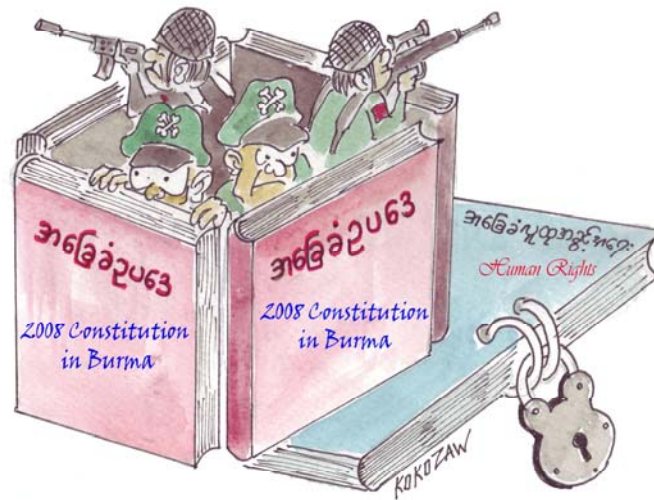


# AN ANALYSIS OF THE ELECTIONS IN BURMA IN 2010 AND THE FOLLOWING PERIOD



နာမ၏ ဖွဲ့စည်းပုံ အခြေခံဥပဒေသည် စစ်ခေါင်းဆောင်များနှင့် အစိုးရအာဏာပိုင်များ၏ အာဏာကို ကျယ်ပြန့်စွာ  
အပ်နှံပေးထားပြီး လူထု၏ အခြေခံအခွင့်အရေးများကို ကန့်သတ်ထားသည်။



THE RULE OF LAW AND DEMOCRATIZATION:  
AN ANALYSIS FROM A HUMAN RIGHTS PERSPECTIVE



COMPILED BY THE BURMA LAWYERS' COUNCIL  
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## INTRODUCTION

For the past fifty years, military dictators have ruled Burma destroying the economy, abolishing rule of law, and perpetuating thousands of human rights violations against its own population. The military regime known as the State Peace and Development Council (SPDC) regularly enlists child soldiers, uses sexual violence against the civilian population, has forcibly displaced and destroyed over 3,000 ethnic villages, and carries out executions with impunity.<sup>1</sup> The state currently holds over 2,000 political prisoners, including Nobel Peace Prize Laureate Daw Aung San Suu Kyi, and has refused repeated calls for release or trials. The international community's efforts to both isolate and engage the military junta have failed to produce results. The regime has announced that elections will assuredly be held in 2010 as an implementation of its military-dominated Constitution, which was forcibly approved in May 2008.

The Burma Lawyers' Council has attempted to produce a comprehensive analysis of the forthcoming 2010 election by scrutinizing the political will of the regime, highlighting historical experiences of elections in Burma with reference to relevant constitutions, exploring election standards that should be applied in Burma, responding to the misconceptions of the international community regarding the 2008 Constitution and 2010 election, analyzing the probability of free and fair elections under current political conditions in Burma, and exploring the issue of impunity arising from the regime's 2008 Constitution as well as the responsibility of the international community. This paper, in addition, proposes concrete steps for the peaceful democratization of Burma on the basis of Rule of Law and human rights.

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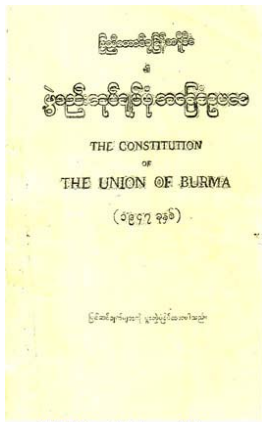
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<sup>1</sup> International Human Rights Clinic at Harvard Law School, 'Crimes in Burma' (2009)  
<<http://www.law.harvard.edu/programs/hrp/documents/Crimes-in-Burma.pdf>> accessed 16 October 2009.

# I. BACKGROUND OF BURMA: CONSTITUTIONS, ELECTIONS, AND POLITICAL WILL

## A. THE 1947 CONSTITUTION AND ELECTIONS

In 1948, Burma gained independence from Britain and established a multi-party, democratic state with a bicameral parliament in accordance with the 1947 Constitution.<sup>2</sup> Democratic elections were held and the parliament was comprised of a Chamber of Deputies<sup>3</sup> (apportioned by population) and Chamber of Nationalities<sup>4</sup> (apportioned by constituent units of the Union). An open market economy was exercised and individual rights were legally guaranteed<sup>5</sup> and protected<sup>6</sup>. Additionally, an independent judicial system<sup>7</sup> was created to check the power of the legislative and executive branches. General elections were held once every four years under the 1947 Constitution and were—to a large extent—free, fair, and inclusive.



1947 Constitution of Burma

Unfortunately, the 1947 Constitution did not provide equitably for the non-Burman ethnic states that stand as the constituent units of the Union. Economic development occurred in the lowland areas of Burma where the Burman or ethnic Burmese,<sup>8</sup> who constitute a majority population of the country, had been residing and benefiting the most. Meanwhile, the mountainous regions of the non-Burman ethnic minorities remained untouched. Due to the stipulations for representation outlined in the constitution,<sup>9</sup> Burman representatives outnumbered non-Burman representatives within the parliament and, thus, in decision-making processes.

The non-Burman ethnic leaders realized that Burmans would overwhelmingly occupy the Chamber of Deputies as it was to be based on the size of the population. Given that democracy in terms of majority rule was appreciated, they did not debate this fact. However, they were dissatisfied with the formation of the Chamber of Nationalities as their analysis concluded that the Burman nationality influenced not only the Chamber of Deputies but also the Chamber of Nationalities.<sup>10</sup>



U Nu  
First Prime Minister of the Union of Burma

<sup>2</sup> Constitution of the Union of Burma (1947), Chapter VI.

<sup>3</sup> Constitution of the Union of Burma (1947), Articles 83 and 84.

<sup>4</sup> Constitution of the Union of Burma (1947), Articles 87, 88, and 89.

<sup>5</sup> Constitution of the Union of Burma (1947), Articles 13-23.

<sup>6</sup> Constitution of the Union of Burma (1947), Articles 24-29.

<sup>7</sup> Constitution of the Union of Burma (1947), Chapter VIII.

<sup>8</sup> The term “Burmese” was conceived by Chao-Tzang Yawngwe, the son of Burma’s first independent President Sao Shwe Theik.

<sup>9</sup> The Chamber of Nationalities consisted of 125 representatives: 25 from Shan, 24 from Karen, 12 from Kachin, 3 from Karenni, 8 from Chin, and 53 from Remaining Territories. Under the title of “Remaining Territories”, Burman Nationalities could also be represented in the Chamber of Nationalities.

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 intensified. A number of ethnic armed groups were founded during the ensuing sixty plus years of civil war.

## B. THE 1974 CONSTITUTION AND ELECTIONS

In 1962, General Ne Win led a coup d'état under the pretense of protecting the union from disintegration. The generals claimed that this drastic action was necessary because the Union was threatened by 'secessionist plots' of Shan princes.<sup>11</sup> The military coup ended the short-lived democracy and brought nearly every sector of society under state power. General Ne Win introduced a new constitution in 1974, which provided the political legitimacy to rule indefinitely and eliminated all political parties except his own—the Burma Socialist Program Party.<sup>12</sup>

The 1974 Constitution named seven ethnic states—Arakan, Chin, Kachin, Karen, Kayah (Karenni), Mon, and Shan—and divided the remaining Burmese territory into seven regions that each carried the same status as one ethnic group.<sup>13</sup> Additionally, the Chamber of Nationalities was abolished and a single People's Assembly<sup>14</sup> (apportioned by population) was established. Individual rights were curtailed and the state-run economy quickly impoverished the local citizens. Elections were held four times during General Ne Win's reign, but never in a democratic fashion. Throughout this time period, the military camouflaged themselves with



civilian dress and continued to rule the country through rigid centralization.

Hand-in-hand with centralization came "Burmanization", the attempt to inundate all cultures in Burma with ethnically Burman culture, ignoring or repressing inconvenient differences.<sup>15</sup> Though post-independence governments and regimes in Burma attempted to seek unity through the idea of a common Burmese identity shared by all the inhabitants of modern



<sup>10</sup> Aung Htoo, 'Ethnic Tensions in Burma' [2000] Panorama <<http://www.kas-asia.org/Panorama.htm#pano32000>> accessed 9 November 2009.

<sup>11</sup> Chao-Tzang Yawngwhwe, 'Burma and National Reconciliation: Ethnic Conflict and State-Society Dysfunction' (2001) 10 Legal Issues on Burma Journal <[http://www.blc-burma.org/activity\\_pub\\_liob.html](http://www.blc-burma.org/activity_pub_liob.html)> accessed 9 November 2009.

<sup>12</sup> Constitution of the Socialist Republic of the Union of Burma (1974), Article 11 states: 'The State shall adopt a single-party system. The Burma Socialist Program Party is the sole political party and it shall lead the State'.

<sup>13</sup> Constitution of the Socialist Republic of the Union of Burma (1974), Article 31.

<sup>14</sup> Constitution of the Socialist Republic of the Union of Burma (1974), Chapter IV.

<sup>15</sup> Louis Southalan, 'Issues of Self-determination in Burma' (2000) 5 Legal Issues on Burma Journal <[http://www.blc-burma.org/activity\\_pub\\_liob.html](http://www.blc-burma.org/activity_pub_liob.html)> accessed 9 November 2009.

Burma,<sup>16</sup> these campaigns sent negative messages to non-Burman ethnic nationalities. As a result, civil war gained momentum and Burma's economy suffered further; eventually the UN placed Burma on the "least developed country" list in 1987.<sup>17</sup>

Life under the repressive regime grew increasingly unbearable, resulting in widespread pro-democracy demonstrations that culminated in the 8888 Uprising on 8 August 1988. A harsh military crackdown led to thousands of deaths and General Saw Maung, in turn, orchestrated another coup d'état, creating the State Law and Order Restoration Council (SLORC).

### C. THE 1990 ELECTION AND THE ISSUE OF THE 1947 AND 1974 CONSTITUTIONS

In the face of international condemnation, SLORC agreed to carry out elections in the aftermath of its military coup. In its first announcement on assuming power on 18 September 1988, the military regime announced that it had taken control "to stage democratic multiparty general elections".<sup>18</sup> SLORC quickly promulgated the Political Parties Registration Act and permitted political parties to register, recruit members, and engage in limited political activities.



On 31 May 1989, SLORC enacted the People's Assembly Election Law "in order to hold free and fair multi-party democratic general elections and to elect representatives of the People's Assembly." According to Article 3 of the Election Law, "The People's Assembly shall be formed with the People's Assembly representatives who have been elected in accordance with this law." In its 43<sup>rd</sup> News Conference on 9 June 1989, SLORC announced:

Presently we have two constitutions in our country; that is the 1947 Constitution and the 1974 Constitution. ... The elected representatives can choose one of the constitutions to form a government, and we will transfer power to the government formed by them. We are ready to transfer power to the government that emerges according to the constitution. If they do not like the two existing constitutions, they can draw up the constitution...The elected representatives are to draw up the constitution.



The junta had anticipated a victory by the pro-military National Unity Party, the successor of the former ruling Burma Socialist Program Party, which was heavily financed and backed by the military. As an added measure, the NUP was given broad media coverage, which SLORC also controlled.

<sup>16</sup> See Martin Smith, *Burma: Insurgency and the politics of ethnicity* (2<sup>nd</sup> edn, Zed Books Ltd., London 1999) for further elaboration.

<sup>17</sup> 'Myanmar' *UN Development Policy and Analysis Division* (1987)

<[http://www.un.org/esa/policy/devplan/profile/country\\_129.html](http://www.un.org/esa/policy/devplan/profile/country_129.html)> accessed 13 November 2009.

<sup>18</sup> SLORC announcement No. 194 (16 February 1989).

In the 1990 election, the population shocked the military junta by voting overwhelmingly for the opposition National League for Democracy (NLD). The NLD won 82 percent of the vote, filling 392 out of 489 seats in the National Assembly. Following the stunning victory of the democracy parties in the May 1990 elections, it quickly became apparent that the military had no intention of transferring power to the newly elected Parliament. To deflect the mounting domestic and international pressure to recognize the election results and to convene the People's Assembly, SLORC announced that a new constitution had to be approved first. The same military regime, who has been ruling the country since September 18, 1988, held election in 1990 and will hold other elections in 2010 and the following period. The difference needs to be observed. In 1990, there was no constitution in Burma. The election winning party could assume political power and draw up a new constitution. As such, election in 1990 was meaningful and it might be a step forward to facilitate gradual democratization process. However, similar opportunities no longer exist in Burma now given that elections in 2010 and the following period shall be held within the framework of the 2008 Constitution.

