Thai society receives from the systematic capitalization on Burmese migrant labor, the costs of exploiting this labor should justly be passed on to Thai society as a whole.

Here, some early news reports mentioned the possibility of government compensation, but apparently this has not materialized. While the Thai trafficking law that came into effect in June creates a system for funding social programs to rehabilitate victims of trafficking, language of the law suggests the ultimate use of these funds is highly discretionary. There are no guarantees when or if funds will be used. Consequently, this is hardly a comprehensive system, and is unlikely to provide aid to the many victims of the systematic abuse of migrant labor.

IV. The Problem of Migrants' Legal Status and its Contribution to the Harms of Smuggling and Trafficking

As mentioned in the previous section, Burmese migrant workers are an integral part of the Thai economy, and yet they are marginalized by Thai society. Even though the Thai economy expects the labor of Burmese workers, Thailand and Burma have signed a memorandum of understanding regarding the exchange of workers,[22] and Thai employers can legally employ Burmese workers, the actual legal status of Burmese workers is tenuous at best. Though Burmese workers can apply for work permits, these permits may be too expensive for the employees to afford, or employers may hold the work permits at the employee's place of work. In either case, the migrant workers face the constant threat of arrest and deportation. This system effectively condones the employers and criminalizes the employees, giving the employers even greater power over migrant workers. And, as the case of the migrant workers shows, this system is disastrous, and perpetuates a dangerous criminal environment.

Without this culture of criminalization surrounding migrant workers in Thailand, the 54 migrant workers would not have suffocated. There would have been no reason for them to sneak across the country, and there would have been no reason for them to travel in a sealed cargo truck. As well, there would have been no reason to imprison the workers for immigration violations, and criminalize them for harms committed upon them. Were the Thai government to publicly acknowledge these workers that they silently condone, were the Thai government to publicly acknowledge the crucial role these workers play in the Thai economy, and were the Thai government to fully legalize the status of the workers, countless future tragedies would certainly be avoided.

V. Accountability: The Problem of Holding Traffickers Liable Under Criminal Laws

While remedies for civil damages may provide some disincentive to place the safety of others at risk, the disincentives are clearly minimal in this case given that damage calculations were small, the focus of civil liability has apparently been placed on just one individual, and no punitive damages are available. In this regard, the possibility of criminal liability is far more important as the primary deterrent against crime.

Unfortunately, the case of the migrants reveals significant limitations in the willingness or ability of authorities to prosecute those responsible. As mentioned above, Thai authorities have only prosecuted six individuals in connection with the crime, while many more were certainly involved in the operation. As noted in the AHRC editorial, a key problem with prosecuting all those involved is the complicity of police and other government officials.

Similarly, the Burmese crackdown on people who were involved in human smuggling but who may not have been involved in this particular case shows either a reluctance or inability to hold accountable those truly responsible. Perhaps the single greatest obstacle to reducing human trafficking is this reluctance or inability of local officials to prosecute genuine offenders.

A. The Problems of Domestic Jurisdictions Combating an International Criminal Network: Necessary Willingness to Cooperate

A fundamental difficulty in the prosecution of those responsible for human trafficking is the frequency with which the crime extends across international borders. Combating trafficking requires the coordinated efforts of police agencies and judicial systems from different jurisdictions to target the totality of a criminal network. Currently, there is insufficient cooperation between Thailand and Burma, and, furthermore, there appear to be significant hurdles to reaching an effective state of cooperation.

Thailand and Burma are signatories on a bilateral memorandum of understanding on the cooperative employment of workers,[23] and on a memorandum of understanding against trafficking in persons covering the Mekong region.[24] Unfortunately, these memoranda are neither legally binding nor effectively followed. Instead, both governments continue to prosecute low ranking members of criminal operations rather than truly cooperating to target entire transnational criminal networks.

The Convention against Transnational Organized Crime to which Burma has acceded and to which Thailand is a signatory and claims an intention to use in forming domestic law outlines protocols for cooperation between nations, although the ultimate effectiveness of the Convention is unclear.[25] Burma has already passed a law setting the framework for cooperation in the prosecution of crimes, but large scale criminal prosecutions ultimately require the discretion and desire of government officials.[26]

Furthermore, the Convention allows nations to criminalize the act of trafficking against their citizens even when the acts are committed outside of their jurisdiction, and the Burmese law explicitly grants Burma authority to prosecute individuals committing offenses against Burmese citizens outside of Burma. However, the Burmese government likely is hesitant to pursue such prosecutions because this could set a precedent that would allow other nations to attempt to prosecute Burmese nationals within Burma. The ultimate success of the Convention will require not just the passing of laws but the actual desire and ability to cooperate in prosecutions. Instead, given the involvement of both government authorities and powerful private officials in human trafficking, both Thailand and Burma may prefer to continue to exercise complete control over

the prosecution of individuals within their jurisdictions.

VI. Recommendations

1) The Burmese migrant workers involved in this case and similar cases should be regarded as victims of trafficking. Due to the prevailing economic conditions in Burma and Thailand, as well as the lack of control over their own destinies once their journey began, they are objects of exploitation who deserve full protection under the law.

2) Migrant worker deaths similar to this case will sadly continue as a result of the economic situation in which there are almost no employment opportunities in Burma while Thailand needs more cheap labor. To improve the situation, Thai authorities, human rights groups and legal organizations should work together to establish a mechanism addressing victims' needs. Currently, victims of labor trafficking have no mechanism for systematic recourse. This mechanism should be a permanent and robust institution.

3) The governments of Burma and Thailand should work together to legalize Burmese migrant workers in Thailand. The lack of legal status remains a primary cause for workers attempting to enter and travel through Thailand under dangerous conditions. The general understanding of migrant workers and legal groups is that even workers holding the certificate issued by the Thai Ministry of Labor have not yet established formal legal status.

4) The governments of ASEAN countries should take concrete steps to liberalize the free flow of labor between countries. While they have supported the flow of capital investment, these countries have to a large extent ignored the burdensome restrictions on the international movement of workforces. Too many restrictions still exist and governments have not made it a priority to reduce them. Although complete freedom such as that in the European Union may not be realistic for ASEAN countries at this time, progressive steps to facilitate worker migration must be made.

5) The ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers should create a strong mechanism to protect migrant worker rights and provide for remedies in the case of abuses. Currently, the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers provides that countries receiving migrant workers must "intensify efforts to protect the fundamental human rights, promote the welfare and uphold human dignity of migrant workers" and "provide migrant workers, who may be victims of discrimination, abuse, exploitation, violence, with adequate access to the legal

and judicial system of the receiving states." The Declaration also requires the countries from which the workers migrate to "enhance measures related to the promotion and protection of the rights of migrant workers." The Committee must use its authority to facilitate the implementation of these obligations.

(Endnotes)

[1] This report was completed using information through July 24, 2008.

[2] Supara Janchitfah, Open Borders to Human Rights, Bangkok Post, Jun. 1, 2008 (http://www. bangkokpost.com/010608_Perspective/01Jun2008_pers001.php); Wimol Nookaew, Burmese Survivors Sent Home, Bangkok Post, May 20, 2008 (http://www.mekongmigration.org/?p=109).

[3] Janchitfah, supra.

[4] Penchan Charoensuthipan, 56 Survivors to be Deported, Bangkok Post, May 15, 2008 (http://www.mekongmigration.org/?p=107)

[5] Wimol Nookaew, Death Truck Survivors Happy to Go Home, Bangkok Post, Jun. 9, 2008 (http://www.mekongmigration.org/?p=150)

[6] Asian Human Rights Commission,
When Will Police and Immigration Officials Also Be Detained over Deaths of 54 Migrants?, Prachathai English News, Apr. 24, 2008 (http://www.mekongmigration.org/?p=94).

[7] Nookaew, supra.

[8] Saw Yan Naing, Human Smuggling Crackdown Hits Kawthaung, The Irrawaddy, June 24, 2008 (http://www.irrawaddy.org/article1.php?art_id=12943).

[9] Janchitfah, supra.

[10] Id.

[11] Id.

[12] Legislative Guide for the Implementation of the Protocol Against the Smuggling of Migrants by Land, Air and Sea, Supplementing the United Nations Convention Against Transnational Organized Crime (2004) (http://www.unodc.org/pdf/crime/legislative_guides/Legislative%20guides_Full%20version.pdf).

[13] Janchitfah, supra.

[14] Referenced on Burmese language Voice of America news program July 23, 2008.

[15] § 420.

[16] § 443.

[17] § 446.

[18] Janchitfah, supra.

[19] Thai Civil and Commercial Code, §§ 223, 424, and 442.

[20] Driver in Burmese Tragedy Surrenders, Bangkok Post, April 16, 2008 (http://www.mekongmigration.org/?p=60).

[21] See, e.g., Dan B. Dobbs, The Law of Torts (West 2000).

[22] Memorandum of Understanding Between the Government of the Kingdom of Thailand and the Government of the Union of Myanmar on Cooperation in the Employment of Workers (2003) (http://www.artipproject.org/artip/ 05_laws/mou/bi/MOU%20Thai-Myanmar%20Work%202003_English.pdf).

[23] Memorandum of Understanding Between the Government of the Kingdom of Thailand and the Government of the Union of Myanmar on Cooperation in the Employment of Workers (2003) (http://www.artipproject.org/artip/05_laws/mou/bi/MOU%20Thai-Myanmar%20Work%202003_English.pdf).

[24] Memorandum of Understanding on Cooperation against the Trafficking of Persons in the Greater Mekong Sub-Region (Oct. 29, 2004) (http://www.artipproject.org/artip/05_laws/mou/multi/MOU%20COMMIT%202004_English.pdf).

[25] United Nations Convention Against Transnational Organized Crime, December 15, 2000, UN Doc. A/55/383 (Annex I, p. 25).

[26] See The Mutual Assistance in Criminal Matters Law (Burma, 2004) (http://www.no-trafficking.org/content/Laws_Agreement/laws_agreement_pdf/mutual%20assistance%20in%20criminal%20matters%20law_eng.pdf).

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(B . 3)

A Discussion of Five Burmese Cases from the Perspective of the Rule of Law

Introduction

Throughout its twenty-year tenure, the State Law and Order Restoration Council (SLORC)/State Peace and Development Council (SPDC) has demonstrated a consistent contempt for the rule of law. Any analysis of the junta's violation of this abstract principle cannot be considered complete without its application to concrete fact. The cases of Honey Oo, Ko Thiha, Ma Thanda, Htin Kyaw and U Ohn Than, reviewed in the context of domestic law and procedure, as well as international legal principles, will help illustrate how the Burmese regime's disrespect for the rule of law is manifest in government action.

Case Summaries

Honey Oo

Honey Oo, a 21-year-old law student, was arrested in October 2007 for helping form a student union, her involvement in the Saffron Revolution protests and for speaking to foreign radio about those protests. After being held for over two months without charge, she was charged on December 20 with sedition and with violation of the illegal associations law. At trial, she was convicted on scant evidence that failed to address her otherwise solid alibi. Further, she was convicted on both charges despite the fact that each was framed on the same activities.