#### **D. THE EMERGENCE OF A NEW MILITARY-DOMINATED CONSTITUTION**

In SLORC's first official statement of its position since the May elections, Major-General Khin Nyunt, First Secretary of SLORC, announced during SLORC's 100<sup>th</sup> News Conference on 13 July 1990:

At the present time we should consider the choice between the 1947 Constitution and the 1974 Constitution. It is evident, because of changing times and conditions, that neither constitution is now suitable or usable. So which constitution should we use in transferring power? We should draft a new constitution. For a strong government to emerge we should proceed systematically according to the law.

The winning parties are to work for the emergence of a resolute constitution in the long-term interests of the state and the entire people. The political parties are responsible for drafting the constitution.

As for our SLORC, we will not regard it as something that is of no concern to us. I would like to say that SLORC will give assistance as much as possible. ... [I]t is of concern to us and we are responsible for it.

Two weeks later, on the eve of a meeting of NLD representatives elected to the People's Assembly, SLORC issued Announcement No. 1/90 saying:

A political organization does not automatically obtain the three sovereign powers of legislative, administrative, and judicial powers by the emergence of a People's Assembly. These powers can only be obtained based on a constitution. ... The representatives elected by the people are responsible for drafting a constitution for the future democratic state.

However, SLORC completely annulled the election results. The representatives elected by the people were not even allowed to draft a constitution for the future democratic state. In



response to SLORC's statement regarding the drafting of a permanent constitution, the NLD representatives highlighted Point 9 of the Gandhi Hall Declaration:

Only the People's Assembly has the responsibility to adopt the new constitution. ... A constitution drawn up at any time and at any place other than the People's Assembly ... will not have an executive power [and] will not have any honor. It is of vital importance to convene the People's Assembly expeditiously so as to draw up a new constitution which aims at building a new democratic union aspired by the people.<sup>19</sup>

Instead of facilitating the drafting of the new constitution in conjunction with the representatives elected in the 1990 May election, SLORC commenced its National Convention in January 1993. In reality the National Convention was a sham. Almost all Convention delegates were not only pre-selected, but also tightly controlled to ensure their acquiescence to a constitution drafted entirely by the military. The representatives of the people elected in the May 1990 elections were wholly excluded from the constitution drafting process.

The regime adopted its military-dominated constitution forcibly by vote rigging and voter intimidation in the May 2008 Referendum while about one-third of the country was submerged under post-Cyclone Nargis floods. The SPDC blocked international aid in the most crucial time period immediately following the cyclone, and instead proceeded with the constitutional referendum. Cyclone Nargis eventually resulted in over 100,000 lost lives. No consideration was given to the needs of the citizens as homeless Burmese were mercilessly forced from temporary shelters at schools and monasteries to set up polling stations.<sup>20</sup> Though mired with blatant electoral fraud, the junta declared a 99 percent voter turnout for the referendum, with 92 percent in favor of the new constitution.<sup>21</sup>

Not only the people of Burma, but also the international community, as well as the regime itself formally approved the 1990 election results. Concurrent with their own laws, the military is still obliged to transfer power to the people's representatives elected in 1990 as a fulfillment of SLORC Announcement No. 1/90. Accordingly, any election to be held by the regime in 2010 or afterward will be illegitimate since the 1990 election results were never implemented—this is the reality of Rule of Law. However, if the term “reality” is only defined as the fact that the military still wields power, then the Rule of Law will never become a reality. Rather, the rule of military dictatorship will become the permanent reality in Burma.

According to the International Bar Association, “It is essential that the organs of state power—the executive branch, the armed forces, the police, the security services, even the Legislature and the Judiciary—all accept that they are subject to the law”.<sup>22</sup> The focal point of

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<sup>19</sup> ‘Gandhi Hall Declaration’ *National League for Democracy* (29 July 1990)

<[http://www.burmalibrary.org/docs/Gandhi\\_Hall\\_Declaration.htm](http://www.burmalibrary.org/docs/Gandhi_Hall_Declaration.htm)> accessed 10 November 2009.

<sup>20</sup> Human Rights Watch, ‘Burma: Stop Forced Evictions’ *Human Rights Watch* (29 May 2008)

<<http://www.hrw.org/en/news/2008/05/29/burma-stop-forced-evictions>> accessed 21 October 2009.

<sup>21</sup> ‘Burma “approves new constitution”’ *BBC News* (15 May 2008) <<http://news.bbc.co.uk/2/hi/asia-pacific/7402105.stm>> accessed 21 October 2009.

<sup>22</sup> ‘The Rule of Law: A commentary on the IBA Council’s Resolution of September 2005’ *International Bar Association* (July 2008) <<http://www.ibanet.org>> accessed 8 October 2009.

the political dialogue recommended to the junta by the UN<sup>23</sup> should be the “restoration of the Rule of Law in Burma”. The current practice of seeking boundless political negotiations undermines the Rule of Law principles and has a negative, long-term impact on human rights.

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<sup>23</sup> ‘Secretary-General’s briefing to the Security Council on Myanmar’ *UN Secretary General* (13 July 2009) <<http://www.un.org/apps/sg/sgstats.asp?nid=3970>> accessed on 9 November 2009.

## II. THE NEXUS BETWEEN THE 2008 CONSTITUTION AND 2010 ELECTION

The international community has repeatedly called for the junta to hold free and fair elections in 2010, as well as allow international monitors to observe, but this alone is an inadequate response to the overall political situation. Before focusing on the future, the international community must turn to the past and address the aspects of the 2008 Constitution that intrinsically flout democracy. First, the constitution was written without the consensus of stakeholders.<sup>24</sup> Second, it was presented to a population where 69 percent claimed to have “no awareness of the details of the proposed constitution”.<sup>25</sup> Third, though the UN has documented a multitude of human rights violations on the parts of SLORC and the SPDC, Article 445 promises impunity for military.<sup>26</sup> Thus, the very premise of the 2010 election as a step towards democracy is already compromised.



Additionally, the constitution contains major flaws related to each branch of government that do not represent democratic norms. In the legislative branch, 110 of the 440 seats of the *Pyithu Hluttaw* (People’s House) are reserved for military personnel.<sup>27</sup> The *Amyotha Hluttaw* (National Assembly) contains 224 seats, with 56 reserved for military personnel.<sup>28</sup> Thus, a full 25% of the *Pyidaungsu Hluttaw* (Union Parliament) would be comprised of military servicemen appointed by the Commander-in-Chief of Defense Services. This proportion has special significance because the 2008 Constitution can only be amended with over 75 percent of parliamentary approval.<sup>29</sup> As a result, it will be impossible to change the constitution without military approval.

The executive is headed by the President, which is chosen by the Presidential Electoral College (PEC).<sup>30</sup> The PEC is comprised of three bodies: one from each chamber of parliament, and one from the military personnel appointed by the Commander-in-Chief of Defense. Each group then nominates a vice presidential candidate from which the president will be chosen after a vote from the entire PEC. This ensures that an incumbent army official will hold one of the three head-of-state positions (either as President or one of two Vice Presidents). The constitution provides the executive with broad powers even though he is not elected by popular vote and, thus, is not accountable to the population.

<sup>24</sup> Larry Jagan, ‘Democracy and death in Myanmar’ *AsiaTimes* (29 May 2008)

<[http://www.atimes.com/atimes/Southeast\\_Asia/JE29Ae01.html](http://www.atimes.com/atimes/Southeast_Asia/JE29Ae01.html)> accessed 21 October 2009.

<sup>25</sup> ‘Burma News International: Release of nationwide voters survey on the Burmese referendum’

*BurmaNet News* (7 May 2008) <<http://www.burmanet.org/news/2008/05/07/burma-news-international-release-of-nationwide-voters-survey-on-the-burmese-referendum>> accessed 22 October 2009.

<sup>26</sup> Constitution of the Republic of the Union of Myanmar (2008), Article 445.

<sup>27</sup> Constitution of the Republic of the Union of Myanmar (2008), Article 109.

<sup>28</sup> Constitution of the Republic of the Union of Myanmar (2008), Article 141.

<sup>29</sup> Constitution of the Republic of the Union of Myanmar (2008), Article 436.

<sup>30</sup> Constitution of the Republic of the Union of Myanmar (2008), Article 60.

## **From the State Peace and Development Council (SPDC) to the National Defense and Security Council (NDSC)**

The new constitution also mandates the formation of an irregular council in the Executive branch called the National Defense and Security Council (NDSC).<sup>31</sup> The NDSC is comprised of eleven people representing various government bodies and ministries. However, the process used to choose representatives guarantees a majority of military officials in the NDSC. The President appoints ministers by selecting from among the *Hluttaw* representatives and a list of military candidates submitted by the Commander-in-Chief of Defense.<sup>32</sup> The ministers of defense, home affairs, and border affairs are exclusively appointed from the military candidates.<sup>33</sup> Thus, at least six of the eleven seats in the NDSC will be military personnel, which constitutes a requisite quorum to pass motions.

- **State President**
- Vice President
- Vice President
- Speaker of the People's House
- Speaker of the House of Nationalities
- **Commander-in-Chief of the Defense Services**
- **Deputy Commander-in-Chief of the Defense Services**
- **Minister for Defense**
- Minister for Foreign Affairs
- **Minister for Home Affairs**
- **Minister for Border Affairs**

The NDSC essentially exercises executive power in conjunction with the President, including the power to declare a state of emergency effective throughout the entire nation.<sup>34</sup> Under a prescribed state of emergency, all executive, legislative, and judicial power would be transferred to the Commander-in-Chief of Defense Services for up to one year, which can then be extended for another year.<sup>35</sup> If the parliament term ends during a state of emergency, then there are simply no representatives in the legislature until another election—as organized by the NDSC—can take place.<sup>36</sup> Thus, the military would run the country under constitutionally legal pretense.

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<sup>31</sup> Constitution of the Republic of the Union of Myanmar (2008), Article 201.

<sup>32</sup> Constitution of the Republic of the Union of Myanmar (2008), Article 232(b).

<sup>33</sup> Constitution of the Republic of the Union of Myanmar (2008), Article 232(b)(ii).

<sup>34</sup> Constitution of the Republic of the Union of Myanmar (2008), Article 417.

<sup>35</sup> Constitution of the Republic of the Union of Myanmar (2008), Article 418.

<sup>36</sup> *Id.*

### III. THE 2010 ELECTIONS: POLITICAL PARTIES AND ETHNIC ORGANIZATIONS

#### A. POLITICAL PARTIES

Chapter 10 of the 2008 Constitution outlines requirements for political parties. Paramount among the goals of political parties is “non-disintegration of the Union, non-disintegration of national solidarity and perpetuation of sovereignty”.<sup>37</sup> Additionally, the 2008 Constitution predetermines a set of unalterable party objectives. In liberal democracies, however, political parties are formed precisely to represent an array of viewpoints and offer different options to voters. The issue of set objectives is significant in the case of Burma because the majority of political parties disagree with the 2008 Constitution and will not comply with it. The regime cannot force a political party to change its agenda, but if a political party cannot adhere to the constitution, then it automatically disqualifies itself. Thus, objections to the constitution and failure to register as a political party under its guidelines may lead to cancellation of the legal status of the party. Without official legal status, the SPDC can effectively bar these groups from elections and government. This can be interpreted as a deliberate attempt to restrict the role of the opposition in political participation, which then renders the possibility of true multi-party democracy obsolete.

Article 407, discusses the justification for dissolving political parties by stating:

If a political party infringes one of the following stipulations, it shall have no right of continued existence:

- (a) having been declared an unlawful association under the existing law;
- (b) directly or indirectly contacting or abetting the insurgent group launching armed rebellion against the Union or the associations and persons determined by the Union to have committed terrorist acts or the association declared to be an unlawful association;
- (c) directly or indirectly receiving and expending financial, material and other assistance from a foreign government, a religious association, other association or a person from a foreign country;
- (d) abusing religion for political purpose.<sup>38</sup>

The provisions of this article do not meet the standards of fairness or objectivity that are found in the constitutions of other democratic countries. In South Korea, for instance, political parties may only be dissolved if the “purposes or activities of a political party are contrary to the fundamental democratic order”, which is determined by the judgment of the Constitutional Court.<sup>39</sup> The Burmese constitution, however, does not allow for any review of activities by an impartial and legitimate body. The scope of this article is so broad that it effectively allows the SPDC to eliminate any political party it chooses. At the same time, it is targeted to encompass groups that have opposed the SPDC. Given its historic conflict with groups representing ethnic minorities, as well as its antagonism towards the NLD, the chances of fair participation are virtually nonexistent.

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<sup>37</sup> Constitution of the Republic of the Union of Myanmar (2008), Article 404(a).

<sup>38</sup> Constitution of the Republic of the Union of Myanmar (2008), Article 407.

<sup>39</sup> Constitution of the Republic of Korea (1988), Article 8.

## B. ETHNIC ORGANIZATIONS

Burma exercises a “First Past the Post” (FPTP) electoral system, which constitutes handing power to the candidate in a district with the highest percentage of votes. Burma has myriad minority groups (at least 135, according to the military regime) and a 60 percent ethnically Burman majority.<sup>40</sup> With the FPTP system, it will be virtually impossible for minorities to win seats in parliament. Lack of representation in government has historically been a point of serious contention for the ethnic minorities, but the electoral system does nothing to address this issue.

In democracies around the world, lawmakers have prioritized ensuring representation for traditionally marginalized populations such as ethnic minorities and women. Most often, this is accomplished by reserving a quota for members of this group. Additionally, electoral systems such as list proportional representation (list PR) can be a powerful way for the government to signify its support of smaller communities. However, reserving a quota system or list PR is nonexistent in the 2008 Constitution. Since independence, Burma has practiced a simple majority or FPTP system. As such, in a number of constituencies, representatives were elected without obtaining over 50 percent of the vote. This reality negatively impacts the representation of ethnic minorities, in terms of total population, in legislative assemblies.

The National Assembly, known as the *Amyotha Hluttaw*, would seem to be the logical place for minority representation, but nothing is specifically reserved for ethnic groups. Instead, the *Amyotha Hluttaw* is simply formed by an equal number of representatives (twelve) from each region and state.<sup>41</sup> While the *Amyotha Hluttaw* may seem to equalize the power in parliament with representation being based on area instead of population—and with the knowledge that states are occupied by a predominant ethnicity—the lack of specific provisions in the 2008 Constitution could still result in almost all ethnically Burman representatives.

Even if the problem of ethnic representation in parliament could be sorted out, there would still be the controversial issue of ethnic militias and the transitional period. Many of the ethnic groups have standing security forces, although the majority has signed cease-fire agreements with the SPDC. In April 2009, *Tatmadaw* officers approached leaders of various groups with the suggestion of transforming ethnic armies into a Border Guard Force (BGF). The BGFs would retain the ethnic soldiers for border security and be paid on equal footing with the regular *Tatmadaw* soldiers, but would add *Tatmadaw* officers to ‘oversee’ operations.<sup>42</sup> Almost all cease-fire groups refused this arrangement, and the SPDC retaliated by sending thousands of troops to northeast Burma. After nearly twenty years, ceasefire agreements were broken with renewed violence between SPDC forces and the Kokang army.<sup>43</sup>

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<sup>40</sup> Nehginpao Kipgen, ‘Obama Energizes Burma’s Ethnic Minorities’ *The Irrawaddy* (11 November 2008) <[http://www.irrawaddy.org/article.php?art\\_id=14606](http://www.irrawaddy.org/article.php?art_id=14606)> accessed 30 October 2009.

<sup>41</sup> Constitution of the Republic of the Union of Myanmar (2008), Article 141.

<sup>42</sup> Wai Moe, ‘Border Guard Force Plan Leads to End of Ceasefire’ *The Irrawaddy* (31 August 2009) <[http://www.irrawaddy.org/article.php?art\\_id=16691](http://www.irrawaddy.org/article.php?art_id=16691)> accessed 31 October 2009.

<sup>43</sup> *Id.*

Such a critical issue should have been discussed in the National Convention with the agreement of ethnic leaders sought before the constitution was formally drafted. From there, guidelines could have been laid out in the Chapter on Transitory Provisions. Unfortunately, no such actions were taken by the military regime. Rather, simply by using military might, ethnic cease-fire organizations were forced to transform into BGFs at the disposal of the regime, without regard to the constitution. As a result, the military regime has created another constitutional problem that will cause long-term destabilization.

If the 2008 Constitution comes into effect, all armed forces will be technically under the command of Defense Services.<sup>44</sup> Given the historical reality of over sixty years of civil war, it is not feasible to place all ethnic armed organizations under the command of the SPDC Army. Despite the fact that the SPDC was able to force smaller ethnic armed organizations to accept the BGF position, stronger organizations such as the United Wa State Army (UWSA) and the Kachin Independence Organization (KIO) have not complied with the SPDC's plan. The deadline for compliance was 31 October 2009, but the USWA and KIO have stated their intention to continue negotiations and meetings with senior military officers.<sup>45</sup> Both organizations have demanded autonomy in their ethnic region, which would be threatened by the inundation of *Tatmadaw* officers under the BGF plan. The KIO has expressed its intent to become the Kachin Regional Guard Force under the new government instead of a subset under the *Tatmadaw*,<sup>46</sup> though no progress has yet been made between the opposing sides.



The last demographic of major ethnic armed organizations are those in active hostility with the regime, such as the Karen National Union, Karenni National Progressive Party, and the Shan State Army (South). They have publicly declared that the 2008 Constitution is unacceptable and must be revised. If the SPDC adheres to its own plan of holding the 2010 elections without addressing the self-determination issue of the ethnic minorities in a revised constitution, civil war and the unnecessary loss of life will persist.

If the current trend continues, there will be a clear division between the ethnic forces that have assumed the BGF role and those that have not. In that case, under the authority of the 2008 Constitution, the SPDC or the 'elected government' may order the BGF—which is under the direct command of the Defense Services—to fight against the ethnic armed organizations that have refused to transform into the BGF. The SPDC has created a situation where one ethnicity is systematically forced to fight against its own ethnic group.

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<sup>44</sup> Constitution of the Republic of the Union of Myanmar (2008), Article 338.

<sup>45</sup> Saw Yan Naing, 'Border Guard Deadline Passes Without Agreement' *The Irrawaddy* (2 November 2009) <[http://www.irrawaddy.org/article.php?art\\_id=17116](http://www.irrawaddy.org/article.php?art_id=17116)> accessed 19 November 2009.

<sup>46</sup> *Id.*

## IV. THE IMPOSSIBILITY OF FREE ELECTIONS UNDER EXISTING DRACONIAN LAWS

Free elections are characterized by the right of access to political information; freedom to organize for political purposes and the right to campaign; regular holding of elections that are decided by the freely cast vote of the majority; and equal voting power for all citizens.<sup>47</sup> The SPDC has restricted each of these tenets with the use of draconian laws and, with the new constitution, will be able to permanently deny free elections under various pretenses.

First, right of access to political information is currently violated due to the fact that the regime controls all media, and restricts other sources of information. The ICCPR outlines the right to information in Article 19. The Human Rights Committee specifically states that protecting the right to information includes the “freedom to seek and receive [information] regardless of frontiers and in whatever medium”.<sup>48</sup> There is no sanctioned outlet for information except for what the SPDC warrants, and those who attempt to seek or raise awareness of political options contrary to the SPDC are imprisoned.<sup>49</sup>

### A. 1962 PRINTERS AND PUBLISHERS REGISTRATION LAW

For example, the 1962 Printers and Publishers Registration Law effectively places a muzzle on free expression. Under this Law, all printed or written material must gain prior approval from the Central Registration Board.<sup>50</sup> Additionally, all printers must register with the government,<sup>51</sup> but registration may be revoked if the printer is found to “[harm] the ideology and views” of the government.<sup>52</sup> This law is commonly used to silence dissidents through imprisonment for publishing materials. It is also convenient for framing opposition leaders by simply planting a scrap of unauthorized paper in their possession, and charging them under this law.<sup>53</sup> This law has been in constant use since its inception and was only amended in 1989 to increase the harshness of its penalties, which includes up to seven years imprisonment and a fine of 30,000 kyat.<sup>54</sup> During an election, all campaign materials from all political parties would need to be approved by the regime before being distributed. This process would, at best, unnecessarily slow down campaigning and, at worst, implicate broad political networks as targets for the regime. Using only government-



<sup>47</sup> Eric Bjornland, *Beyond Free and Fair Election: Monitoring Elections and Building Democracy* (Wilson Center Press and Johns Hopkins University Press, Baltimore 2004).

<sup>48</sup> UNCHR ‘General Comment 10’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies’ (2008) UN Doc HRI/GEN/1/Rev.9 (Vol. I).

<sup>49</sup> Assistance Association for Political Prisoners (3 October 2009) <<http://www.aappb.org/>> accessed on 2 November 2009.

<sup>50</sup> 1962 Printers and Publishers Registration Law (1962), Part 5.

<sup>51</sup> 1962 Printers and Publishers Registration Law (1962), Part 4.

<sup>52</sup> 1962 Printers and Publishers Registration Law (1962), Part 4(10).

<sup>53</sup> Interview with U Nyi Nyi Hlaing, Defense Lawyer, Mae Sot (12 November 2009).

<sup>54</sup> Law No 16/89—the Law Amending the 1962 Printers and Publishers Registration Law (1989).



censored material undeniably restricts citizens' access to information and political parties' right to campaign.

## **B. 1975 STATE PROTECTION LAW**

The 1975 State Protection Law allows the military to preemptively arrest and charge people for crimes that may “endanger the sovereignty and security of the state or public peace and tranquility”—even if they have not yet been committed.<sup>55</sup> The language is sufficiently vague to allow interpretation befitting the desires of the SPDC. The prescribed consequences, however, are unfortunately specific and dire. The law carries articles that allow the Cabinet to extend the duration of a person's detention for up to three years.<sup>56</sup> However, since there is no stipulated limit on how many times a prisoner's detention may be extended, this law may be used to detain a person indefinitely.

The State Protection Law provides for arbitrary detention, or the suspension of any other “fundamental right of any person suspected” of planning to violate this act.<sup>57</sup> In the International Covenant on Civil and Political Rights (ICCPR)<sup>58</sup>—which is considered customary international law—as well as the domestic constitutions of democratic nations around the world, suspects are presumed innocent until proven guilty. Moreover, detainees are generally guaranteed speedy access to justice, and allowed to defend themselves in a competent court. Article 9(e), however, states that a person “against whom action is taken” will only be handed over to judicial authorities if “sufficient facts for filing a lawsuit have been gathered”.<sup>59</sup> The wording implies that people may still be held in detention *without trial* if ample evidence cannot be mounted. Again, the lack of specificity regarding the term “sufficient” provides likely scenarios of government abuse.

The 1975 Law not only omits access to justice, but goes as far to specifically bar detainees from appealing their detention to authorities.<sup>60</sup> Overall, the State Protection Law is an illegal tool used capriciously to strip innocent citizens of their fundamental right to liberty. Since the SPDC has historically used a broad interpretation of this law to remove opposition figures from public life, it can be inferred that political activists will either be discouraged from openly campaigning or punished for doing so. Labeled as “subversive”, political parties are routed and, therefore, denied the right to organize freely.

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<sup>55</sup> State Protection Law (1975), Article 7.

<sup>56</sup> State Protection Law (1975), Article 14.

<sup>57</sup> *Id.*

<sup>58</sup> International Covenant on Civil and Political Rights, Article 14(2).

<sup>59</sup> State Protection Law (1975), Article 9(e).

<sup>60</sup> Notification No 11/91—the Law Amending the State Protection Law (1972).

### C. 2004 ELECTRONIC TRANSACTION LAW

The 2004 Electronic Transaction Law was promulgated by the SPDC to dictate all use of electronic technology. The purported aims of this law are to support modernization; increase opportunities for development in various social sectors; and enable communication with international organizations, regional organizations, foreign countries, government departments, etc.<sup>61</sup> However, as with the aforementioned laws, it is primarily applied as a means to charge and sentence political opponents of the military. Section 33 of this law outlines “Offences and Penalties” for the misuse of electronic transaction technology including:



Nay Phone Lett whom was provided penalty in accordance with the 2004 Electronic Transaction Law

- (a) doing any act detrimental to the security of the State or prevalence of law and order or community peace and tranquility or national solidarity or national economy or national culture;
- (b) receiving or sending and distributing any information relating to secrets of the security of the State or prevalence of law and order or community peace and tranquility or national solidarity or national economy or national culture.<sup>62</sup>

In this current era, the Internet and mobile phones are powerful tools used to disseminate information widely and cheaply. In democracies, electronic technology is used to the mutual benefit of politicians and the electorate. Politicians can convey their agendas to an extensive audience in a small amount of time; public opinion regarding various political platforms can be quickly gauged and adjusted in a way that truly responds to the needs of the people. For developing countries where infrastructure makes traveling difficult, the Internet may also be utilized to inform voters of the election issues and voting process. Unfortunately, the Electronic Transaction Law renders these progressive tools obsolete through the imposition of severe punishments for normal electronic use.



Min Ko Naing and 88 students whom were provided penalty in accordance with the Electronic Transaction Law

A violation of this section may result in seven to fifteen years of imprisonment.<sup>63</sup> This punishment was recently used to sentence prominent pro-democracy leader Min Ko Naing, Chairperson of the All Burma Federation of Student Unions and 88 Generation Students group, and nearly forty other dissidents to sixty-five years in prison.<sup>64</sup> The members of the 88 Generation Students group were charged with violating four counts of the Electronic Transaction Law, with each violation carrying the maximum fifteen-year sentence. This is a highly disproportionate punishment for simply using

<sup>61</sup> The Electronic Transactions Law (2004), Section 3.

<sup>62</sup> The Electronic Transactions Law (2004), Section 33.