Ko Thiha

Ko Thiha was arrested for picking up "anti-government" publications from a photocopy shop on September 7, 2007. One week later, he was charged with sedition, an invalid law given the SPDC's lack of constitutional authority. Whereas the law dictates that Thiha should have been tried openly in Wundwin, the site of the arrest, the trial was held in a special court in Mandalay Prison. Facing a life sentence, Thiha was not permitted to access a lawyer, nor was he allowed either to call witnesses or defend himself. He received a 22 year sentence despite the fact that the strongest evidence against him was a confession exacted from him by torture.

Ma Thanda

Ma Thanda was arrested on April 23, 2007 at a checkpoint after having visited her husband in Thailand. Charged with sedition, involvement in an illegal

organization, and violating immigration law, she faced trial in a special Rangoon court and not the border town in which she was arrested. After court proceedings in which she was not allowed either a lawyer or to call witnesses, she received three separate but almost identical sentences, whose penalties were added together to total 28 years.

Ko Htin Kyaw

Ko Htin Kyaw was arrested for his role in the August 2007 protests against fuel prices that preceded the Saffron Revolution. After appearing with a placard criticizing a forthcoming rise in the price of compressed natural gas, Htin Kyaw and another man were grabbed by men in plainclothes belonging to Swan Ah Shin, thrown into an unmarked vehicle and taken to a special interrogation army camp. Although his co-protester was released after a few weeks, Htin Kyaw was held without charge in a police battalion until February 6, 2008. He was then charged with sedition even though his protest was clearly directed at government policy and not the government itself.

U Ohn Than

On August 27, 2007, U Ohn Than carried out a solo protest in front of the US embassy in Rangoon. The 60-year old was taken away in a small public vehicle by men in plainclothes belonging to Swan Ah Shin after brandishing a pro-democracy placard. He was held without charge in a military interrogation camp until the end of January. After a trial with seriously compromised due process that equated his one-person protest with sedition, he was sentenced to life imprisonment.

Burmese Procedure

Unlawful Arrest

These cases demonstrate a number of irregularities with respect to the proper procedure for arrest. The arrest of Honey Oo occurred without a warrant despite the fact that she was accused of a non-cognizable offence. S. 54(1) of the *Code of Criminal Procedure* (CCP) outlines the limited circumstances in which an arrest may take place without a warrant, including arrests only for cognizable offences:

54. (1) Any police-officer may, without an order from a Magistrate and without a warrant arrest –

…any person who has been concerned in any cognizable offence…

Neither Htin Kyaw nor U Ohn Than were arrested by police officers. Both were apprehended by individuals in plainclothes belonging to Swan Ah Shin and forced into unmarked cars. In neither case was the accused brought into police custody. S. 59 (1) of the CCP outlines the conditions in which an arrest by a

private citizen may occur. This is legal only when the alleged offence satisfies the conditions of s. 54 (1), above, and when the accused is immediately brought into police custody and re-arrested:

59. (1) Any private person may arrest any person who in his view commits a non-bailable and cognizable offence…and without unnecessary delay shall take over any person so arrested to a police-officer or, in the absence of a police officer, take such a person or cause him to be taken into custody to the nearest police station.

(2) If there is reason to believe that such person comes under the provisions of section 54 a police officer shall re-arrest him.

Unlawful Detention

Both Honey Oo and Htin Kyaw were held for lengthy periods without charge. Honey Oo was held without charge in Insein Prison from the time of her arrest on October 9, 2007 until December 10 of that year. She was not brought before a court until December 20. Htin Kway was not charged until February 6, 2008 despite having been arrested on August 25, 2007. The CPP, s. 167 (2), however, allows a maximum detention of 30 days without charge:

The Magistrate to whom the accused person is forwarded…may…authorize the detention of the accused in such custody as the Magistrate think fit. But the detention of such person shall not exceed in the whole 30 days where a person is accused of an offence punishable with rigorous imprisonment for a term not less that seven years, and where a person is accused of an offence punishable with rigorous imprisonment of less than seven years, the detention of such person shall not exceed 15 days in the whole.

Improper Jurisdiction

The case studies suggest a tendency for cases to be tried in either Mandalay or Rangoon, regardless of where the accused was arrested. Because Ko Thiha was arrested in Wundwin, south of Mandalay, his case should have been opened in the Wundwin District Court. He was tried, however in a special court inside Mandalay Prison. Ma Thanda was arrested at a checkpoint at Than Gan Niy Naung in Myawaddy Township, but was tried in a special court inside Rangoon's Insein Prison. These are both violations of the requirements for jurisdiction that appear in s. 177 of the CPP:

177. Every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed.

In addition, the trials of Ko Thiha, Ma Thanda and U Ohn Than all took place at closed special courts inside prisons at either Mandalay or Rangoon. Judiciary Law (2000), however, states:

2. The administration of justice shall be based upon the following principles;…
e) dispensing justice in open court unless otherwise prohibited by law;

Pre-Trial Irregularities

The case of Honey Oo, in particular, demonstrates serious irregularities in the process by which the case against the accused was brought to trial. Specifically, the Law Officer who referred her to court had insufficient evidence by which to do so, a fact made all the more worse by the court's guilty verdict on scant evidence. The CCP specifically states that where there is inadequate evidence to make a case against an accused, he or she should be released from custody:

169. If, upon an investigation under the Chapter, it appears to the officer in charge of the police-station or to the police-officer making the investigation that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond...

The fact that Honey Oo was tried on evidence that was either false or based on hearsay indicates a failure of the prosecutor to satisfy the requirements, stated in the *Instructions to the Prosecutor (2001)* 1/2001 at Chapter 7, that the officer in charge of the case analyse and guarantee the facts of the case as correct and relevant to the law.

The sole piece of evidence passed on by police to the Law Officer was a police statement signed by Honey Oo. This is in clear disregard of the *Attorney General's Rules And Regulations*, which, at Regulation 51 of Chapter 6, requires cases referred to the Law Officer be accompanied by a) First Information Report or Direct Complaint; b) Prosecutor Side and Defence Side Witness Statements; c) Confessions; and d) Relevant Facts, Documentation, Photos and other such Evidence.

Access to Defence

It stands to reason that any accused will have difficulty securing justice without access to legal counsel. Ko Thiha, Ma Thanda and U Ohn Than were all denied legal representation during their trials. This is a violation of a number of procedural safeguards established in both s. 455 (1) of the *Burma Courts Manual*

and the CPP. The CPP states:
340. (1) Any person accused of an offence before a criminal court, or against whom proceedings are instituted under this code in any such court, may of right be defended by a pleader.

The *Judiciary Law (2000)* stipulates:
2. The administration of justice shall be based upon the following principles …
f) guaranteeing in all cases the right of defence and the right of appeal under the law;

The *Attorney General Rules and Regulations 2001* s. 81 (b) (Dock Brief) outlines grounds where a lawyer must be provided when the accused cannot otherwise do so, and the *Attorney General Law (2001)* states, at 9. j), that this is essential where the accused faces a criminal offence punishable by death.

Ability to Call and Cross-Examine Witnesses

A common thread between the cases of Ko Thiha, Ma Thanda and U Ohn Than is that none of the three was able to call or question witnesses in their defence. In the case of Ko Thiha, this was justified by the fact that the accused confessed, although the confession itself was false and its submission to the court was in violation of the *Evidence Act* (see below). The CPP clearly outlines the right of the accused to call witnesses in its description of trial procedure regarding defence:

290. The accused or his pleader may…open his case, stating the facts or law on which he intends to rely, and making such comments as he thinks necessary on the evidence for the prosecution. The accused shall then give evidence, if he desires to give evidence, on his own behalf, and after his examination, cross-examination and re-examination (if any) he shall examine his witnesses (if any), and after their cross examination and re-examination (if any) he may sum up his case…

291. The accused shall be allowed to examine any witness not previously named by him, if such witness is in attendance...

Compound Sentencing

The cases at hand indicate the willingness of courts to try and convict the accused multiple times for the same actions. Honey Oo, for instance, was convicted of both sedition and illegal association, even though both cases were framed the same. Ma Thanda experienced a similar fate in her sentencing under the *Burma Immigration Act*, *Penal Code* s. 124A and *Unlawful Assembly Act (1908)*, when the judge handed her three separate but almost identical

sentences with the penalties of each added together.

The *Burmese Penal Code*, at s. 71, explicitly forbids the overlapping of offences in a manner that exceeds the maximum sentence for a given offence:

71. Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided.

Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or

Where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence,

The offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences.

This principle is reiterated in the double jeopardy provision of the CPP, at s. 403:

403. (1) A person who was once tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him...

Burmese Law

Although it should go without saying, a state's judiciary should always act consistently with its own law. This is a principle upheld by the SPDC's own *Judiciary Law (2000)*, which states:

2. The administration of justice shall be based upon the following principles;

a) administering justice independently according to the law

***Burma Penal Code*, S. 124A**

In all of cases examined, the accused was charged and convicted of sedition. However, that charge requires that a lawyer for a constitutional government, which the SPDC is not, lodge the charge of sedition. SLORC's promulgation of the *1974 Constitution* on September 26, 1988 ended any pretence of the constitutional legitimacy of the ruling junta, something that was

confirmed by the regime's rejection of democratic election results in 1990. The definition of sedition, as described by the *Burma Penal Code* at s. 124A, does not apply to an SPDC government that is *de facto* and not *de jure*:

124A. Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards [the Government established by law for the Union and for the constituent units thereof] shall be punished with transportation for life or a shorter term, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

Even if the offence of sedition did apply to the SPDC, the cases suggest that the courts are applying it in an improper manner. The prosecution is not following the law, which requires a charge of sedition to be approved by the home affairs ministry. Moreover, in the case of Htin Kyaw, the accused was protesting government policy with respect to fuel prices and was neither questioning nor challenging the authority of the state. The evidence of the case does not suggest any statements made by Htin Kyaw approached "excited disaffection" towards the state.

Evidence Act

The cases of Honey Oo, Ko Thiha and U Ohn Than suggest that the courts have been hearing evidence in violation of the *Evidence Act*. The sole evidence presented by police against Honey Oo was an unsigned police statement allegedly made by the accused while in custody, and Ko Thiha was convicted exclusively on the basis of a confession made under suspicious circumstances. Regarding the latter, the accused claims that he was tortured into giving a confession, and the court heard evidence of that confession from a judge that Thiha insists he had never seen before. The *Evidence Act*, however, forbids the court from finding against a victim based on a confession rendered while in custody:

25. No confession made to a police officer shall be proved as against a person accused of any offence…

26. No confession made by any person while he is in the custody of a police officer, unless it be made in the immediate presence of a magistrate, shall be proved as against such person.