<sup>63</sup> *Id.*

<sup>64</sup> Phanida, ‘Min Ko Naing & “88 Generation Students” Given 65 Years’ *Mizzima* (15 November 2008) <<http://www.mizzima.com/news/inside-burma/1307-min-ko-naing-a-88-generation-students-given-65-years.html>> accessed 10 November 2009.

email communication<sup>65</sup> and, similar to the State Protection Law, presents a serious risk for political opponents of the SPDC.

#### **D. SECTION 505(B) OF THE PENAL CODE**

Under Section 505(b) of the archaic Burmese Penal Code, people can be charged for any statement, rumor, or report made “with intent to cause, or which is likely to cause, fear or alarm to the public or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquility”.<sup>66</sup> The junta has used this law to repress and punish those taking part in free expression, peaceful demonstrations, and forming organizations.<sup>67</sup> Most notably, Section 505(b) was used in-part to charge U Gambira, leader of the All Burma Monks’ Alliance and key activist in the 2007 Saffron Revolution, with a total of 68 years in prison.<sup>68</sup> The Saffron Revolution was an entirely peaceful protest of religious figures that were brutally crushed by the military junta.<sup>69</sup> With the harsh consequences of this law widely known, political parties are denied their right to organize and campaign. This, in turn, additionally violates citizens’ rights to access the political information necessary to make an informed choice during polling.

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<sup>65</sup> Interview with U Nyi Nyi Hlaing, Defense Lawyer, Mae Sot (12 November 2009).

<sup>66</sup> The Penal Code (1860), Section 505(b).

<sup>67</sup> Human Rights Watch ‘2100 by 2010: Free Burma’s Political Prisoners’ *Human Rights Watch* (16 August 2009) <<http://www.hrw.org/en/free-burmas-prisoners/background>> accessed on 2 November 2009.

<sup>68</sup> ‘U Gambira to Serve Total of 68 Years in Prison’ *Mizzima* (21 November 2008) <<http://www.mizzima.com/news/inside-burma/1343-u-gambira-to-serve-total-of-68-years-in-prison.html>> accessed on 10 November 2009.

<sup>69</sup> Andrew Buncombe, ‘Burma: Inside the Saffron Revolution’ *The Independent* (27 September 2007) <<http://www.independent.co.uk/news/world/asia/burma-inside-the-saffron-revolution-403645.html>> accessed on 12 November 2009.

## V. DISENFRANCHISED DEMOGRAPHICS: MIGRANT WORKERS, REFUGEES, INTERNALLY DISPLACED PERSONS, AND POLITICAL PRISONERS

The question of “equal voting power for all citizens” is very controversial in Burma’s situation. Burma is and has been a nation in crisis for nearly fifty years. Harsh military rule has resulted in a scattered population due to either economic or security reasons. Thus, disenfranchised populations exist both outside and inside of Burma. Though a registration was compiled for the 1990 election, the worst internal fighting occurred after that, necessitating an updated registration roll.

The right to vote is guaranteed in Article 25 of the ICCPR. Furthermore, in General Comment 25, the Human Rights Committee (HRC) applied the principle of non-discrimination stating that “the right to vote must be recognized and protected for all citizens, with no distinctions, restrictions or impairments permitted on the grounds of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.<sup>70</sup> Finally, the HRC imposes a positive obligation on the State to facilitate the right to vote, mandating it to “adopt specific measures to ensure that obstacles to voting and participation, such as poverty, illiteracy, restrictions to freedom of movement and homelessness, are overcome” and that “voters should be able to form opinions independently, *free of violence or threat of violence, compulsion, inducement or manipulative interference of any kind.*” (emphasis added)<sup>71</sup> The following groups of people are disenfranchised under the SPDC’s current policies.

### A. MIGRANT WORKERS

The 1962 coup d’état and subsequent economic failure under General Ne Win impoverished Burma. The lack of economic liberalization, along with political instability, led to decreased investment in the country and a soaring unemployment rate. Citizens soon began crossing international borders (most notably into Thailand) to earn wages doing manual labor. Many workers are undocumented, and even the ones with documents cannot easily return home to vote without forfeiting their jobs.

The Convention on the Protection of the Rights of All Migrant Workers and Members of their Families underscores the “right to participation in public affairs of their State of origin and to vote and to be elected at elections of that State”.<sup>72</sup> Even though



<sup>70</sup> UNCHR ‘General Comment 25’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies’ (2008) UN Doc HRI/GEN/1/Rev.9 (Vol. I).

<sup>71</sup> *Id.*

<sup>72</sup> UNGA ‘International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families’ UN GAOR 45<sup>th</sup> Session Supp No 49A UN Doc A/45/49 (1990).

Burma has not ratified this specific convention, the right to vote is still an internationally recognized norm.<sup>73</sup> The practice of out-of-country voting (OCV) has been implemented in many countries around the world including the Philippines, Malaysia, Indonesia, Thailand, and Lao.<sup>74</sup> The Filipino Overseas Absentee Voting Act of 2003 allows migrant workers to register at consulates or embassies in countries of residence, and apply to vote in absentia.<sup>75</sup> 65 percent of the 359,297 registered overseas voters participated in the 2004 election,<sup>76</sup> which was comparable to the in-country turnout. Thus, it is possible for a developing country to facilitate OCV. More



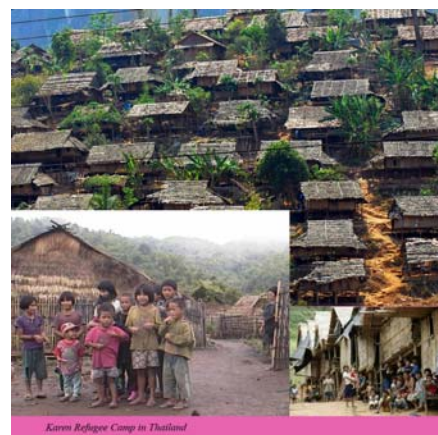
54 Burmese Migrant Workers Who Died of Suffocation

importantly, it is a clear violation of the right to vote if the SPDC does not implement measures to vote in absentia.<sup>77</sup> The lack of such a policy would deny up to three million Burmese migrant workers in Thailand<sup>78</sup> from their right to vote.

Earlier this year, the SPDC began a partnership with the Thai government to issue temporary passports without forcing migrants to return to Burma. This has helped provide national verification and documentation for migrant workers. In the same vein, the regime is obligated to create a voter registration process that will allow workers to cast votes without having to return to Burma.

## B. REFUGEES AND INTERNALLY DISPLACED PERSONS

When fighting intensified among the ethnic groups, which are situated in the North and West along Burma's border, countless villages were destroyed and people were forcibly displaced. Many asylum seekers crossed international borders and are trapped in Thai refugee camps without status as belonging to any nation. According to Refugees International, there are an estimated 3.5 million displaced Burmese.<sup>79</sup> Asylum seekers and refugees are in situations of persecution, which makes it unsafe for them to return to Burma. Even if their safety could be guaranteed



Karen Refugee Camp in Thailand

<sup>73</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 21. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 25.

<sup>74</sup> 'Voting from Abroad: Handbook on external voting' *International IDEA and IFE* (2007) <[http://www.idea.int/publications/voting\\_from\\_abroad/](http://www.idea.int/publications/voting_from_abroad/)> accessed 19 November 2009.

<sup>75</sup> The Overseas Absentee Voting Act of 2003 (Republic Act No. 9189), Section 6 and Section 11.

<sup>76</sup> 'The Philippines: The First Experience of External Voting' *ACE Electoral Knowledge Network* <<http://aceproject.org/ace-en/topics/va/country-case-studies/the-philippines-the-first-experience-of-external>> accessed 19 November 2009.

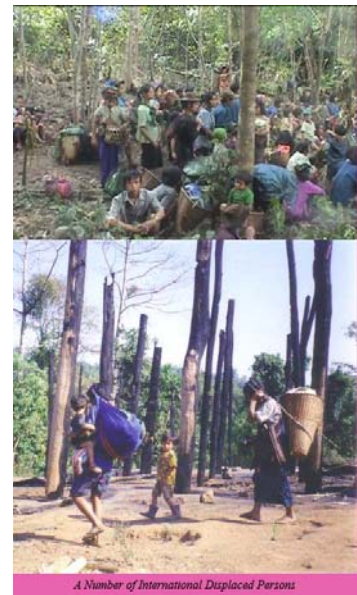
<sup>77</sup> Alexander Kirshner, 'The International Status of the Right to Vote' *Democracy Coalition Project* (2003) <[www.demcoalition.org](http://www.demcoalition.org)> accessed on 2 November 2009.

<sup>78</sup> 'UN Report Speaks Up for Migrant Workers' *Irrawaddy* (7 October 2009) <[http://www.irrawaddy.org/article.php?art\\_id=16944](http://www.irrawaddy.org/article.php?art_id=16944)> accessed on 9 November 2009.

<sup>79</sup> 'Burma' *Refugees International* <<http://www.refintl.org/where-we-work/asia/burma>> accessed on 2 November 2009.

inside the country, many are currently residing in camps, which they are prohibited from leaving. Internally, people forced from villages, but unable to cross the border, have set up new residences in safe locations. However, internally displaced persons would not be able to return to their original homes without jeopardizing their physical security.

Again, an out-of-country voting (OCV) or absentee system should be instituted to enfranchise rightful citizens. This is particularly crucial in Burma's case because internally and externally displaced communities contain a disproportionately high percentage of ethnic minorities. Participation of minority groups is internationally recognized as necessary to change existing conditions in governments that result in discriminatory practices.<sup>80</sup> However, political change cannot occur when ethnic minorities cannot even exercise their right to political participation. Displacement, especially in combination with ethnicity, provides particular conditions of vulnerability. As a result, special attention and provisions must be implemented to ensure safe political participation for this demographic.



### C. POLITICAL PRISONERS

Article 392 of the constitution prohibits the right to vote from “persons serving prison terms”.<sup>81</sup> The Assistance Association of Political Prisoners (AAPP) estimates over 2,100 political prisoners are currently being held in detention without trial.<sup>82</sup> Prisoners, as a result of breaking the social contract of the law, have historically been denied the right to vote. This practice, however, has proved increasingly illogical. Participation in civil society through democratic norms and an understanding of larger societal structures is an important way to re-engage those who may have committed crimes.<sup>83</sup> While states may choose to restrict the right to vote, the HRC emphasizes that such measures must be “objective, reasonable, and proportionate”.<sup>84</sup> Few crimes have warranted sufficient reason or proportionality to deny the right to vote. In the case of Burmese political prisoners, the denial of the right to vote is especially inappropriate, as the vast majority has not been tried by a competent court.

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<sup>80</sup> ‘The Lund Recommendations on the Effective Participation of National Minorities in Public Life and Explanatory Note’ *Organization for Security and Cooperation in Europe* (September 1999) <<http://www.ecmiserver.de/polpart/resources/>> accessed on 2 November 2009.

<sup>81</sup> Constitution of the Republic of the Union of Myanmar (2008), Article 392.

<sup>82</sup> Assistance Association for Political Prisoners (3 October 2009) <<http://www.aappb.org/>> accessed on 2 November 2009.

<sup>83</sup> Philip Lynch, ‘The Human Right to Vote and Participate in Public Affairs’ *Human Rights Law Resource Centre* (March 2006) <<http://www.hrlrc.org.au/content/topics/prisoners/prisoners-right-to-vote/>> accessed on 4 November 2009.

<sup>84</sup> UNCHR ‘General Comment 25’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies’ (2008) UN Doc HRI/GEN/1/Rev.9 (Vol. I).

After meeting with UN Secretary General Ban Ki-moon in July 2009, the junta has pledged to release political prisoners via amnesty in time for next year's elections.<sup>85</sup> While AAPP reports the release of three political prisoners in October, an additional 41 were arrested.<sup>86</sup> Clearly, the SPDC still has a long way to go before fulfilling this promise. Interestingly enough, Section 401 of the Code of Criminal Procedure stipulates that only the President may grant pardons.<sup>87</sup> Though not the president, General Than Shwe has taken on the powers of the Presidential office, which is a concern within itself. In regards to such pardons, however, the action has been used as a tool to physically separate activists who are considered a threat to the regime.<sup>88</sup> For example, pardon has been granted to some members of political organizations and not to others in order to facilitate a "divide and conquer" approach to dissidents.<sup>89</sup> Though the SPDC may release all political prisoners before the election, timing is also a factor. It is not enough to grant them freedom immediately before the vote. Rather, the military regime should ensure ample time for political prisoners to organize and campaign for the 2010 elections as legal participants on equal footing with every other political party.

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<sup>85</sup> Laura Trevelyan, 'Burma junta "to free dissidents"' *BBC News* (13 July 2009) <<http://news.bbc.co.uk/2/hi/8148850.stm>> accessed on 4 November 2009.

<sup>86</sup> 'Monthly Chronology- October 2009' *Assistance Association for Political Prisoners* (October 2009) <[http://aappb.org/Chronology\\_Oct\\_2009\\_Eng.pdf](http://aappb.org/Chronology_Oct_2009_Eng.pdf)> accessed on 10 November 2009.

<sup>87</sup> The Code of Criminal Procedure (1898), Section 401.

<sup>88</sup> Interview with U Nyi Nyi Hlaing, Defense Lawyer, Mae Sot (12 November 2009).

<sup>89</sup> *Id.*

## VI. DEMOCRATIC ELECTION STANDARDS

In order for the 2010 Election to be considered a genuine free and fair process, a series of conditions must be met.

### A. ELECTION COMMISSION

An independent election commission must be created to oversee the elections. The 2008 Constitution mandates the formation of the Union Election Commission (UEC) for this purpose, but the parameters of the commission leave little room for independence.<sup>90</sup> According to the constitution, the President appoints each member of the commission and does not need approval from parliament.<sup>91</sup> This is an irregular practice as it allows one person to determine and appoint a supposedly unbiased committee. Additionally, since there is currently no president, one can infer that the SPDC will choose the members of the first election commission.

While the constitution does mention the UEC being in charge of “election tribunals”—which would point to the creation of a complaint mechanism for electoral disputes—it does not go into detail as to how disputes would be resolved.<sup>92</sup> It is likely that their election commission will not investigate charges against the SPDC. Another worrying factor is that the UEC has



conclusive decision-making power on all matters pertaining to elections.<sup>93</sup> Thus, a body lacking the minimum requirements for impartiality will have an indisputable ability to determine the government. There is no higher authority open for appeal, and evident lack of UEC independence will tarnish the reliability of the entire election. In order to balance the UEC and maintain neutrality, the military regime should

request international monitors to observe and adjudicate disputes in the elections either independently, or at least complementarily.

### B. ELECTORAL ROLL

The electoral roll or voter registration is crucial for preventing electoral fraud in various forms. Currently, it is unclear what the military junta is using for an electoral roll. If the 2010 electoral roll is based on the one compiled for the 1990 election, it is sorely in need of an update as an entire generation has been born and gained the right to vote in that time period. During the 2008 referendum, there were numerous allegations of voter registration irregularities reported.<sup>94</sup> If the junta plans to use the roll from the referendum, irregularities must be investigated and

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<sup>90</sup> Constitution of the Republic of the Union of Myanmar (2008), Article 398.

<sup>91</sup> *Id.*

<sup>92</sup> Constitution of the Republic of the Union of Myanmar (2008), Article 399.

<sup>93</sup> Constitution of the Republic of the Union of Myanmar (2008), Article 402.

<sup>94</sup> ‘Burma: Events of 2008’ *Human Rights Watch* (2008) <<http://www.hrw.org/en/node/79297>> accessed on 5 November 2009.



rectified. Additionally, it is doubtful that the 2008 roll includes the aforementioned disenfranchised groups.

One of the key problems with registering displaced voters is that identity documents are often destroyed or left behind when people are fleeing conflict. As a result, the SPDC should ask international organizations such as the International Organization for Migration (IOM) to help provide identity documents for displaced persons in order to compile a voter registry. The IOM has extensive experience working in post-conflict areas to provide this specific service. This process should begin immediately to ensure adequate time to cross-reference existing names on the registry, and to verify eligibility for new voters. Then, hard copies of the lists should be displayed publicly to point out possible errors or challenge the eligibility of registrants.

### **C. VOTING, ADVANCE VOTING, OUT-OF-COUNTRY VOTING**

According to Article 391 of the new constitution, voting will be conducted by secret ballot. There are no further specifications in the constitution, but in order to prevent ballot stuffing or intimidation, election laws should specify guidelines for election day and training for poll workers. As a precursor to election day, educators should travel around the country and explain the voting process to citizens, as well as measures for secrecy.

Due to security, it may not be feasible for a significant number of people to return to Burma and vote. In order to fulfill their positive obligation to guarantee the right to vote, the military regime should initiate advance voting and OCV measures. Advance voting allows more flexibility for citizens who may be able to travel back to Burma, but not on the specific day of elections. Alternately, OCV can be facilitated by the IOM in any country where there is a mission. The IOM has helped carry out OCV in post-conflict areas (Iraq and Afghanistan), but will not participate without a specific request from the UN member state.<sup>95</sup>

OCV is an admittedly difficult task to carry out, involving bilateral agreements and a high degree of regulation. However, considering the necessity of participation for pluralistic democracy building in an ethnically heterogeneous state like Burma, OCV should be prioritized and implemented.

### **D. ELECTION OBSERVERS**

Election observers are common staples of free and fair elections. In flourishing liberal democracies, national observers may be adequate to address electoral complaints. In transitioning or young democracies, however, national observers are often complemented with international observers that have extensive election experience. Since the 2010 elections will be Burma's first democratic election in twenty years, it would be prudent to request the assistance of international observers. Various non-government organizations (NGOs) such as the Asian Network for Free Elections (ANFREL), the Carter Center, and the National Democratic Institute (NDI) offer independent election monitoring.

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<sup>95</sup> 'Overview Information' *UN Electoral Assistance Division*  
<[http://www.un.org/Depts/dpa/ead/overview.html#Requesting\\_Assistance](http://www.un.org/Depts/dpa/ead/overview.html#Requesting_Assistance)> accessed 4 November 2009.

ANFREL, for example, has been previously asked to partner with a number of Asian countries in training domestic observers regarding election norms. ANFREL conducted operations in Indonesia (2009), Thailand (2007/2008), Cambodia (2008), Bangladesh (2008) and others to help prepare and facilitate elections.<sup>96</sup> The organization functions as an educator to election officials, as well as the general electorate by producing election materials and raising awareness of political issues through grassroots means. Election observers are relied upon to expose fraud or other irregularities leading up to an election that do not match international standards. Observers also lend legitimacy to election results if they are perceived to be independent.

However, observers must have free reign in the host country in order to adequately fulfill their duties. This includes the ability to travel widely to ensure universal suffrage, access to financial documents, meeting with election officials, permission to be physically present during polling and counting, speaking to representatives from all political parties, access to interview normal citizens, and anything else the monitors deem necessary to verify the validity of the election.<sup>97</sup> If the SPDC truly intends to hold fair elections, there should be no hesitation in allowing observers into the country. However, if restrictions on foreigners are not removed and monitors are not given complete liberty to do their work, Burma will not be able to claim a democratic election process.

## **E. COUNTING, RECOUNTING, AND DECLARATION OF RESULTS**

Vote counting is a crucial component of elections as this determines the new government, but is also susceptible to various forms of fraud. The ACE Electoral Knowledge Network recommends the following eight principles that should be considered when setting up guidelines for vote counting.<sup>98</sup>

**Transparency** requires allowing representatives from political parties to witness or participate in the process. National and international observers should also be present to record the counting methods used. Manual counting is considered more transparent than computerized counting, which can be manipulated more easily. Accordingly, provisions should be set out in the election laws to ensure that a representative from each political party may be present at the counting.

**Security** of the ballots and ballot boxes must be maintained from the beginning of voting through the completion of the count. Representatives from all political parties and election monitors should watch the boxes throughout the day, and accompany the ballots if they are moved to a central counting location. Boxes may be transparent to deter fraud. After votes are collected, boxes or bags should be individually numbered and tamper-proof. Alternately, votes

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<sup>96</sup> 'Country Observation and Monitoring' *Asian Network for Free Elections* (November 2009) <<http://www.anfrel.org/countrymonitoring/index.asp>> accessed 19 November 2009.

<sup>97</sup> 'Declaration of Principles for International Election Observation and Code of Conduct for International Election Observers' *United Nations Electoral Assistance Division* (27 October 2005).

<sup>98</sup> 'Guiding Principles of Vote Counting' *ACE Electoral Knowledge Network* <<http://aceproject.org/ace-en/topics/vc/vc20>> accessed 4 November 2009.

may be counted at the polling station after election hours in order to minimize the likelihood of ballot stuffing en route. Either way, independent international observers should also be present to verify the integrity of the ballot boxes.

**Professionalism**, such as training for poll workers, is necessary for vote counting to be administered correctly. Community leaders who are known to be unbiased should be selected as polling staff and the UN Election Assistance Division should be requested to prepare them. Counting officials must sign an oath stating their commitment to non-partisanship, in which consequences for partisan behavior include legal prosecution. Additionally, the oath should require confidentiality in protecting sensitive information, such as voter identity.

**Accuracy** is necessary to avoid accusations of fraud and is directly related to the integrity of the election. Clear procedures that entrench transparency, adequate staff training, and mechanisms for recounting all contribute to improved accuracy. Currently, there are no measures in place that facilitate these objectives. Thus, the government should provide funds to begin training workers and perhaps invest in vote-counting technology administered by an outside, independent firm.

**Secrecy** is of particular importance in the situation of Burma where there is a risk of reprisal for certain vote-casting. Voters should not be victimized or intimidated in their choice. If secrecy is an issue at the local level, ballots may be taken to a central location and randomized before counting. This, of course, would need to be weighed against security concerns. If voter identification is necessary for counting purposes, these must be kept strictly confidential by vote counters. Voters should be hidden from view when marking their selections and no one except for trained poll workers should be in the polling station. Additionally, no one should be allowed to loiter within a certain perimeter of the building and figures in authority positions (security forces, community leaders, employers, etc.) should be penalized for discussing election matters with individuals. These restrictions will allow people to vote as they please without fear of reprisal.

**Timeliness** is important because delays in counting could result in a negative perception of the voting process. The election commission should outline the stages of the counting process, factoring in realistic considerations such as transport and communication, in order to present a reasonable timeline for official results. Updates should be given periodically in order to reassure the public that integrity and accuracy are being maintained. An official outside organization should give reports jointly with the national election commission in order to provide legitimacy, and to confirm that progress is being made.

**Accountability** at the national level will most likely fall on the election commission. Clear responsibility and chain-of-command are needed to isolate and deal with problems. Additionally, an unambiguous complaints and appeals process must be readily available. Professionals with authority and competence, as well as the confidence of the electorate, should administer these processes. Counting rules and criteria for rejecting ballots should be agreed upon and understood by everyone involved in the process. This is a precondition for the clear audit trails essential in ensuring accountability. Considering the general population's mistrust of

the military regime, it is absolutely crucial for the SPDC to invite observers at all levels, and to give them access to any information requested.

**Equity**, or the concept that rules should be the same for all participants, helps ensure that counting is administered in a fair manner. Thus, all political parties must agree on and be satisfied with the process used to count the votes.

## F. ELECTORAL FRAUD

There are myriad ways that electoral fraud could occur in the upcoming elections. One of the most glaring and difficult to control will be abuse of government power. Since the SPDC is in charge of all aspects of this election and, thus far, have not requested assistance from any independent organizations, it is doubtful that their practices will adhere to international standards. With absolute control over the election laws and media, it will be difficult for other political parties to raise awareness regarding their platforms. Due to current laws, political parties and activists are already prohibited from organizing freely, which eliminates the possibility of countering government propaganda.<sup>99</sup>

Looking at the 2008 referendum as an example reveals widespread intimidation and the use of pre-marked ballots. Ballots also included identification details that prevented secrecy, and many voters were forced to fill out their ballots under the watchful gaze of ‘election monitors’.<sup>100</sup> Threats of expulsion from villages or loss of employment were also used to dictate the outcome.<sup>101</sup> The SPDC was also accused of other forms of fraud such as ballot stuffing and demographic manipulation.<sup>102</sup> To expose electoral fraud, election monitors must be allowed into the country and given the freedom to travel anywhere within it, as well as access to information and documents. Anything less will compromise the legitimacy of the election.

### CASE STUDY: ZIMBABWE 2008

It is difficult to overemphasize the need for free, fair, and credible elections. At stake are not only the next government of Burma and the subsequent direction of the country, but the ideals of democracy itself. Countries such as Zimbabwe present a warning of dictators who use the guise of democracy to drive their own countries to ruin. The 2008 Zimbabwe elections should be reviewed as an example of what to avoid and secure against in order to administer genuine elections.

Electoral fraud was identified in Zimbabwe’s national election on 29 March 2008 when voter rolls identified over 8,000 non-existent voters. The ‘voters’ were registered as residing on a

<sup>99</sup> The Penal Code (1860), Section 505(b).

<sup>100</sup> Max Quincy, ‘A people’s ballot, Burma style: vote for the army or else’ *The Observer* (4 May 2008) <<http://www.guardian.co.uk/world/2008/may/04/burma.humanrights>> accessed 4 November 2009.

<sup>101</sup> *Id.*

<sup>102</sup> ‘Burma: Events of 2008’ *Human Rights Watch* (2008) <<http://www.hrw.org/en/node/79297>> accessed 5 November 2009.

plot of land known to be uninhabited. The opposition party, Movement for Democratic Change (MDC), filed the complaint to the Zimbabwean Electoral Commission (ZEC). Unfortunately, the ZEC was also accused of printing 50 percent more ballot papers than the number of registered voters.