In addition, the convictions of Honey Oo, Ko Thiha and U Ohn Than were partially based on evidence heard from witnesses who were not in the presence of the accused at the time the alleged crime was committed. Numerous

witnesses, none of whom was allowed to testify at Honey Oo's trial, insisted that she was writing a law school exam at the time that the prosecutor's witnesses claimed she was leading a protest. In Ko Thiha's case, the court heard from witnesses that were not present at the time of his arrest. In the case of U Ohn Than, the court heard testimony of four witnesses who had been present at two previous protests attended by the accused and not the protests under consideration by the court. These irregularities are in violation of the *Evidence Act*'s stipulations against hearsay:

60. Oral evidence must, in all case whatever, be direct; that is to say –
If it refers to a face which could be seen, it must be the evidence of a witness who says he saw it;
If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;
If it refers to a fact which could be perceived by any other sense of in any other manner, it must be the evidence of a witness who says he perceived by that sense or in that manner…

Burma Immigration Act (1947)

Ma Thanda was charged under s. 13(1) of the *Burma Immigration (Emergency Provisions) Act* (1947), which states:

Whoever enters or attempts to enter the Union of Burma…in contravention of any of the provisions of this Act or the rules made thereunder…shall be liable on summary conviction to imprisonment for a term not exceeding one year or to a fine or to both.

Although the *Immigration Act* as written applies equally to citizens of Burma and to foreigners, subsequent case law dictates that only foreigners can be charged under s. 13(1) of the *Act* (*Sakinabebe v. Union of Burma (1966 Supreme Court No. 320)*. In other words, Ma Thanda, a Burmese citizen, was charged with a provision of the *Immigration Act* that is applicable only to foreigners.

International Legal Principles

While many of the judicial irregularities occurring in Burma do not explicitly contravene either domestic law or procedure, there are several practices that fall within the purview of international legal principles.

Right to a Fair Trial and the Presumption of Innocence

The right to a fair trial is an umbrella principle, and it is easy to see how much of what occurred in the cases under consideration is in violation of this

principle. Honey Oo was tried and convicted based on hearsay evidence that contradicted her otherwise solid alibi. The court did not follow proper procedure and her sentence was clearly unfair. Ko Thiha was tried in a closed court and was permitted neither to defend himself, to call witnesses, nor to counter the prosecution's witnesses, who were not present at the time of his arrest. He had no opportunity to challenge the torture-induced confession presented to the court. To make matters worse, his trial was far too short to have followed proper practice, with hearings completed in a single day following a mere ten days of investigation. Likewise, Ma Thanda was convicted after only one day of closed court hearings in which she was not permitted either to defend herself or to call and question witnesses. Htin Kyaw was convicted in a closed court on evidence that did not confirm the offence with which he was charged. Like Ko Thiha and Ma Thanda, U Ohn Than was unable to defend himself or to call or challenge witnesses in a special court; in addition, the presiding judge rendered inadmissible a question of his that clearly pertained to his case.

Given these and other occurrences, it is clear that none of the accused considered here was given access to a fair trial that respected and facilitated the presumption of innocence. These are principles codified in the Universal Declaration of Human Rights (UDHR), which is binding upon Burma by virtue of its membership in the United Nations:

Article 10. Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11. (1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was com mitted. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was commit ted.

Freedom from Arbitrary Arrest and Detention

Honey Oo, Htin Kyaw, and U Ohn Than were all held for months without charge in clear violation of the 30 day maximum provided for under Burmese

law. Honey Oo's arrest took place in absence of a warrant, and private citizens arrested Htin Kyaw and U Ohn Than. These actions are in clear contradiction of the UDHR, which states:

Article 9. No one shall be subjected to arbitrary arrest, detention or exile.

This is a principle that is further elaborated upon in the International Convention for Civil and Political Rights (ICCPR). While Burma is not a signatory to this convention, it is indicative of international legal practice, and a case can be made that it constitutes customary international law:

Article 9. 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly in formed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release…

Freedom from Torture and Security of the Person

Ko Thiha insists that he was tortured while in custody, and that it was only under these conditions that he confessed to the offence of which he was accused. Clearly this is a violation of the *UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, although, like the ICCPR, Burma is not a signatory of that treaty. Torture is also in contravention of Article 9(1) of the ICCPR (above) and of the UDHR:

Article 3. Everyone has the right to life, liberty and security of the person.

Article 5. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Freedom of Assembly

Both Honey Oo and Ma Thanda were charged under the *Unlawful Assembly Act (1908)*; the former for her involvement in a student union and the

latter for having crossed the border with individuals associated with a banned organization. These draconian charges are in transgression of Freedom of Assembly, which is codified in the ICCPR:

> Article 21. The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

The case of Honey Oo, as it pertains to her student union, is also in violation of Freedom of Assembly as described by the *ILO Convention Concerning Freedom of Association,* which is binding on Burma, and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), which is not:

> Article 8. 1. The States Parties to the present Covenant undertake to ensure:
>
> (a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;…

Freedom of Expression

With the exception of the Ma Thanda, each of the cases considered involved an arrest for some kind of expression. Honey Oo was accused of corresponding for foreign journalists and partaking in protests; Ko Thiha was in possession of publications said to be anti-government; and both Htin Kyaw and U Ohn Than were protesting in public. Clearly these individuals had their freedom revoked for non-violent expression that, if anything, challenged the tenuous authority of the SPDC. This is a lucid and egregious violation of freedom of expression as described in the UDHR:

> Article 19. Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without

interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Freedom of expression is also articulated in the ICCPR:

Article 19 1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

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Burma Lawyers' Council Challenges Unlawful Detention by the SPDC Judiciary, Attorney General and Police Force in the Case of Min Ko Naing and 21 Other Democracy Leaders

The cases in brief

Throughout the summer of 2007, the price of general commodities was soaring in conjunction with the military government's increase in fuel prices. This had a disproportionately large effect on ordinary people in Burma, who earn less than a dollar per day. In August of 2007, Min Ko Naing, Ko Ko Gyi, Ko Pyone Cho, Jimmy, Htay Kywe, Mya Aye, Pannait Tun, Kyaw Kyaw Htwe, and Min Zeya, all leaders of the '88 generation uprising, protested by marching from Shwe Gone Daing Traffic Point to Tarmwe Market.

Min Ko Naing and these other prominent leaders had already served long-term prison sentences after the 8-8-88 Uprising. They were again arrested and taken from their homes at midnight on August 21, 2007 because of this more recent demonstration against the rising prices of commodities.

Min Ko Naing and the other leaders were produced for trial on September 9, 2008 at the following courts:

(1)Rangoon Eastern District Court, charged under Section 4 of the Law for the Protection of the Stable, Peaceful and Systematic Transfer of State Responsibility and the Successful Implementation of National Convention Tasks, Free from Disruption and Opposition (SPDC Law No. 5/96);
(2)Rangoon Northern District Court, charged under Section 33 (a) of the Electronic Transaction Law;
(3)Dawbon Township Court, charged under Section 17/20 of the Printers

and Publishers Registration Act;

(4)Hlaing Tharyar Township Court, charged under Section 505/b of the Penal Code (making a statement with intent to cause fear to the public which may result in the committing of an offense against the State or public tranquility);

(5)Thingangyun Township Court, charged under Section 17(1) of the Unlawful Association Act; Section 32/b/36 of the Television and Video Act; Section 24/1 of the Law Amending the Control of Money Laundering Law;

(6)Insein Township Court, charged under Section 505/b of the Penal Code;

(7)South Okkalapa, charged under Section 130 (b) of the Penal Code (libel against foreign powers);

(8)North Okkalapa Township Court, charged under Section 6 of Law Relating to the Formation of Organizations (SPDC Law No. 6/1998).

In all, there are 21 cases in 8 courts. The BLC has determined that all of the defendants were wrongfully arrested and are being detained illegally.

Legal Analysis

(1) In criminal cases involving cognizable offenses, the police force is the agent of the state responsible for custody before trial and the State is the prosecutor during trial. Pursuant to Code of Criminal Procedure Section 167(2) and Court Manual Paragraph 407, a judge can permit a defendant to be held in custody for up to 30 days while the police complete their investigation. This 30 day limit applies to offences punishable with rigorous imprisonment for a term of not less than seven years. If the police cannot complete their inquiry within 30 days, the defendant must be released from custody. Min Ko Naing and the other political prisoners were in custody for much more than 30 days while the police continued to investigate. They were arrested on August 21, 2007 and were held in custody until September 4, 2008. Their total period of time in custody was 378 consecutive days. This constitutes *wrongful confinement*, which is a violation of Penal Code, Section 340. Additionally, this detention was "imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law," and thus a crime against humanity pursuant to Article 7(1)(e) of the ICC Rome Statute.

Further, the police went to numerous courts requesting separate remand periods for each case. The limit of the remand period for all combined charges against an individual is 30 days. These continuous remand periods are unjust and against the law.

(2) Court Manual Paragraph 405(2) provides the grounds for issuing a remand. Police Manual Paragraph 1351 precisely describes the procedure for the remand, investigation, and maintenance of a daily record.

Police Manual Paragraph 1347 defines when the investigation may be extended. Only if the reasons listed in the daily report justify an extension can a second remand be issued, provided that it falls within the 30 day limit. In the case of Min Ko Naing and the other activists, the first remand period was 14 days and the second was 14 days. All other granted remands that extended the custody period beyond 30 days were unlawfully issued. In conclusion, the extended detention of Min Ko Naing and the other pro-democracy activists of 378 days by the government clearly violates each of these laws. They have been illegally detained.

(3) Police officers involved in the investigation distorted the facts of the case in order to incriminate the defendants. These police officers must be dismissed according to procedures in the Police Manual and Penal Code, Section 177, which prohibits *furnishing false information*, and Section 218, which prohibits *public servants from submitting false records*. The police must be prosecuted under these sections of the Penal Code.

(4) Attorney General Rules Section 48(a) provides that the prosecutor in charge has the duty to check the validity of the remand form. The prosecutor must scrutinize and correct flawed police records and remand dates. Attorney General Rules Section 48(c) provides that the remand form and the records must be complete, correct and submitted to the Attorney General's office. If the remand forms are incomplete, the office must return them to the police to be corrected or completed. Attorney General Rules Section 53 provides that the Attorney General's office must review and ensure that all of the police reports and the case file are correctly completed. Attorney General Rules Section 58 provides that the period of remand ends promptly on the date stated and the case must be transferred to the court without delay. The burden of these duties is on the Attorney General to follow. In the case of Min Ko Naing and the others, the Attorney General's office did not check and correct the remand forms, thus permitting multiple remands that exceeded the 30 day period.

(5) In conclusion, Min Ko Naing and the others were detained under an excessive remand period of 378 days. The military government's conduct in the judiciary, the Attorney General's office and the police force violated the existing laws and universally recognized rule of law principles.

Legal Analysis Section
Burma Lawyers' Council
September 25, 2008

Note: Case facts and criminal sentences were acquired from Assistance Association for Political Prisoners (Burma).

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Part C : Special Features

(C . 1)

A Legal Analysis on the Plight of Ethnic Nationalities in Burma

By Aung Htoo[1]

I. Introduction

Burma is composed of various ethnic nationalities, including the majority Burman people. The situation of the non-Burman ethnic nationalities has been an underlying political and legal question in Burma for hundreds of years. The successive ruling military juntas in Burma manipulated this issue to prolong their rule for almost five decades.

Since Burma's independence in 1947, the ethnic nationalities of Burma have struggled for their right to self-determination. Due to the inability to divide power fairly among all peoples of Burma, several ethnic groups resisted the centralized government. As a consequence, in 1960 the military seized control by force. Ethnic armed struggles continue even today as a result of the military regime's refusal to recognize the rights to self-determination of ethnic nationalities. The current situation has not improved and, many would argue, has even worsened. The Union Constitution recently approved by the military regime in May 2008 attempts to legalize this inequality and unfair treatment. Dangerously, the new Constitution, much worse than the previous ones, creates the most rigid centralization, to be assumed by the military elite over the Burman majority and non-Burman ethnic minorities alike. This paper attempts to explore the plight of ethnic nationalities in Burma from legal and human rights perspectives.

II. A Brief Background of Ethnic Nationalities in Burma

(A) Pre-independence Era

Before the 18th century, ethnic peoples were mainly self-governed in various forms. Some were independent kingdoms while others were still principalities. During the 18th century, the Burman feudal kings became stronger than the rest and assumed governance of the Mon and the Arakan kingdoms together with the Shan principalities. The British defeated the Burman King in 1885. Britain administered most of the country directly but left governance

local in Karenni and Shan areas. However, all ethnic regions, together with the majority Burman area, were formed into a single country called Burma. Burma became part of the British empire and was made a province of India.

In January 1947, representatives from Burma led by General Aung San went to Britain and asked for Burma's independence, including (mainland) Burma proper and the Frontier Areas. The British intended to grant independence for Burma proper but not for the Frontier Areas. The British expressed their intention that "independence be extended to the Frontier Areas once the people living in the Frontier Areas agreed to join Burma proper; however, let these people decide the question of unification themselves". General Aung San met with Shan, Kachin and Chin leaders at Panglong on 12 February 1947 and signed an agreement with them guaranteeing the federal structure of the future Union of Burma. This became known as the Panglong Agreement. The essential parts of the agreement provided:

* frontier peoples would have the right to exercise autonomy in their respective areas;
* frontier peoples would enjoy fundamental democratic rights just as in other democratic countries; and
* states would be entitled to financial allocation from the national revenue.

(B) The 1947 Constitution and its Consequences

The 1947 Constitution was drafted in the pre-independence era. This was also a period of much hard work to gain independence and sovereignty from the British. The Constitution was drafted in a very short period by a 111-member constitution drafting committee, composed of leaders from AFPFL, members of the Cabinet, representatives of ethnic peoples and intellectuals. It was based on initial trust and understanding among the ethnic groups, and for practical purposes it was intended to flesh out the details later. However, the proposed equal rights for the ethnic people were not realised because of a lack of infrastructure and insufficient attention from the then country's leaders. When it became apparent that ethnic people did not, and would not in the foreseeable future, enjoy political and economic equality with the Burman majority, civil war broke out. A number of ethnic armed groups were founded during the ensuing more than 50 years of civil war in Burma.

The democratic governments formed under the 1947 Constitution, which ruled the country from 1948 to 1962, fostered economic development for the country.[2] However, development throughout the country was uneven. Progress generally occurred in the low land where the majority of Burman people resided whilst very little change happened in areas where other ethnic nationalities were found.[3] The movement of the ethnic leaders for constitutional reform, based on

federalism, emerged in this context. However, the military, led by General Ne Win, manipulated the situation and staged a coup in 1962 under the pretext of protecting the union from disintegration.[4] The next four decades of military rule in Burma only exacerbated the ethnic divide in Burma as it consistently waged a propaganda that federalism would lead to secession and disintegration of the union.[5]

(B) The 1974 Constitution and Ethnic Rights

Following the coup in 1962, Burma's economy started to deteriorate. To overcome the glaring problem of legitimacy, the regime drafted a Constitution for the formation of a one-party state, which fully guaranteed the perpetuation of the military dictatorship. A referendum was held on the draft constitution in 1973 and the people were forced to support it. What followed were a general election and the installation of so-called civilian government dominated by military and ex-military officers.

The 1947 Constitution established a semi-federalist state under which the rights of the ethnic people were to some extent protected by the bi-cameral system through which legislative power can be checked and balanced. However, the 1974 Constitution abolished the Chamber of Nationalities, which had comprised representatives from the ethnic states. State power was exercised only by the People's Assembly, with its great majority of Burman representatives who were mostly army and ex-army personnel.

After dissolving the previous Union, composed of five ethnic states and Burma proper, as provided for in the 1947 Constitution, the constituent units in the 1974 Constitution were transformed into seven ethnic states, largely inhabited by non-Burman people, and seven geographical divisions, largely inhabited by the majority Burman people. As a result, an ethnic state had status equal to one division, in which only one seventh of the Burman people lived. Under the new 1974 Constitution the multi-party democratic system[6] and free-market economy was abolished.[7]

The 1974 Constitution deprived individuals as well as collective groups of the freedom of association and political participation. The dissatisfaction of the ethnic people greatly increased following this further dilution of their rights and political influence. The armed struggle of the ethnic organisations consequently gained momentum between 1974 and 1988. The mountainous areas of Burma became largely controlled by armies formed by the ethnic people.[8] As developments progressed, the ten ethnic armed organizations formed a political alliance entitled National Democratic Front (NDF).

The economic and socio-political situation of the country deteriorated

dreadfully. This set the scene for the popular democratic uprising in 1988. Then in September 1988 the military again staged a coup, abolished the 1974 constitution, and established a military administration. As a negative impact of civil war, the ethnic peoples are a disproportionate target for human rights abuses and heinous crimes. Ethnic regions are regularly exploited for their natural resources, leaving behind environmental disasters, drug problems and human rights violations as of now.

III. Suffering from the Commission of Heinous Crimes

(A) Crimes against humanity in Eastern Burma

In June 2008, Amnesty International issued its important report on crimes against humanity in Eastern Burma.[9] The report makes the case, in convincing fashion with specific cases and data, that heinous crimes such as rape, forced labor, torture and murder have been committed by the military regime in a systematic and widespread manner. The report notes that for 2½ years a human rights emergency has been occurring in the form of a military offensive by the Burmese army (*tatmadaw*) waged against ethnic Karen civilians in Kayin (Karen) State and Bago (Pagu) Division. This offensive has involved the widespread and systematic violation of international human rights and humanitarian law that constitute crimes against humanity.

The current counter-insurgency campaign has civilians as primary targets and is unprecedented in its length. An estimated 147,800 people have been and remain internally displaced in Kayin State and Bago Division. Many of these people have been subject to widespread and systematic human rights violations including unlawful killings, torture, enforced disappearances, arbitrary arrests, forced labor, the destruction of homes and villages, and the destruction or confiscation of crops and food stocks. Amnesty International adds that the continued impunity of these bodies contributes to the country's human rights crisis.

(B) Imprisonment and other severe deprivation of physical liberty in violation of fundamental rules of international law

It is a crime against humanity to imprison someone in violation of fundamental rules of international law when it is part of a widespread or systematic attack against civilians. The SPDC regularly, as part of government policy, arrests and imprisons political opponents, including leaders of ethnic groups. On 9 February 2005, nine Shan national leaders including U Khun Htun Oo, Chairman of the Shan National League for Democracy, were arrested by the Burmese military regime for attempting to form a committee called the "Shan State Academics Consultative Council".

The Shan leaders were quickly convicted of serious crimes and punished with long-term imprisonment of up to 106 years. From the evidence, however, it is apparent that they were simply attempting to implement their political aspirations by exercising their fundamental human rights and freedoms, including freedom of expression, freedom of peaceful assembly and freedom of association. The regime was concerned that such attempts might spread to other provinces or states within which various ethnic nationalities reside and a number of ethnic armed cease-fire organizations are based, resulting in a threat to their power. As a result, such peaceful attempt was criminalized, exaggerated, and combined with other fabricated offenses; subsequently, for one major action, outrageous penalties were rendered several times under numerous separate charges, contrary to the effective national laws in Burma.

The fate of U Khun Htun Oo and his colleagues was already decided once they were arrested. The judge in each case merely acted as a rubber stamp to the regime's wishes. The admittance of hearsay, the failure to correctly apply the law, the use of evidence that had no relation whatsoever to the alleged crime, were all symptoms of a judiciary that is completely controlled by the regime. Moreover, generally, justice requires that sentences be proportionate to

the nature of the crimes. Here, the use of maximum sentences in all cases, regardless of the complete lack of evidence, was another indication that the courts were being manipulated by the regime and were unable to decide the cases independently.

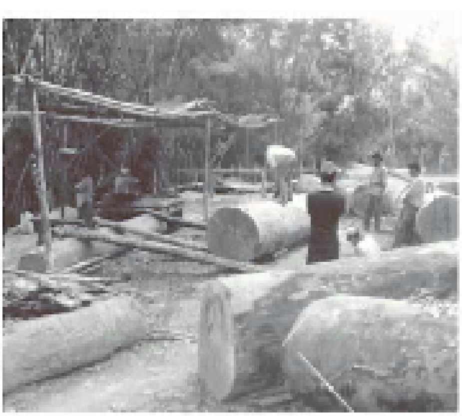
IV. Exploitation of Natural Resources in Ethnic Areas

One of the ways in which the military regime oppresses ethnic nationalities is through exploitation of natural resources. Environmental damage, human rights violations and economic dependency are all byproducts of the SPDC's exploitation of timber, precious stones, natural gas and other resources that should benefit and belong to the ethnic nationalities.

(A) Impact of logging and mining

After the Burmese government reached a ceasefire agreement with an ethnic Kachin armed group in 1994, the military regime signed a contract with China to cut down timber and hardwood in Kachin forests. Due to deforestation, there was a historic flood in Kachin state in 2004, climate change and an increase in temperature[10]. Forests in Karen, Karenni and Mon states have also been targeted by the regime's economic machine.

Exploitation of precious stones and metals has led to a negative environmental impact. Chinese companies were allowed to extract gold along Burma's longest river, the Irrawaddy. They amalgamated large amounts of mercury with the gold and dumped it into the river. Now, the Irrawaddy has been polluted with mercury that threatens the health of the people[11]. Burma is one of the world's top-producers of high-quality rubies and is the top jade producer[12]. However, Burma's gem mines, which are ruled by military authorities and mining companies, experience unsafe working conditions and flagrant human rights violations, including widespread land confiscation, extortion, forced labor and child labor[13]. Careless use of machines and oil has caused environmental pollution. Infectious diseases such as HIV/AIDS, malaria and tuberculosis are increasing in mining areas and, because of readily available drugs, more and more people have become drug users and addicts[14]. Recently, on 30 September 2008, a news article was released on the jade trade in Hpakant, Kachin State. Noting



Logging between Panawy and Man Set. KDRC.

the regime's control over the gem industry, the article highlighted that "Myanmar's mining industry is built on suffering. Forced and child labor, land confiscation, drug abuse, sexual exploitation and environmental damage have scarred the mining trade, according to human rights groups."[15]

(B) Impact of dam and hydropower projects

Around 2005, the Burmese military regime signed a memorandum of understanding with Thailand and China to construct a series of hydropower dams along Salween River. Salween Watch reported that human rights violations, including forced relocations, rape, forced labor, illegal confiscation of property and murder, are common in these areas. At the Tasang site in Shan state, 300,000 people have been forcibly relocated since the dam studies began[16]. Electricity exploitation is also rampant in Karenni State.