The MDC reported that their supporters were turned away from polling stations, and erasable voting ink was used to change ballots cast. Local election observers noted that voter turnout was low, and intimidation was used in the incumbent President Robert Mugabe's strongholds. Furthermore, in certain districts, village heads had instructed the local population to vote for Mugabe. International observers were banned from the country.

Thus, the main sources of voter fraud in the election included the registration of non-existent voters, intimidation/threats at polling stations, coercion by local leaders to dictate voter outcome, and lack of safeguards against ballot tampering. Another evident problem was the lack of electoral commission independence, and its position as a lackey of Mugabe.

At the time of the election, Zimbabwe could have easily been considered a dictatorship under Robert Mugabe with the pretense of 'democracy' as evidenced by opposition parties. The absence of international observers, which must be invited by the government, is an indication in itself of a lack of transparency and unwillingness to adhere to international norms for democratic elections. Though opposition parties were vocal, they were restricted at every level due to Mugabe's total control. This situation demonstrates "illiberal democracy", a term coined by author and editor of *Newsweek International* Fareed Zakaria in describing countries that simply hold elections without building institutions of liberty, law, and governance.<sup>103</sup>

Despite talk of a genuine transition to democracy, the SPDC has now created a legal instrument capable of entrenching its power. The international community should be wary of the upcoming elections and the risk of lending a façade of legitimacy to a brutal military dictatorship. The "democracy" label will not end the human rights abuses or bring perpetrators to justice. Liberal democracies necessarily involve the existence of institutions that protect and promote individual rights—not just the casting of a ballot. One positive example that can be taken from the case of Zimbabwe, however, is the affect of international pressure on Mugabe to establish a coalition government with Morgan Tsvangirai and the MDC. The SPDC, though much more resistant than Mugabe, has responded to international pressure in the past. In the coming months leading to the elections, the international community should use its collective influence to force a change in the best interest of the Burmese population.

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<sup>103</sup> Fareed Zakaria, *The Future of Freedom: Illiberal Democracy at Home and Abroad* (W.W. Norton & Company, New York 2003).

## G. COMPLAINT MECHANISM AND THE ROLE OF JUDICIARY

As discussed in Section A of this chapter, the only complaint mechanism currently available is administered through the Union Election Commission (UEC), which has the final say on all election disputes. This is highly irregular as most functional democracies employ courts that are a permanent part of the judicial system as final arbitrators of dispute. These courts may be Constitutional Courts (Spain, Austria, France, Germany), Electoral Tribunals (Mexico), or a Supreme Court (US); either way, they are recognized as autonomous and impartial, with a definitive grounding in due process and rule of law.

For countries that lack an independent judicial system—such as Burma—Alternative Dispute Resolution may be a legitimate option. This model entails the creation of a body of experts with the backing of an international organization such as the UN. The dispute resolution body considers local laws and customs when arbitrating, without neglecting due process and democratic principles. This model can be particularly useful to build confidence in a setting where accusations of bias run particularly high, or previous conflict make it difficult for opposing sides to agree on terms of resolution. Alternative Dispute Resolution has been successfully used in Bosnia, Cambodia, and South Africa.<sup>104</sup>

## H. RIGHT TO INFORMATION AND THE ROLE OF THE MEDIA

As highlighted earlier, the right to information is an aspect of Article 25 of the ICCPR. Historically, the junta has failed to impart information regarding procedure or content of actions requiring political participation. For example, the text of the 2008 Constitution was released only one month before the referendum, and it was sold in bookstores for a price equal to the daily wage of a person.<sup>105</sup> The constitution was not translated into any ethnic languages, which not only indicates the junta's disregard for ethnic participation in the government, but is also a violation of facilitating Article 25.<sup>106</sup> The basic tenets were not explained,<sup>107</sup> and the majority of the population admitted to not understanding its principles.<sup>108</sup> The media was prohibited from printing anything hinting at a 'No' vote on the referendum and were instead forced to publish government propaganda advocating an enthusiastic 'Yes'.<sup>109</sup> These practices must be prevented in the 2010 elections.

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<sup>104</sup> 'Legal Framework' *ACE Electoral Knowledge Network* <<http://aceproject.org/ace-en/topics/lfb/lfb12/lfb12a/lfb12a05>> accessed 19 November 2009.

<sup>105</sup> 'Survey: 66.4% to Vote "No" in Referendum on Burma's New Charter' *The Friedrich Naumann Foundation* (May 2008) <[http://www.fnfasia.org/index.php?option=com\\_content&view=article&id=173:survey-664-to-vote-no-in-referendum-on-burmas-new-charter&catid=24:burma&Itemid=55](http://www.fnfasia.org/index.php?option=com_content&view=article&id=173:survey-664-to-vote-no-in-referendum-on-burmas-new-charter&catid=24:burma&Itemid=55)> accessed 5 November 2009.

<sup>106</sup> UNCHR 'General Comment 25' in 'Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies' (2008) UN Doc HRI/GEN/1/Rev.9 (Vol. I).

<sup>107</sup> Max Quincy, 'A people's ballot, Burma style: vote for the army or else' *The Observer* (4 May 2008) <<http://www.guardian.co.uk/world/2008/may/04/burma.humanrights>> accessed 4 November 2009.

<sup>108</sup> 'Burma News International: Release of nationwide voters survey on the Burmese referendum' *BurmaNet News* (7 May 2008) <<http://www.burmanet.org/news/2008/05/07/burma-news-international-release-of-nationwide-voters-survey-on-the-burmese-referendum>> accessed 4 November 2009.

<sup>109</sup> 'Fifteen IFEX members and others call on junta to allow free expression of views on referendum' *World Press Freedom Committee* (2 May 2008) <<http://www.wpfc.org/?q=node/177>> accessed 5 November 2009.

Freedom of expression has been entirely censored in Burma, and those who are brave enough to defy the SPDC find themselves beaten, imprisoned, or both.<sup>110</sup> Independent media outlets exist in Burma, but are under constant threat to tout the party line. In next year's elections, coverage by independent journalists and foreign correspondents should be publicly broadcast. Opposition parties should be able to campaign without fear of reprisal, and the election commission should disseminate information to the extent that citizens are able to make an informed decision about their political options. Without public discourse on the role of the government, the system cannot be declared democratic or reflective of the will of the people.

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## VII. ANALYSIS OF THE SITUATION IN BURMA

### A. THE SPDC: NOT PLANNING TO STEP DOWN BUT *STRENGTHENING ITS POWER*

The SPDC has proven its unwillingness to relinquish power. The regime repeatedly promises one thing, and then reneges on what it has stated to serve its own purposes. In 2005, the SPDC established Naypyidaw as the new capital of Burma. Located approximately 320 km north of Rangoon, the move attests to the SPDC's intent to maintain political control. In contrast to Rangoon, Naypyidaw is relatively undeveloped and unpopulated (except for by government officials). The area is void of mobile phone service and private landlines are prohibited for civil servants. The top military generals themselves live hidden from the public eye in mansions 11 km from the main government offices. Naypyidaw represents less of a capital city where a citizen would go to petition a government, and more of what it really is—a military base with pitiful civilian trappings.<sup>111</sup>

One advantage of the new capital is that it is too removed from the population to be disrupted by events like the 2007 Saffron Revolution, where monks flooded the streets of Rangoon. Business continued as usual in Naypyidaw, while the junta brutally quelled the uprising down south and arbitrarily imprisoned thousands of citizens. In the face of such blatant protest, General Than Shwe proceeded to prepare for a referendum on 10 May 2008 to ratify the constitution developed by the National Convention.

### B. ARE ALL ELECTIONS STEPPING STONES FOR A GRADUAL DEMOCRATIZATION?

The tenets of liberal democracy—protection of individual rights, separation and independence of government branches, media freedom, and a robust civil society—will not appear overnight. Such institutions must be intentionally fostered and sustained in a political environment that is conducive. It is difficult to maintain democracy in the best of situations, and nearly impossible to establish democracy following a history of violence akin to the scale in Burma. The current example of Iraq highlights the difficulties of uniting a diverse population

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<sup>110</sup> *Id.*

<sup>111</sup> Nina Martin, 'Living in a ghost town' *Bangkok Post* (18 October 2009)

<<http://www.bangkokpost.com/news/investigation/25872/living-in-a-ghost-town>> accessed 21 October 2009.

under one national, democratic government after decades of authoritarianism—despite billions of dollars in aid and technical assistance. The lack of information in Burma is another barrier to democratic transition. Even if liberal norms are clearly understood, the practice of such norms is a completely different matter. In order to prime the population for democracy, the SPDC should give civil society free reign to educate others about the exercise of liberal rights. Without this political backdrop, the elections are just another puppet show with no clear objective.

Earlier this year, the International Crisis Group (ICG) released a report describing the 2008 Constitution as the “flawed product of a flawed process”.<sup>112</sup> At the same time, the report submitted optimistic hopes for the elections to spur political change. Though the Burma Lawyers’ Council would like nothing more than for this election to ignite genuine democratization, it is crucial to remember that the 2008 Constitution, as it stands, will never lead to such a transformation. Though elections were held four times under the 1974 Constitution, none of these could be described as gradual stepping-stones towards democratization. The ICG raised three points as to why the 2010 Elections might lead to democracy:

- the hopeful promise of generational transition;
- provisions in the 2008 Constitution envisioning a multi-party state capable of representing divergent interests;
- the improvement in the domestic and international contexts, including developments in information technology (IT), media, civil society, and political awareness.<sup>113</sup>

Unfortunately, even given these concessions, there is no reason to believe that the present scenario will differ from the historical course of elections in Burma.

First, positive generational transition can only occur when the generation coming into power has been exposed to and believes in the merits of liberalization. Nothing in the past half century has set the groundwork for that occurrence. Moreover, the 2008 Constitution does not lead in the right direction for promotion of human rights and encouraging democratic Rule of Law. No country in the world has transformed itself from the rule of military dictatorship to democracy within the framework of a Basic Law similar to the SPDC’s 2008 Constitution, which simply legitimizes the military dictatorship.

Second, despite claims of multi-polarity, no actions on the part of the SPDC have fostered such a political climate. Decades of anti-association and anti-assembly promulgations make the declarations of political heterogeneity ring hollow. Even if divergent groups were allowed to be elected and hold office, the charade of democracy would end there. Between the 75 percent majority needed to pass bills and the 25 percent of parliament claimed by the military, it would be virtually impossible for any group to pass meaningful legislation. A multi-party state is pointless if even the best of coalitions remain impotent to render change.

Third, while IT, civil society, and political awareness in Burma have undoubtedly developed from 35 years ago, instances like the Saffron Revolution reveal that it is still unable to influence the governing powers. Media is so tightly censored that it symbolizes the junta’s unquestionable control more than anything else. Regional pressure is unlikely to materialize

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<sup>112</sup> International Crisis Group, “Myanmar: Towards the Elections” (20 August 2009) <<http://www.crisisgroup.org/home/index.cfm?id=6280>> accessed 13 November 2009.

<sup>113</sup> *Id.*



considering the passivity of the Association of Southeast Asian Nations (ASEAN) in dealing with the military. The analysis that ‘the [regional] context has changed’<sup>114</sup> presents a worrisome presupposition. Moreover, the lack of sustained pressure and tangible action on the part of the international community has actually seemed to result in an ever-emboldened regime. Though the international community has expressed the intent to take action, current efforts appear uncoordinated and even contradictory at times.

In Asian countries where democratization has occurred (such as South Korea, Taiwan, and Indonesia) economic liberalization and the loosening of political control have preceded such transitions. In the cases of all three countries, military dictators ruled for several decades. Generational transition, however, did not happen within the framework of the constitutions. Instead, student demonstrations with the background support of civil society organizations facilitated societal change outside of the constitutional framework. Additionally, the authoritarian regimes of all three countries were reasonably susceptible to popular opinion, which paved the way for stabilization into liberal democracy. Thus, civil society can only be effective in propelling democratic change if the ruling authorities are also willing to concede power incrementally. These factors are still not in place in Burma. Due to arbitrary restrictions made by the military regime,<sup>115</sup> the status of civil society inside Burma has yet to reach the level of civilian participation experienced by any of the aforementioned countries prior to liberalization.

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<sup>114</sup> International Crisis Group, ‘Myanmar: Towards the Elections’ (20 August 2009)  
<<http://www.crisisgroup.org/home/index.cfm?id=6280>> accessed 13 November 2009.

<sup>115</sup> Community-based and non-profit organizations cannot receive funding directly from international sources.

## VIII. CIVIL SOCIETY FORMATION AND THE RULE OF LAW

### A. CIVIL SOCIETY CONCEPT

#### Society and State

The term “civil society” may be used loosely to describe the public space of a community where open discussion thrives and voluntary associations work toward the betterment of society as a whole.<sup>116</sup> In many countries, Socrates’ philosophy to resolve conflicts within society through public argument using ‘dialectic’ can be invoked in every sector of society, regardless of the subject—racial, religious, economic, social, or political. According to Aristotle, an “association of associations” that enables citizens to share in the virtuous task of ruling and being ruled can be comprehended as an ideal state. This is due to the ownership and distribution of power ensuring representation of and accountability to the population.