(C) Impact of gas pipeline project

Another example of a trade agreement that has brought human rights abuses is the construction of a pipeline to export natural gas. In the 1990's, the 260 kilometer-long *Yadana* natural gas pipeline was constructed from the Andaman Sea, across Burma, to Thailand. Forced labor was used for project infrastructure and villagers were made to carry arms and supplies for soldiers patrolling the pipeline route. Local people were subjected to abuses such as extrajudicial killings, torture, rape and extortion by pipeline security forces. Villages were relocated to clear the way for the pipeline and villagers' lands along the pipeline route were confiscated[17]. Similarly in Arakan state of western Burma, since 2000, Korean international company Daewoo has been exploring underwater gas in the Bay of Bengal off the Arakan coast. Military presence was increased in the area to secure the gas pipeline. Along with the increase in troop deployments came a corresponding increase in human rights abuses such as extortion, violence, forced labor and land confiscation to make way for barracks, outposts and other military infrastructures[18]. Other natural gas exploitation takes place in Karen and Mon states.

(D) Impact of contract farming

In December 2005, Burma signed a contract farming agreement with Thailand, in which Burma agreed to reserve 17.5 million acres for Thailand to plant crops such as sugarcane, palm oil, maize, cassava and rubber to be

supplied to factories in Thailand[19]. This contract farming agreement increased land confiscation in Shan state and Kachin state[20]. For instance, with the help of the military regime, the pro-junta Yuzana Company seized over 200,000 acres of land in Hukawng Valley to cultivate crops for Thailand[21]. Similar land confiscation is taking place throughout the country for many other purposes. In Burma, land is the primary source of livelihood for more than half of the population. The government confiscation deprives hundreds of thousands of people of their livelihood.

(E) Land Confiscation

Land confiscation is common throughout Burma, including in ethnic areas. For instance, in Kachin State, from 2001 to 2006, the military increased its presence from ten battalions to fifty battalions. To meet this expansion, the military confiscated people's farm land without giving notice or paying compensation. In Karen State, the military confiscated land for Army Plantations-- in April 2000, in Kyar-Ein-Seik-Kyi Township, over 80 acres were confiscated by IB 283, 284, and 32 for an army plantation. Similar incidents have been documented in Karenni State, Mon State and Shan State. Uprooting people from the agricultural lands their families have used for generations leads to massive displacement, creating internally displaced people and driving people to foreign countries to seek migrant work or refugee status.

V. Lack of Constitutional Guarantees of Ethnic Rights

In his "Position Paper on the National Convention's Principles for a Constitution for the Union of Burma", Professor David C. Williams of the University of Indiana School of Law analyzes to a large extent how the SPDC's constitutional principles formulated in its National Convention undermine ethnic rights.[22] The central thesis of his paper is that, like previous Burma constitutions, the National Convention's Draft Principles continue to over-concentrate power in the Burman majority, a select group of men that dominate the executive, legislative and judicial branches, and in the army.

According to Professor Williams, the National Convention Principles (and consequently the SPDC Constitution) over-concentrates power in the Burman majority. If maintained, this disregard for the legitimate desire of ethnic nationalities for "measured self-determination" will lead to continued conflict

with the Burman majority. Professor Williams posits that it is very unlikely that ethnic minorities will control the upper house of parliament because the army has the right to choose at least twenty-five percent of the members of the upper house. Furthermore, some of those representatives will likely come from specially designated territories and self-administered areas within the ethnic states and regions which may not fully represent ethnic interests. Professor Williams adds that even the power that the ethnic nationalities have in the upper house means little because it is the weakest part of the government. In reality, the presidency is where the power will lie and, in addition, the Burman majority will control the lower house of parliament.

Importantly, the differences among Burma's states require a different form of government for each state. But the NC Principles create the same legislature for each, without respecting these different needs. Furthermore, under the NC Principles, the president appoints and controls the state and regional executive department. Thus, the executives of each state are merely subordinates of the national president, thus effectively diminishing ethnic power. Moreover, the state or regional parliament has no power to reject the president's choice unless that person fails to satisfy the constitutional qualifications such as age and residency. The president's control over the Chief Minister means he also controls the Chief Minister's choice of ministers. In fact, the NC Principles state outright that all the ministers are subordinate to the president.

Similarly, the national president will control the judiciary in ethnic areas. The president appoints the justices of the High Courts of the states and regions. The state legislature cannot reject the president's choices except on the grounds that they do not meet the formal constitutional qualifications. Thus, for instance, the legislature cannot reject a nominee on the grounds that he is incompetent, corrupt, or a lackey of the president. The president will be able to control lower courts through his control of the High Courts.

The division of powers between the national government and the state and regional governments also reflects over-concentration at the national level. The powers given in the NC Principles to local government are insignificant and do not address the need of ethnic nationalities for self-determination.

VI. Conclusion and Recommendations

In spite of the fact that the ethnic issues need to be addressed properly and with special emphasis, this does not mean that the issues are too complicated to resolve. It is also unreasonable to say, as the military junta usually mentions and ASEAN has unofficially adopted, that without strong centralization by military prowess in order to establish stability, Burma would collapse. If Burman and non-Burman ethnic nationalities reach a common understanding on how to

construct a political union within the framework of a federal union and its constitution, where the minority groups feel they belong and which they are proud to be a part of, "trust" would be established and Burma will never fall apart. To this end, the international legal communities may take notice of and support the following recommendations:

1) To conduct a legal campaign, that challenges the SPDC Constitution and legitimacy of the forthcoming 2010 election process; and to provide recommendations for a democratic transition of Burma from the legal perspective;
2) To put pressure on the UN Security Council to refer the situation of Burma to the International Criminal Court in order that SPDC officials be held responsible for crimes against humanity and war crimes, justice for victims be sought, and the rule of law, which is a pivotal foundation for a genuine national reconciliation, be effectively promoted;
3) To critically evaluate and publicize the current condition of the judiciary in Burma and bar council, focusing on the relationship between judicial independence and the rule of law, holding accountable the members of the judiciary who legitimize the military regime's oppression.

October 16, 2008

(Endnotes)

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[2] The Information reported in the Mirror and the New Light of Myanmar, the newspapers published in 1961-62.
[3] U Tun Myint, Secession Issue of Shan State [23 January 1957], pp. 17-18.
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[5] Analysis of SLORC's National Convention, Constitutional Seminar Record, published by the Burma Lawyers' Council, 1995, p. 47.
[6] Article 11 of the Constitution of the Socialist Republic of the Union of Burma (1974).
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[8] Martin Smith's interview with Brang Seng, "Burma, Insurgency and the Politics of Ethnicity" by Martin Smith, p. 443.
[9] "Crimes Against Humanity in Eastern Myanmar", Amnesty International, 5 June 2008.
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[19] http://ethnicvoices.civiblog.org/blog/Thailand.
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[21] Kachin News Group, 17 Aug. 2007.
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(C . 2)

[Editor's Note: This paper will be published as a four-part series of articles in the LAWKA PALA journal. This edition contains the Executive Summary and Part I. With the permission of the author, specific recommendations made by the Ethnic Nationalities Council have been omitted.]

Position Paper on the National Convention's Principles for a Constitution for the Union of Burma

Prepared on behalf of The Ethnic Nationalities Council by
David C. Williams
Director, Center for Constitutional Democracy in Plural Societies

January 15, 2008
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Executive Summary

In working toward a better constitutional future for Burma, all should pay attention to the objective conditions inside Burma. Every country needs its own constitution, designed to suit it; there is no one size fits all constitution. Burma's future constitution should therefore respond to Burma's particular needs and problems, so Burma should have its own unique constitution, different from others. The central objective fact is this: since independence, Burma's constitutions have over-concentrated power, and this over-concentration has been one of the primary causes of the country's profound problems. Although an improvement on the current regime, the National Convention's Draft Principles continue this pattern.

The constitutions have over-concentrated power, and the NC Principles would over-concentrate power, in at least three ways. Burma's history shows that Burma's governments are especially prone to these three types of over-concentration. These three are therefore the most relevant objective conditions, specific and particular to Burma itself. Any constitution tailored to Burma must therefore deal with these risks:

1. Since 1947, Burmese constitutions have over-concentrated power in the Burman majority, ignoring the legitimate desire of ethnic minorities for measured self-determination. As a result, a number of ethnic groups went into

resistance, and in response, the military seized control in 1960. The ensuing conflict is the longest ongoing civil war in the world today. If this over-concentration is not remedied, Burma's problems will only continue. There are two ways to de-concentrate this power: **power-sharing** at the center, so that the minorities have sufficient power to balance the majority; and **decentralization**, so that Burma's diverse cultures can rule themselves within an over-arching national framework. The National Convention's Principles pay lip service to these doctrines, but in reality they merely make token gestures.

2. Since 1960, Burmese constitutions have de facto over-concentrated power in a small group of men wielding executive, legislative, and judicial power. Usually, one particular general has dominated this group, leading to an almost monarchical style of government. As a result, the country has groaned under arbitrary government without checks and balances. The constitutional remedy is the **separation of powers**, with a particular focus on limiting the power of the president, because the executive is the most likely branch to dominate the others. Again, the National Convention's Principles pay lip service to this doctrine, but in reality they would create a president of almost kingly power.

3. Also since 1960, Burmese constitutions have de facto over-concentrated power in the army, the Tatmadaw. The military is an important institution, but it is not democratic. To give it substantial power in government is therefore to make Burma un-democratic. Burma has not known truly civilian government for almost fifty years, as one military junta after another has held absolute sway. In central Burma, the military has largely suppressed political activity except for a brief period shortly after 1988. In many ethnic areas, the Tatmadaw has been waging war on minority resistance groups, so that the military commander's will is the only law. This pattern is so deeply entrenched that it will take strong constitutional measures to change it and to keep Burma from reverting to it. The constitutional remedy for this over-concentration is the **subordination of the military to civilian government**. The National Convention's Principles do not even pay lip service to this doctrine, as it overtly mandates that the Tatmadaw should have a "national political leadership role," run itself without civilian involvement, and be the body "primarily responsible for safeguarding the State Constitution"

This position paper will analyze the NC's Principles with respect to these four doctrines: power sharing, decentralization, separation of powers, and subordination of the military to civilian government. It will explain why the Principles do not sufficiently embody these doctrines, and accordingly how the Principles need to be amended.
[…]

Full Analysis

I. Power-Sharing

Because Burma is a diverse and plural country, it is vital that all major groups feel that they have a stake in the constitutional regime in general and in the national government in particular. In the past, Burma's ethnic minorities have felt excluded from the politics of the center. Any workable constitution must offer them a realistic opportunity to balance the power of the majority, so that they will not be simply over-whelmed and side-lined. In a simple majoritarian democracy, in which the majority always rules in proportion to its numbers, then the minorities will have little stake.

The NC's Principles seem to recognize this concern because they do not create a simple majoritarian democracy. Instead, they would create a bicameral legislature: in the lower house, representation would be based on population so that the majority will rule; but in the upper house, each State and Region will have the same number of representatives regardless of its population. See Principle IV/2. If one State has one million people and a different State has ten million people, each will still have the same number of representatives. The effect of this arrangement would ostensibly be to give disproportionate power to smaller (in population) states and regions, where Burma's ethnic minorities are concentrated. This arrangement is characteristic of many of the proposed constitutions for Burma, and the goal is always to empower Burma's ethnic minorities some disproportionate power. In the union government, the upper house would be their particular champion, their reason for giving loyalty to the regime. […]

But in fact, under the NC's Principles, the upper house will not actually serve to protect the ethnic minorities, for two reasons: first, it is unlikely that the ethnic minorities actually will control the upper house; and second, even if they did, it is unlikely that the upper house will actually have any real power, as compared to the lower house and the President.

a. Under the NC Principles, Ethnic minorities will not control the upper house.

It is very unlikely that ethnic minorities will actually have controlling influence within that house. The SPDC would give equal representation to each of the seven States and seven Regions (currently the seven divisions, see Principle I/4(b)); each will send twelve members to the upper house. Commonly, Burmese people anticipate that ethnic minorities will dominate the seven states, and ethnic Burmans will dominate the seven regions. Of course, some ethnic minorities might be elected from the seven regions, but then some

Burman people might be elected from the seven states, probably in equal numbers. So, at first glance, it would appear that the upper house would exactly balance power between the majority and minorities. But once more, appearances are deceptive, because in the end, the Burman majority will actually control the upper house for several reasons:

First, the Tatmadaw will have the right to choose at least twenty-five percent of the members of the upper house (and it may be more, as explained in the next section) "at the rate of four representatives from each region or state inclusive of Union territories." Principle IV/ 13(b). In other words, one-quarter of the representatives from the ethnic states will actually be chosen by the Tatmadaw. In all likelihood, these representatives will not be sympathetic to the concerns of ethnic peoples. The real balance of power in the upper house will therefore be that the minorities control only three-eighths (because they control 75% of the representatives from the ethnic states, which are one-half of the upper house), and the majority will control five-eighths (because they control all the representatives from the regions and 25% of the representatives from the ethnic states).

Second, although the upper house will be composed of equal numbers of representatives from each state or region, it appears that some of those representatives will come from specially designated territories and self-administered areas within the states and regions. The language is not clear, but it is important: "equal numbers from each region or state inclusive of Union territories and including one representative from each self-administered division or self-administered zone." Principle IV/13(a). in other words, each state is allocated twelve representatives, but from that number must come representatives from these special areas. The Principles are not explicit about how these representatives will be chosen, but they might shift the ethnic balance of the upper house still further.

The provision seems to contemplate different arrangements for representatives from territories and representatives from the self-administered areas, so it is important to separate the two. With respect to the self-administered areas: each will send one representative to the upper house, so that the number of representatives chosen by the other people of the state will go down. If a state has four self-administered areas, the voters in the rest of the state will command only eight representatives. Because it is likely that the self-administered areas will be concentrated in ethnic minority states, this provision is likely to reduce their power still further. Of course, representatives from these areas may be sympathetic to minority concerns, but they may not be, because the Principles do not specify how the representatives from those areas will be chosen and whether they will be truly independent. As we will see, the President will largely control the "leading bodies" of those areas: they are regarded as administrative

units of the executive branch, even though the voters choose some members of the leading bodies. It seems likely therefore that the President will also dominate the representatives from these areas to the upper house of the union legislature.

In addition, the union territories will be sending representatives to the upper house, but it is entirely unclear how this process will work. The provision may mean only that voters in the territories participate in the elections to the upper house in the same way as all the other citizens of the state. If that is the meaning, then the provision may not change the ethnic balance of the upper house very much.

But the language might mean that the union territories will each receive some number of their own representatives to the upper house, to be drawn from the number allocated to the surrounding state. If the territories are heavily Burman, then the provision would shift the balance in the upper house still further away from the minorities. And there is reason to believe that the territories might well be heavily Burman because of the way that they will be formed. The Principles stipulate that the Capital of the Union Nay Pyi Taw shall form a union territory, see Principle II/5(a), and majority Burmans will probably control the representatives from that territory. The Principles provide that further territories could be created: "if the need arises to designate areas that have special situation in connection with national defence, security, administration, and economy etc. as Union territories they may also be designated as Union territories after enacting laws." Principle II/5(b). The Principles are not very clear about the process for creating new territories; it would appear that the legislature would have at least some role in "enacting laws." But as we will see, the lower house will really control the legislature, so that the majority Burmans will be deciding how many new territories are needed and where they should be. In addition, the Principles specifically provide that new territories may be created for reasons of "national defence" and "security"—areas in which the Principles give the Tatmadaw almost carte blanche as we will see. The Tatmadaw and the lower house could use this power to create new territories, dominated by the majority, that would take representatives away from the minority populations of the state.

In short, then the minorities will not control the upper house when the constitution is enacted, and as time goes on, their share of power will likely decrease if new Union territories are created with their own representatives to the upper house.

[…]

b. Under the NC Principles, the Upper House will be powerless.

In short, then, the ethnic minorities will not control the upper house under the NC's principles. But even If they do, it will make little difference because the upper house is by far the weakest element of the union government. As we will see, the Burman majority will control the president, who will have enormous power, so much so that the legislature will probably function mostly as an advisory body. In addition, the majority will control the lower house, and under the principles, whenever the upper house and lower house disagree, the lower house will win.

In some bicameral systems, both houses must consent before a bill can become law: the upper house cannot act without the lower, and the lower cannot act without the other. Such a system would ideally balance power in the government, so that majority and minorities must learn to seek each other's support and understanding.

But that is not how the legislature will work under the NC Principles. If the upper house and the lower house cannot agree, then the question shall be decided by the two houses sitting together as a joint body: "If there arises disagreement between the Pyithu Hluttaw [the lower house] and the Amyotha Hluttaw [the upper house] concerning a bill, the bill shall be discussed and approved in the Pyidaungsu Hluttaw [both houses sitting together]." Principles on Legislature of Hluttaws 19. In addition, the Principles provide that certain matters "shall be initiated exclusively in the Pyidaungsu Hluttaw," Principles on Pyithu Hluttaw and Amyotha Hluttaw 11(a) and (b), so that the upper house will not even be able to meet separately to consider the issue and hold its own—overrideable—vote. It is not entirely clear from the Principles which issues belong exclusively to the Pysidaungsu Hluttaw, but apparently they include such important matters as over-riding presidential vetoes, see Principles on Legislature of Hluttaws 21(a) the ratification of treaties, see Principles on Legislature of Hluttaws 14, and crucially, ratifying executive orders that have the force of law, see Principles on Legislature of Hluttaws 15(b).

In short, then, under the NC's Principles, Burma will not have a truly bicameral legislature. Instead, it will have a unicameral legislature—the Pyidaungsu Hluttaw, consisting of the two houses sitting together--where some questions must initiate and where all questions end up in the case of disagreement between the two houses. In that unicameral legislature, the members of the lower house will dominate simply because there will be more of them than members of the upper house. Under the Principles, the lower house will have 440 members, see Principle IV/4, and the upper house will have only

224 members, see Principle IV/13. To be sure, some of the members of the lower house may be ethnic minorities, but because representation in the lower house will be based on population, the ethnic minorities will have no more than a proportional share—perhaps 35%. And in fact, they will likely have many fewer than that, as many electoral systems disfavor the minority—as exemplified by the results of the 1990 election in Burma.

In short, then, as we have seen, ethnic minorities will control no more than 3/8 of the upper house (eighty-four members) and no more than 35% of the lower house (154 members), for a total of 238 members in the Pyidaungsu Hluttaw, which is 35% of the total with both houses sitting together—and likely they will have substantially less than that. The majority will control the other 426 members. In the absolute best case scenario, then, the minorities will hold 35% of the power in a unicameral majoritarian legislature. The whole point in bicameralism was to give the minorities a disproportionate share of power so that they would not be over-whelmed by majority rule and have a stake in the system. On their face, the NC's Principles appear to acknowledge the importance of that goal, but when all is said and done, they would return the country to a pure majoritarian system.

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Part D: Criminal Accountability

(D . 1)
Momentum Building for Criminal Accountability Campaign

For decades, the people of Burma have suffered extreme oppression under the rule of the military regime, the State Peace and Development Council (SPDC). The most horrific of the regime's acts, such as murder, rape, and torture, have been widespread and part of government policy. They are not merely human rights violations; rather they are crimes against humanity and war crimes that must be brought to justice.

In August 2007, the Global Justice Center (GJC), Burma Lawyers' Council (BLC) and Network for Human Rights Documentation – Burma (ND-Burma) met to formulate a strategy to end impunity for these crimes and hold perpetrators accountable by means of international justice mechanisms. The primary objective is to obtain a UN Security Council referral of the crimes to the International Criminal Court. This campaign for criminal accountability has now become a worldwide effort among numerous organizations and individuals to finally end the SPDC's reign of terror.

This timeline describes some of the highlights as the campaign continues to build momentum.

- August 2007: BLC, GJC and ND-Burma held three days of meetings to discuss how to hold perpetrators of heinous crimes in Burma accountable.
- August 2007: BLC published in its *Lawka Pala* legal journal an important legal strategy paper written by GJC President Janet Benshoof entitled "The Changing Landscape of International Law: The Global Responsibility to Prosecute Perpetrators of Grave Crimes Inflicted on the People of Burma".
- August 29, 2007: Australian Shadow Minister for Foreign Affairs Robert McClelland (currently Attorney General of Australia) called on Australia to request the UN Security Council to authorize the ICC to commence investigations into Burma's leaders for crimes against humanity.
- September 25, 2007: BLC and GJC officially executed a Memorandum of Understanding expressing their desire to work as partners to enforce the rights under international law of redress and accountability for victims of heinous crimes in Burma, focusing on the International Criminal Court.
- September 29, 2007: The Nation newspaper in Thailand published an editorial by the BLC and GJC urging the UN Security Council to take all actions necessary to stop the murders of innocent people in Burma and hold the military junta commanders criminally accountable.
- November 1, 2007: Journalist Bertil Lintner discussed in his Irrawaddy article how it has become necessary to explore ways of holding the SPDC leaders accountable through international justice mechanisms, including the ICC.
- November 22 – 23, 2007: The BLC and Union for Civil Liberty organized a Consultation in Bangkok on the International Criminal Court and the Rule of Law in Burma and Thailand that was supported by the Coalition for the

International Criminal Court - Asia (CICC-Asia) and the International Federation for Human Rights (FIDH). Speakers included an attorney authorized to practice before the ICC, a human rights expert and a Program Officer from FIDH, the Coordinator for CICC – Asia, and Legal Adviser for the International Committee of the Red Cross.