In the modern world, a primary purpose of the state is to function in a way that prevents the condition of total war such as those that took place in ancient human history, elaborated by Thomas Hobbes.<sup>117</sup> As part of preventing war, the state assumes the role of a political institution that effectively maintains social control through law and order. Today, the state is expected to not only keep peace with other countries, but also provide for its citizens to the fullest degree possible. Along these lines, it is necessary to discuss the role of “law” in society.

#### Law and Society

Law and society have an intimate relationship. Law focuses on the socio-political aspects of society, extensively addressing societal problems. Law deals with the legal aspect of governance to preserve social order and enable social progress. It sets a standard and can be used to measure progress over time.

Modern behavioral scientists like David Easton assert that any legal system depends very much on the social environment. The legal system gains its inputs from the social environment; laws must be generated in response to societal needs in order to fulfill their purpose. As such, we must recognize society’s influence on law. Society not only influences law, it also depends on law. Accordingly, the legal system must be dependable to gain the confidence of the population. If genuine principles of the Rule of Law do not prevail, only a superficial stability may emerge.

In order for civil society to come into existence, the prevalence of just laws on the basis of Rule of Law is essential. People as well as people’s organizations should be aware of the laws and regulations of the state, the nature and modes of government function, and their positive or negative impact on society. Similarly, the government should be aware of the benefits that civil society may provide, and work to foster a vibrant civil society.

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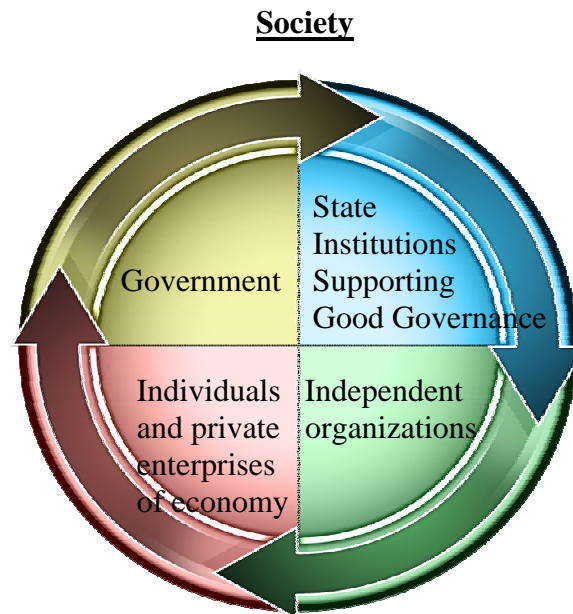
<sup>116</sup> Michael Edwards, ‘Civil Society’ *The Encyclopedia of Informal Education*  
<[http://www.infed.org/association/civil\\_society.htm](http://www.infed.org/association/civil_society.htm)> accessed 4 February 2010.

<sup>117</sup> Alexander Moseley, ‘The Philosophy of War’ *The Internet Encyclopedia of Philosophy*  
<<http://www.utm.edu/research/iep/w/war.htm>> accessed 4 February 2010.

## Application of Civil Society to the Case of Burma

In order to address the extreme challenges experienced in developing civil society in Burma, and to clarify the misconception that the 2010 election may create a space for a gradual democratization process, a more specific definition of society should be formulated and promoted. Society can be categorized into four distinct sectors:

- government (executive branch and parliament)
- individuals and private enterprises that form an economic force
- state institutions supporting good governance (judiciary, commissions, and other independent governmental agencies)
- independent organizations and media



### B. FIRST SECTOR: THE GOVERNMENT

The government is the main driving force behind the existence of society—whether good or bad. Every country must have a government as a well-established political institution. In order to stabilize society, the role of the government as a consolidated political force is of paramount importance. The major obligations of the government must be specified. First, the government must maintain order in society pursuant to just laws on the basis of Rule of Law principles. Second, the government should protect its own citizens from the perils of those who abuse the rights and liberty of others, and who strive to attack society as a whole. Third, the government should help improve and foster economic sufficiency in terms of living conditions.

To limit autocratic governance, civil society (individuals and NGOs) work to monitor the operational mechanisms, policies, and functions of the government. When governments are accountable to the people, this monitoring can be effective in raising public awareness and forcing government improvement. Civil society also works to analyze government actions and

assess if it is complying with its obligations or abusing its power. If the latter occurs, civil society is instrumental in notifying international organizations and other states that may have an affect on the government. For more domestic matters, civil society helps to uncover underlying societal issues, including their causes and effects. In a country like Burma that has many ethnicities, civil society organizes to research, present, and negotiate the demands of various groups in order to maintain stability. Finally, civil society often gains high exposure through advocacy, lobbying, and public campaigns to alleviate the suffering of people, alter the law and policies of government that lack effectiveness, and promote the average standard of living for citizens.

### **C. SECOND SECTOR: INDIVIDUALS AND PRIVATE ENTERPRISES OF ECONOMY**

Though governments should facilitate “economic sufficiency”, this should not be incorrectly interpreted to mean that the government should assume all economic power and regulate the economy of the entire society. In myriad cases, the government has usurped power and aggrandized its role more than necessary while eschewing its aforementioned obligations. History has already shown how the Soviet Union collapsed mainly because the ruling regime usurped both political and economic power simultaneously to exercise rigid centralization, rejected political checks and balances, and ignored the promotion of economic sufficiency for people. The government became reactionary, abusive, and corrupt, leading to a forfeiture of transparency and accountability.

People who are hungry and live from hand-to-mouth may not be able to pay heed to societal issues and their causes and effects. As a result, the population functions under “survival mode” where the only thing that matters is meeting the basic needs of food and shelter at any cost. A government is obligated to address the economic problems encountered by its people as a component of society. In addition to other factors taking place in national and international arenas that may negatively affect an economy, rigid centralization of the government results in extreme circumscription of people’s freedoms and brings about poverty, particularly in developing countries. Prof. Amartya Sen, Nobel Laureate of Economics, asserts that poverty is inevitable for people who lack freedom.<sup>118</sup> Poverty results in a lack of knowledge and security, denying a decent life for people.

A properly operating market economy system requires good governance. Good governance means an efficient, independent, accountable, and open government without corruption that is dedicated to the public good and focused on four main areas: accountability, accessibility of information, transparency, and a legal framework for development. In terms of economic planning, regulation without rigidity is most beneficial. The economy must be regulated enough to provide jobs domestically, but flexible enough to adapt and adjust to international market forces. Whereas the government itself is required to exercise good governance, civil society organizations are obliged to observe the factors that influence the livelihoods of people and take indispensable action, along with the target communities, to promote it.

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<sup>118</sup> Amartya Sen, *Development as Freedom* (Anchor Books, New York 1999).

#### **D. THIRD SECTOR: STATE INSTITUTIONS SUPPORTING GOOD GOVERNANCE**

Though the judiciary is commonly included in the first sector under government institutions, its specific importance will be pointed out as an individual sector in this paper. The judiciary plays a pivotal role in balancing the power of the government and should have the ability to exercise judicial review, which checks that the functions of government are in line with the constitution of the respective state and other organic laws. Courts have exhibited growing boldness and activism in challenging the constitutionality of executive actions, which only benefits society as a whole by exemplifying that no person or entity is above the law.

The idea of limited government, or constitutionalism, is in conflict with the idea of parliamentary sovereignty, as constitutionalism is safeguarded through judicial review. Because electoral democracies have, at times, failed in protecting civil and political liberties, the demand for judicial protection of fundamental rights has arisen. The concept of expanded judicial power has even crept surreptitiously into the international system as to whether the United Nations Security Council's findings are reviewable by the International Court of Justice. The judicial system is increasing in importance as a mode of justice for citizens, as well as a regulator of the chief executive and parliament.

Reciprocity and personalism remain central in many descriptions of East and Southeast Asian politics and economies. According to numerous scholars, Asian culture exudes a preference of order over freedom, hierarchy over equality, and harmony over conflict. The status quo, however, is incompatible with international law standards that prioritize the rights of the individual in protection against the collective. It is time to progress toward a society in which freedom is protected while maintaining order, equality is practiced while hierarchy is respected, and conflict is resolved peacefully through the judiciary, which encourages a genuine instead of superficial harmony.

There are a number of conflicts that cannot be resolved through public argument using 'dialectic', as elucidated by Socrates. When these arise, the judiciary should provide a viable recourse to resolve the underlying conflicts of society peacefully, removing the need to resort to violence. Peaceful conflict resolution can become a reality only with the existence of an impartial, independent, and efficient judiciary. When citizens know that they have access to justice, this will diminish the need to extreme action. Additionally, a functioning court system acts as a deterrent to those who would infringe upon the rights of others.

If the government is the perpetrator in denying rights, judicial review in democracies checks majority power by upholding laws in accordance with the constitution. If a constitution is created on behalf of the people, constitutional adjudication should address the need to monitor political agents and prevent them from renegeing on the founding bargain with citizens. Courts gain credibility for being impartial and holding all responsible lawbreakers to the same standard.

There can be no genuine civil society without the rule of law, and there can be no rule of law without an independent judiciary. The judiciary must be independent enough to review government laws and actions; without a strong judiciary, independent organizations cannot rely on judicial protection from arbitrary government interference. Currently, the judiciary in Burma

is completely exploited by the military regime. Their actions, in fact, could make them complicit in the crimes of the regime. For the first time in decades, however, lawyers and democracy activists have been publicly fighting for the right to fair trial, justice, and equal application of the law in courtrooms. Several have been arrested and others are threatened with contempt of court or worse. However, their efforts are an excellent example of the slowly emerging civil society. It is absolutely essential that systemic reform be applied to the Burmese judiciary in order to encourage and protect the development of civil society.

In today's world, in addition to the judiciary, the emergence of other state institutions that uphold good governance can be found. Examples include Human Rights Commissions, National Counter Corruption Commissions, Commissions for Gender Equality, etc. These state institutions may be set up by the government, but must be independent enough to honestly assess the situation in the country. The organizations that are categorized as civil society organizations inside and outside of Burma must—at minimum—exert efforts for the reformation of the incumbent judiciary in Burma to be independent, impartial, and efficient. Additionally, such organizations should highlight and denounce the intervention of executive power in the judiciary, which results in the denial of strong rights protection mechanisms, and impedes the emergence of civil society.

#### **E. FOURTH SECTOR: INDEPENDENT ORGANIZATIONS AND MEDIA**

Civil society forms organically to fill a gap unmet by the government. In the contemporary world, civil society addresses political, religious, and physical needs among other needs. According to the London School of Economics Centre for Civil Society, civil society may be defined as

...the arena of *uncoerced* collective action around *shared interests, purposes and values*. ...Civil societies are often populated by organizations such as registered charities, development non-governmental organizations, community groups, women's organizations, faith-based organizations, professional associations, trades unions, self-help groups, social movements, business associations, coalitions and advocacy groups (emphasis added).

Civil society is a dense network of associations working openly in a democratic society with the ability to affect decision-makers in order to influence events. Civil society consists of various forms of associations that will freely interact and communicate with each other in a spirit of civility and tolerance for the sake of the entire population. Societal pluralism (i.e. the ability of all groups to work freely, openly, and equally without violating the rights of others) is one of the underlying concepts of civil society. Here, it is important to note that a civil society, which extols the idea of democracy, does not allow one group to act selfishly for its own goals without regard to the others. Additionally, any group that is fraudulently created by the military junta, such as the Union Solidarity and Development Association (USDA), cannot be considered a civil society organization even if it is not technically part of the government.

In many countries including Burma, the following organizations are normally regarded as civil society organizations:

- Rights Based Associations
  - Human rights, workers' rights, farmers' rights, ethnic rights, etc.
- People's Organizations or Interest Groups
  - Trade unions, teachers' associations, lawyers' councils, women's organizations, etc.
- Academic Institutions
  - Universities, research groups, think tanks, etc.
- Issue Oriented Organizations
  - NGOs and community-based organizations
- Development Organizations and Foundations
  - Health, education, agriculture, etc.
- Racial, Religious and Cultural Institutions
- Social Welfare Assistance Groups
  - Funeral help, orphanages, homes for the poor and elderly, clean water associations, nursery schools, humanitarian relief, etc.

To protect and further their own interests, these groups must often adopt a political stance. For instance, in implementing a development project, development organizations may provide training to farmers, teach them how to grow plants, distribute seeds, assist in providing farming equipment, etc. They can contribute to improving farmers' lives. In spite of that, these organizations' actions are futile if they do not challenge blatant government infringement of rights and policies. For example, ignoring people's rights to own land, illegal land confiscation by local authorities, prohibition on freedom to choose which crops to grow, restrictions on free trade of farming products, all undermine the purpose of the organization. As of now, no development organization, formally operating under ruling military regime, in Burma has publicly challenged the policies of government as to whether they infringe upon the basic rights of people.