- February 1, 2008: The National Council of the Union of Burma formally endorsed the Campaign for Criminal Accountability.
- From February 18 - 22, BLC General Secretary U Aung Htoo, GJC President Janet Benshoof and Vice President Andi Friedman traveled to London to increase awareness of the criminal accountability campaign. They met with:
  – The Director of the UK Campaign for Burma, Ms. Anna Roberts.
  – The UK House of Lords.
  – The Honorable Baroness Scotland, Attorney General of the UK.
  – Ms. Sappho Dias of the Burma Justice Committee, comprising 34 experienced UK lawyers, primarily from the Queen's Council, dedicated to working for the rule of law and justice in Burma. Ms. Dias is the granddaughter of U Rashid (former Education Minister of Burma prior to the 1962 coup) and a Barrister in Law.
  – Director of War Crimes Emma Davies and Burma Desk representative Nigel Boud from the UK Foreign Commonwealth Office.
  – The Burmese community in London, including representatives of Burmese women's groups, the Burmese Muslim Association and NCUB representatives.
  – The Venerable U Uttara, secretary of International Burmese Monks Organization.
- March 17 - 18, 2008: BLC General Secretary provided training on the ICC to the Karen Human Rights Group.
- April 7, 2008: The BLC and ND-Burma entered into a Memorandum of Understanding to eliminate impunity for crimes by focusing on the collection and analysis of evidence. Shortly thereafter, the two organizations formed working teams that meet regularly to create an evidence database and prepare an analysis report.
- April 14, 2008: The GJC, BLC and Burma Justice Committee issued a press release denouncing the SPDC's attempt to give itself criminal immunity in the constitution.
- April 30 - May 4, 2008: The BLC General Secretary traveled to Sydney, Australia to discuss, among other things, the criminal accountability campaign. He met with:
  – A number of leading Burmese activists in Australia.
  – About 65 activists from different organizations at a symposium conducted by Joint Action Committee.
  – About 20 ABSDF activists.
  – Mr. John Kaye, a member of the Australia Legislative Council.
  – He was interviewed by the Sydney Morning Herald, one of the top newspapers in Sydney, and the Australian Broadcasting Center.
- May 5, 2008: The Far Eastern Economic Review published an article authored by BLC General Secretary U Aung Htoo and GJC President Janet Benshoof condemning the SPDC Constitution and urging an ICC referral.

- May 7 – 15, 2008: The BLC General Secretary traveled to Tokyo, Japan, where he participated in a number of activities involving criminal accountability.
  – Gave a speech at a Symposium with Japanese lawyers to over 100 participants and activists.
  – Met with six Japanese Members of Parliament from both the House of Representatives and the House of Councilors, including two senators who played a crucial role in persuading the Japanese government to ratify the Rome Statue.
  – Met with Mr. Akira Kawamura, Secretary General of International Bar Association, Mr. Kohki Abe, Professor of Law, Kanagawa University School of Law, Yokohama, Mr. Kiyohiko Toyama, Member, House of Councilors and Chairperson, Committee on Judicial Affairs, and the offices of Morrison & Foerster, the largest law firm in Tokyo.
  – Held a press conference in the presence of the Asahi Shimbun, Yomiuri Shimbun, Kyodo News, Jiji Press and Human Rights Watch.
  – Met about 30 Burmese leaders of the Joint Action Committee and discussed how they can advocate within the political and legal community of Japan, focusing on criminal accountability.
  – Met with about 100 participants in a meeting organized by People's Forum on Burma, an association of Japanese MPs, Japanese lawyers and Burmese activists, where he discussed Burma's background of heinous crimes and the importance of criminal accountability.
  – Attended Parliamentarians for Global Action (PGA) meeting at the National Diet entitled "Strategy Meeting on the International Criminal Court (ICC) and the Responsibility to Protect the Civilian Population in Darfur and Tibet". It was attended by 10 MPs, including Ms. Yoriko Kawaguchi, former Minister of Foreign Affairs, Ms. Mayumi Moriyama, former Minister of Justice, diplomats and some academicians. Dr. David Donat Cattin, Director of the International Law and Human Rights Programme, PGA, said that a referral of Burma to the ICC is quite possible from the legal perspective.
- May 12, 2008: International Crisis Group President suggested that a prima facie case for crimes against humanity exists as a result of the military regime's actions after Cyclone Nargis.
- May 22, 2008: European Parliament recommended use of ICC to hold SPDC accountable for crimes and calls on EU Member States to press for a UN Security Council resolution referring the case to the ICC for investigation and prosecution. The ICC language was only included after extensive lobbying efforts from the GJC.
- May 22, 2008: In the wake of the SPDC's criminal behavior after Cyclone Nargis, the International Federation for Human Rights (FIDH) joined the BLC and GJC in calling for criminal accountability at the ICC.
- May 24, 2008: Andrew Mitchell, the UK Tory Party's shadow international development secretary, said that the regime's leaders should be brought to the ICC to face charges of crimes against humanity.
- May 27, 2008: Christian Solidarity Worldwide joined the GJC and BLC in urging the UK to use its presidency of the UN Security Council to press for justice and accountability by referring the military regime to the ICC.

- June 5, 2008: Amnesty International released a report detailing extensive crimes against humanity perpetrated by the SPDC.
- June 17, 2008: U.S. Senator John Kerry sent a letter to the U.S. Secretary of State expressing his grave concerns over the Burmese military junta's restricting foreign aid after Cyclone Nargis, and asked for a legal opinion on whether the junta's actions may constitute "crimes against humanity" under international law.
- June 19, 2008: All Burma Monks Alliance called on the European Union to bring Than Shwe before an international criminal court to face charges of crimes against humanity.
- June 20, 2008: The Karen Women's Organization and Palaung Women's Organization joined the GJC and BLC in recognizing the importance of historic UN Security Council Resolution 1820 on sexual violence in armed conflict and called for the Security Council to use its Chapter VII powers to refer the military junta to the ICC.
- June 24, 2008: Women's League of Burma called on the UN Security Council to refer top leaders of the Burmese military junta to the ICC for war crimes and crimes against humanity.
- June 27, 2008: BLC General Secretary met with ASEAN MPs in Mae Sod, Thailand to discuss criminal accountability.
- June 30 – July 2, 2008: GJC Vice-President met with Amnesty International, Burma Campaign UK and UK Foreign Commonwealth Office to continue ICC discussions.
- August 1, 2008: Sasanamoli International Burmese Monks Organization wrote an open letter to the European Parliament requesting the EU to push all Security Council members for a Chapter VII referral to the ICC, including accountability for violations of the Genocide Convention and Geneva Conventions.
- August 9, 2008: The BLC met with Tomás Ojea Quintana, United Nations Special Rapporteur, to discuss the legal situation in Burma and the criminal accountability campaign.
- August 24, 2008: The BLC General Secretary and Staff Attorney met with three Japanese Members of Parliament in Bangkok during their mandated delegation to discuss the legal situation in Burma and criminal accountability.
- September 1, 2008: Women's League of Burma and BLC met to discuss how the WLB can formally join the criminal accountability campaign.
- October 29 – November 1, 2008: BLC General Secretary U Aung Htoo introduced criminal accountability and the ICC to an esteemed audience at the 21st Conference of LawAsia in Kuala Lumpur, Malaysia.

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(D . 2)

Perspective

The International Criminal Court's Indictment of the Sudanese President for Genocide in Darfur and its Relevance to Burma

By B.K. Sen
September 2008

Burma is a country that has been under military rule for decades. Human rights violations, crimes against humanity and systematic aggression against ethnic minorities have been widespread. Those who have been fighting for change, political reform and good governance have been thrown in prison. Inhuman conditions prevail in prisons and selective torture is carried out. To hold the perpetrators accountable is not an easy matter. The Darfur example shows the challenges that the activists of Burma will confront in their pursuit to realize transitional justice.

To date, 106 States have signed the Rome Statute that led to the creation of the International Criminal Court (ICC). The US is not a member of the ICC. Former U.S. President Bill Clinton had a big role to play in the creation of the ICC. In fact, he signed the 1988 Rome Statute but the treaty was never submitted to the US Senate for ratification. The Bush administration officially withdrew the signature. The double standard of the Bush administration was yet again demonstrated when it was reluctant to lend legitimacy to the ICC's jurisdiction despite its antipathy towards the government in Khartoum.

In the Sudan conflict, the ICC Prosecutor has sought the arrest of the Sudanese President. The UN Secretary-General was quick to distance himself. He said the move would have very serious consequences for peace keeping operations and the political process. The Arab League and African Union have said that the ICC move could adversely impact the peace process in Darfur. The Chinese government has expressed “grave concerns and misgivings" over the ICC Prosecutor's decision. China had taken credit for persuading the Sudanese government to agree to the joint deployment of AU/ UN forces in Darfur. International Crisis Group has also criticized the ICC's move. Sudan is going to polls in 2009 and the President has promised a free and fair election. “Save Darfur" activists and human rights activists in the West have labeled the conflict in Sudan as "genocide". But the contrary view is that the conflict is political and the peace process should not be destabilized by outside elements. There is a fear that the West will selectively target elected heads of the State, such as the President of Sudan, and a precedent may be set.

President al-Basher has described the Prosecutor’s accusations as "lies” and said that the ICC has no jurisdiction over Sudan. The main allegations against him were

based on his command responsibility. The Sudanese government has refused to hand over two senior officials earlier indicted by the ICC on war crimes charges. Sudan's position is that it is not a member of the ICC and the court has no jurisdiction over Sudan. The ICC's move has led to protests on the streets and all political parties except the separatist groups have condemned the ICC.

The ICC has the authority to act against the Sudanese President on the basis of a UN Security Council mandate. The Security Council passed Resolution 1593 in March 2005 referring the situation in Darfur to the ICC Prosecutor. The Chief Prosecutor requested a warrant on 10 counts which include allegations of murder, torture and rape. Eighteen ICC judges will weigh the evidence and then decide. Under Article 16 of the Rome Statute, the Security Council has the power to suspend any indictment as part of a "deferral of investigation and prosecution." Russia and China, both veto wielding States, have indicated that they would thwart any attempts to isolate Sudan and its President. Many Sudanese and even the UN want al-Bashir at the helm to revive the faltering peace negotiations in Darfur.

Burma has made attempts to take the case of human rights violations to the Security Council and ICC. All have been aborted. The interest of the international community unfortunately is lukewarm. The US has been at the forefront in condemning Burma's junta but now thinks that the neighboring countries have to play an active role to move the peace process. In that category China is the only country which can influence the junta in Burma. The newly appointed UN Human Rights Commissioner or the Special Envoy can do little. The US has a huge trading interest in China and China is critically dependent on US investment. The US' leverage has to be used to remind China of the risk in not cooperating with the US and the international community. The election in 2010 scheduled by the junta is elusive and has to be nullified and genuine peace talks have to be revived in line with the new initiative that Daw Aung San Su Kyi has released. There must be a time frame and the talks must be made at the highest level by those who wield decision making powers. The pressure on the Security Council and the ICC has to be built up but the focus on peace talks has to be intensified. Law has a long hand and the junta knows it well.

Part E: Political Developments

(E . 1)

Dictators Cannot Bury Democracy

By B.K. Sen
September 2008

Burma appears to be calm and in a vicious cycle. The military crack-down on Buddhist monks, the devastation caused by Cyclone Nargis, the refusal of the junta to accept humanitarian assistance in the face of millions of deaths, the systematic violation of human rights for decades, the brute force used in refusing to restore democracy in terms of the mandate of 1990 Election - all these tragedies seem to have never happened. The desperate attempt to earn respectability and legitimacy continues. Unfurling a Constitution defying all norms and making a show of acceptance in an equally fraudulent referendum were only signs of the junta's bankruptcy. The junta is running out of options. Fixing 2010 as the time to hold elections is the last card. The day of democratic reckoning is inevitable.

History will repeat itself, as it did in respect of the 1974 Constitution. It was inherently anti-people. It collapsed in spite of Dr. Maung Maung's desperate attempt to save it by an amendment. The SPDC's Constitution is also inherently anti-democratic and no façade of democracy can save it on the day of reckoning. In Pakistan, a country long plagued by military dictators, constitutional rule came and fell. Military dictators seized power and tried to prevent the restoration of constitutional rule notwithstanding the fact that some of the dictators did set up a façade of constitutional rule. Pakistan is a classic case study where the military dictators abysmally failed to bury democracy. The dictators in Burma may ignore this but to the activists the case is a source of great inspiration.

On January 30, Daw Aung San Suu Kyi publicized her new initiative within the framework of an on-going "dialogue process". The occasion was the outcome of the visit by the UN Secretary General's Special Envoy last October after the crackdown of the Saffron upheaval. The Envoy's effort to bring about reluctant and subsequent talks with Daw Su Kyi speaks volumes of her undying relevance to the democracy movement in Burma. Than Shwe agreed to start a "dialogue process" and a liaison officer to engage with her was subsequently appointed. Democratic activists long disillusioned about Than Shwe's trickery dismissed it as an empty gesture aimed to diminish the external pressure on the junta. But the significance ought not to be missed, namely Daw Suu Kyi met her NLD associates and told them that she had asked the liaison officer to convey her

message to Than Shwe that the dialogue has to be facilitated at the "highest" political level. Her proposal in essence was that she has to meet the decision-maker/policy-maker to bring about any substantive progress in the ongoing "dialogue process", "time bound" with no "prior conditions from both sides". The purpose of this new initiative was to test for the SPDC's real game plan and at the same time to quicken the pace of a negotiated settlement of the basic democracy issue. The political context of the initiative is as important as its substance. The message is clear that nothing can move within the parameters of the road map that the junta has lain down. The question has to be answered, what happens to the long labored exercise that the junta has produced in placing a Constitution before the country? Will the junta give it up and go for talks which eventually will dislodge it from the seat of power? Not likely. The only option that the activists have is to patiently build in the minds of the people that rule of law will triumph. Frustration and fatigue have to be prevented, adventurism must be avoided and people's faith in ultimate victory promoted. Daw Aung San Suu Kyi has taken a new initiative. She has asked for talks only at the highest level and refused to meet the liaison officer and UN Envoy. It is for the people to build up resistance to erode the junta rule.

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(E . 2)

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BLC Supports the UN Credentials Challenge and Urges United Opposition to the SPDC Roadmap

1. On 9 September 2008, Members of Parliament Union, National Council of the Union of Burma and International Burmese Monks Association submitted a petition to the United Nations challenging the right of the State Peace and Development Council (SPDC) to represent Burma in the UN General Assembly. If successful, the challenge could replace the SPDC representatives at the UN with democratically elected representatives of MPU.

2. The Burma Lawyers' Council wholeheartedly supports the credentials challenge, which is an important step in undermining the SPDC's plan to gain legitimacy. We must not let the passage of time and the frustration over a lack of progress lull us into accepting the SPDC's unlawful seizure of power through military coup and their refusal to acknowledge the results of the free and fair elections held in 1990.

3. Through its seven-step "road map" to democracy, the SPDC has been attempting to legitimize its rule in the eyes of the Burmese people and the international community. All of its so-called "progress", however, has been achieved through deception, coercion and oppression. The first step, the National Convention, was attended primarily by handpicked lackeys of the regime. Major opposition ethnic groups and political parties such as the National League for Democracy refused to participate. The Convention was characterized by a complete lack of dialogue and free exchange of ideas. In fact, the SPDC issued a law prohibiting criticism of the National Convention, by which many activists have been imprisoned. Participants in the Convention who escaped to Thailand have related how, during "discussions", they had to follow a government script provided in advance. They rightfully called the process a "sham National Convention". The National Convention was a clear maneuver by the SPDC to create a façade of democratic dialogue.

4. The Constitution that resulted from the Convention also creates an appearance of democracy. After peeling away its surface, however, it becomes obvious that at the heart of the Constitution is continued military dominance. At a minimum, the military will control 25% of the Parliament, which will allow it to automatically veto major decisions such as constitutional amendments. The judiciary will be appointed and removed at the whim of the executive, which will also be controlled by the military. Basic rights are completely undermined by exception clauses that permit the government to suspend rights in the name of national security or to enforce currently existing oppressive laws. The Constitution even provides legal amnesty for SPDC officials for crimes they have committed. Like the National Convention, the Constitution is a military ploy to lend the regime legitimacy. We must not fall into this trap.

5. Similarly, the constitutional referendum held in May 2008 was characterized by a complete lack of respect for democratic principles, rule of law and fairness. First, the constitution was not released until about one month before the referendum, giving people no time to actually study it – in a survey of 2,000 voters, 69% said they were not aware of the details in the constitution. *("Burma News International: Release of nationwide voters survey on the Burmese referendum", BURMANET NEWS, May 7, 2008)*. Even today many people inside Burma have not seen the constitution and it has not been made available in ethnic languages. Moreover, the SPDC refused to delay the voting when the country was reeling from Cyclone Nargis. Before and during the voting, the SPDC implemented a number of strategies to coerce or trick people into voting "yes". For instance, SPDC agents pointed to the "yes" box when giving voting instructions, forced families to vote together, and threatened to imprison individual voters or cut off water to villages that did not achieve an 80% "yes" vote. *("Burmese Constitutional Referendum: Neither Free Nor Fair", The Public International Law & Policy Group, May 2008)*. Other reports told of destruction of "no" ballots and ballots prefilled with names and "yes" votes.

6. The planned election in 2010 is the latest of the SPDC's attempts to legalize its rule. To finally nullify the 1990 election results and legitimize its own rule, the SPDC is trying to convince the people of Burma and the international community that it genuinely intends to hand over the government to democratically elected bodies. In reality, though, the SPDC continues its manipulation of hopeful people and nations around the world. Based on the experiences with the National Convention, referendum and constitution, there is no possibility that the 2010 elections will be free and

fair. UN Special Envoy Ibrahim Gambari has urged participation in the elections. This is a dangerous statement that must be challenged.

7. The SPDC's manipulation of the judiciary is an additional tactic used to create the impression that the SPDC's actions are lawful and legitimate. To justify their imprisonment of political opponents, oppression of monks, and widespread murder of ethnic minorities, the SPDC argues that it has the right to create laws, the laws must be enforced, and the judiciary has the duty to apply the existing laws. This argument completely ignores crucial facts: first, the SPDC does not have the right to pass laws because it is not a legitimate government; second, the SPDC laws violate international laws and norms, with which Burma as a member state of the United Nations must comply; and third, the existing, valid laws must be applied fairly and correctly. The BLC's work over the last 14 years clearly shows that the SPDC laws are patently inconsistent with universally accepted international norms and in all cases in which the SPDC has an interest, the judiciary ignores or misapplies laws to favor the regime. Using the judiciary to rubber stamp convictions does not make those convictions valid.

8. The BLC urges the people of Burma, democratic opposition groups and the international community to boycott the 2010 elections. There should be no cooperation with the 2008 constitution. While the fight for positive change should continue, it must take place outside the framework of the current constitution. The sham National Convention and Referendum were clear evidence that working from within the SPDC guidelines leaves no room for dialogue and constructive cooperation.

Burma Lawyers' Council
26 September 2008

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Part F : Recent BLC Activities

(F . 1)

BLC Lawyers and Staff Provide Legal Training to Karenni Refugees

From November 6 – 8, the BLC offered training on fair trial, criminal law, criminal procedure and administrative matters to Karenni refugees in Karenni Camp, Lansue Village, Mae Hong Song District, Thailand. The training was in response to a request by the Karenni Camp Committee, which was notified by Thai authorities that they could implement their own justice system so long as it was consistent with Thai laws.

A total of 18 people attended the trainings, including members of the Karenni Camp Committee, camp judiciary, camp security, camp educators, KnYO (Karenni Youth Organization), KnWO (Karenni Women's Organization), as well as staff of the camp hospital and the IRC (International Rescue Committee).

On the first day, BLC General Secretary U Aung Htoo presented the fundamental concepts of a criminal code. On the second day, BLC Executive Board Members U Myint Thein and U Hkun Okker gave presentations on fair trial and criminal procedure. On the last day, all participants discussed the camp administration manual. The KnWO asked the BLC General Secretary about BLC activities and the General Secretary's experiences. They also requested that U Myint Thein and U Hkun Okker discuss the Burma Constitution and political background of Burma. Naw Ku, Coordinator of BLC's Legal Aid Section, discussed the activities of the Legal Aid Section and BLC office staff member U Htun Htun talked about how to cooperate with other NGOs.

The attendees gained knowledge from the BLC about rule of law and fair trial concepts to improve camp law, identify and overcome difficulties, and learn how to create their own laws. The improvements are a result of the combined cooperation among the BLC, IRC, camp NGOs and camp administrators.

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(F . 2)

BLC Collaborates with Democratic Voice of Burma to Film Television Program on Legal Topics

From November 11 – 12, the Burma Lawyers' Council (BLC), Democratic Voice of Burma (DVB), Palaung Youth Network Group (PYNG) and All Arakan Student and Youth Congress (ASYC) collaborated to create a television program entitled "Rule of Law Discussion". The program, which consisted of three parts on constitutional matters and three on rule of law, will be broadcast in 2009 inside Burma. The BLC is the first organization to take advantage of the power of television inside Burma to educate viewers on legal issues.

The program's six parts were as follows:

1) Introductory Concepts of a Constitution (presented by Lway Palanchay from PYNG and U Thar Htoo from BLC)
2) Strengths and Weaknesses of the 1947 Burmese Constitution (presented by U Kyaw Htwee from ASYC and Nant Hsan Hsar Hpound from BLC)
3) Essence and Effects of the 1974 Burmese Constitution (presented by U San Htwee from ASYC and Mai Moe Kote from PYNG)
4) Burma Judiciary and Rule of Law (presented by U Myo and Nant Hsan Hsar Hpound from BLC)
5) Analysis of Suffocation Case of 54 Migrant Workers (presented by Naw Ku and U Naing Naing from BLC)
6) Reforming the Fundamental Rule of Law of a Future Democratic Burma by Sending the SPDC to the ICC for the Perpetration of Serious Crimes and Abuses (presented by U Thar Htoo and Daw Ei Phyu from the BLC)

Future television programs between the DVB and BLC have also been planned.

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Burma Lawyers' Council

EVERYONE IS EQUAL BEFORE THE LAW.

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

Mission Statement

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

The Status of Organization

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

Objectives of the BLC

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

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