Even the existence of religious institutions, whether they are Buddhist, Christian, Hindu, Muslim or some other religion, have been increasingly aligned to a specific political stance. Although their main purpose is to gather for worship, focus on learning and teaching their own religious doctrine, and practice their respective religious rituals, they are inadvertently pulled into politics because they are influential and often concerned with the well being of their practitioners, which the government's policies affect.

For example, in the September 2007 Burmese monk-led uprising, the monks peacefully gathered not to practice regular rituals but to pressure the regime to seek a negotiated settlement in order to transform the society into a peaceful, free, and developed one. Their actions demonstrated and spurred the role of civil society. However, the regime brutally cracked down on their peaceful gatherings, imprisoned many monks without trial, and continues to persecute innocent religious figures. The Buddhist Religious Institution, formally created by the ruling regime inside Burma, has not yet shown any indication of encouraging civil society, and is unduly influenced.

Whenever society is damaged, alleviation of suffering is an essential response, regardless of whether the damage is attributed to natural disasters, man-made actions, or government mismanagement. The assistance of social welfare organizations to the affected people—national and international alike—greatly contribute to society and help survivors re-establish their lives. Civil society organizations, however, cannot single-handedly resolve all public problems nor represent their members' interests well without taking a role in political life.

## **MEDIA**

Independent media is vital to developing a transparent society and bringing about the exchange of viewpoints necessary for civil society to emerge. In developing countries, where access to education may not be widespread, media plays a large role in shaping the opinions of the public. It is an important source of information, and greatly encourages civil society because it offers well-researched and unbiased news for the population. Inhibiting freedom of the press is a dangerous practice because of all the other sectors that are invariably affected. In Burma, registration of the media and prior “government approval” (thinly veiled censorship) for publications render genuine civil society impossible as it creates a coercive environment.

It is reasonable for governments to register organizations, or require that organizations pay taxes on income, but unacceptable for the government to use the registration process as a method to weed out associations it does not approve of, or outlaw organizations that object to government policies. With the exception of organizations intent on violating the rights of other civilians (such as terrorist organizations), people must be free to organize and disseminate information as they wish.

These four sectors serve to check and balance the power of one another. The non-government sectors must be strong enough to formally challenge the government but, overall, power should be evenly dispersed throughout. Generally, academicians and the UN have focused too much on the fourth sector as the only check on government. Actors inside of Burma as well as outside of the country need to highlight all sectors equally to be truly effective.

## **F. CASE STUDIES ON CIVIL SOCIETY**

The SPDC is responsible for numerous cases of unlawful government interference and blatant quelling of the organizations that would comprise civil society. While Burma enjoyed a lively civil society after independence and before the military coup, current conditions make civil society impossible. Beyond the numerous indirect obstacles to civil society in Burma such as media censorship, the ruling regime also uses direct measures to bar progress. The following case studies are illustrative of the challenges facing civil society formation in the country.



## U Khun Htun Oo and Shan Leaders

On 9 February 2005, nine Shan leaders were arrested under accusation of violating the Law Protecting the Peaceful and Systematic Transfer of State Responsibility and the Successful Performance of the Functions of the National Convention against Disturbance and Oppositions.<sup>119</sup> U Khun Htun Oo, Chairman of the Shan Nationalities League for Democracy, and other Shan leaders were arrested for certain statements at a Shan dinner that the SPDC evaluated as secessionist in nature. The statements by the New Generation (Shan State) were:

- “Now we are at the first step of creating our own fortune for Shan State.”
- “All ethnic nationalities, living in Shan State, are encouraged to actively participate and work together with united spirit.”<sup>120</sup>

The title of “New Generation” refers to the hope of the Shan people for future generations to work toward progressively gaining more opportunities. In this context, the above statements are inspiring and motivational. The SPDC, however, used the statements out of context to condemn the Shan leaders preemptively for starting a secessionist movement. Arrested and tried under high treason, sedition, and forming organizations (among other things), the Shan leaders were sentenced without fair trial under the highest maximum penalties. Prison sentences ranged from 79 to 106 years—a clearly disproportionate punishment for peaceful, non-violent, and non-immediate actions.<sup>121</sup>



Shan Ethnic Leaders whom were provided 75 to 106 years imprisonment for their efforts to form a Shan State Academic Consultative Council

False charges for mild statements manipulated as “crimes” have gone far beyond limiting free speech. Burmese civilians are effectively muzzled from saying anything but positive comments about the country and government, as anything less may be used against them. Civil society is impossible without free discussion and exchange of ideas. Furthermore, the Shan leader case is just one of many examples of political party suppression under the Law Relating to the Forming of Organizations.<sup>122</sup> Since civil society is comprised of organizations, associations, and advocacy groups, this law essentially strangles all civil society possibility.

## Zarganar

Another example of undue government interference in what would be civil society is the case of Zarganar, the famous Burmese comedian, satirist, actor, and director. In and out of prison several times for open participation in peaceful protests and criticism of the government through entertainment media, Zarganar has also facilitated awareness of HIV/AIDS and distributed disaster relief after Cyclone Nargis in May 2008. As an independent activist, Zarganar uses his considerable influence to bring attention to unmet societal needs.

<sup>119</sup> “BLC Statement and Legal on Shan Leader Case” *Burma Lawyers’ Council* <[http://www.blc-burma.org/activity\\_statement.html](http://www.blc-burma.org/activity_statement.html)> accessed 8 February 2010.

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*

<sup>122</sup> Law Relating to the Forming of Organizations (1988).

On 3 June 2008, Zarganar was arrested under a public order offense when he criticized the government for failing to administer humanitarian aid during Cyclone Nargis in a timely manner.<sup>123</sup> His hearing was held secretly in Insein Prison and officials ransacked his home to seize his computer and \$1000 USD that was raised for Cyclone Nargis victims.<sup>124</sup> *The Irrawaddy* reported that Zarganar was arrested as a threat and warning to other private donors who were fed up with the government's sluggish response and rejection of international aid, and were working to bring international aid directly to the people.

Zarganar had recruited and organized 400 volunteers to distribute aid to un-reached victims, but the SPDC wanted all aid channeled through the military, which is intent on portraying itself as the sole benefactor of the people. Zarganar refused to entrust the government with a timely delivery of supplies. Additionally, he rejected the SPDC request to ignore foreign media and acted as an important liaison for international news groups attempting to cover the post-Nargis situation.<sup>125</sup> Zarganar was charged with 59 years in prison under a combination of laws including the Electronic Transmission Act (45 years), the Unlawful Association Act, and other sections of the antiquated Penal Code—17/2, 32(b), 295(a), and 505(b).<sup>126</sup>



When a ruling power fails to meet the needs to the population, it is only logical that ordinary citizens will step up to address the problem. This trend is evident in countries around the world and civil society actors formulate many of the most innovative solutions to local issues. The implications of the SPDC's willingness to arrest humanitarian workers create a doubly oppressive situation; the government ignores the needs of the people, and also blocks those who would help. This presents a vicious cycle in which poverty and unnecessary suffering will remain rampant.

## U Gambira and Buddhist Monks

Religious organizations fulfilled multiple roles in what is now considered relatively separate sects of civil society.

In September 2007, U Gambira led the All Burma Monks' Alliance in a series of peaceful protests—now known as the Saffron Revolution—against the actions of the junta. The peaceful protest of 2007 was not a random incitement of rebellious forces, but rather collective action consistent with monks' historic role as civil society promoters in Burma. What has changed,

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<sup>123</sup> Ed Cropley, 'Myanmar charges comedian with public order offense' *Reuters* (1 August 2008) <<http://www.reuters.com/article/idUSBKK73850>> accessed 8 February 2010.

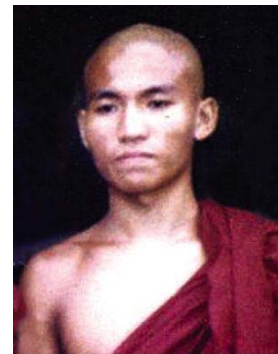
<sup>124</sup> Saw Yan Naing, 'Zarganar arrested, cyclone relief money seized' *The Irrawaddy* (5 June 2008) <[http://www.irrawaddy.org/article.php?art\\_id=12512/](http://www.irrawaddy.org/article.php?art_id=12512/)> accessed 8 February 2010.

<sup>125</sup> *Ibid.*

<sup>126</sup> 'Political Prisoner Profile: U Thura @ Zarganar' *Assistance Association of Political Prisoners* (30 April 2009) <[http://www.aappb.org/bio\\_pdf/Zarganar\\_bio\\_30\\_April\\_2009.pdf](http://www.aappb.org/bio_pdf/Zarganar_bio_30_April_2009.pdf)> accessed 8 February 2010.

however, is the government's response to religious figures. Instead of the expected reverence or at least respect for monks, the SPDC reacted with unnecessary use of force.

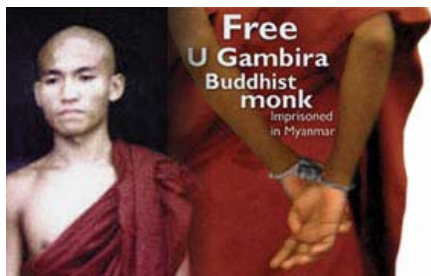
On 26 September, the military leadership began a harsh crackdown including monastery raids and arrests.<sup>127</sup> Thousands were imprisoned and the ensuing violence left hundreds injured or killed. U Gambira was first held in prison without trial and then sentenced to 68 years in prison after being found guilty of sixteen separate counts, including violation of Joining or Continuing in Unlawful Assembly and the Unlawful Association Act.<sup>128</sup>



U Gambira

The key term in both of these acts is “unlawful”, which is unfortunately defined by the SPDC. As the monks marched, they chanted the *Metta Sutta*, a prayer of kindness and compassion.<sup>129</sup> The *Metta Sutta* could hardly be construed as subversive, and the monks even encouraged civilians to refrain from joining their march in order to avoid an escalation of violence. The intent of the monks was to keep everything as calm as possible because they believed that their position as religious figures would protect them from the wrath of the SPDC. This, unfortunately did not hold true.

After the Saffron Revolution, the SPDC banned the *Metta Sutta* from being publicly chanted.<sup>130</sup> First, this freedom of speech restriction also represents a violation of religious



freedom. Second, banning the public ceremonies held by Buddhist monks prevents people from making donations to them, which is an essential part of the religion for practitioners and the means of subsistence for the monks. The junta has now also adopted a stance of profiling religious figures as subversive forces. This example of religious persecution illustrates the complete lack of boundaries used by the generals. Consequently, the one sphere that previously

provided a safe place for people to gather no longer retains that hold; even the mildest sources of civil society in Burma have been quelled.

<sup>127</sup> ‘Political Prisoner Profile: U Gambira @ Sandor Bartha @ Nyi Nyi Lwin’ *Assistance Association of Political Prisoners* <[http://www.aappb.org/bio\\_pdf/U\\_Gambira\\_bio\\_11\\_June\\_2009.pdf](http://www.aappb.org/bio_pdf/U_Gambira_bio_11_June_2009.pdf)> accessed 8 February 2010.

<sup>128</sup> *Ibid.*

<sup>129</sup> ‘Saffron Revolution of 2007’ *US Campaign for Burma* <<http://uscampaignforburma.org/learn-about-burma/saffron-revolution>> accessed 8 February 2010.

<sup>130</sup> Arkar Moe, ‘Burmese authorities ban chanting of *Metta Sutta*’ *The Irrawaddy* (6 August 2009) <[http://www.irrawaddy.org/article.php?art\\_id=16498](http://www.irrawaddy.org/article.php?art_id=16498)> accessed 8 February 2010.

## G. CONCLUSION

Education and awareness are the first steps to promoting civil society growth. Civil society may never come into existence as long as people in Burma lack sufficient knowledge of the form and role of civil society. Furthermore, no progress in this area can proceed as long as unjust laws deprive individual liberty and restrict freedom of association, assembly, and expression. Likewise, if an effective rights protection mechanism remains non-existent and the judiciary stays subservient to the executive, civil society will remain powerless to challenge the power of the government. The military regime's excessive abuse of power, rigid centralization, and failure to fulfill the most basic obligations of providing for their citizens—or, at the very least, allowing other groups to provide for the people—places a chokehold on civil society development. Last, but not least, as long as structural reform allowing the four sectors which serve to check and balance the power of each other is not implemented, Burma will remain woefully stunted.

If structural changes are made to all four sectors, the democratic movement is confident that civil society will emerge. International organizations should demand more clear and tangible steps for the SPDC to put into practice as evidence of genuine change. The word “democracy” means little alone, and the term “disciplined democracy” is even more vague. The results of the specific sector improvements described in this paper, however, could be readily seen within a few years with enough international pressure. While the people of Burma certainly appreciate humanitarian assistance, it would be more beneficial in the long-term to focus on building up the specific sections of society that would allow the population to take care of itself and reduce dependence on foreign aid.

The SPDC's 2008 Constitution has primarily denied the emergence of the abovementioned four sectors which will serve to check and balance the power of each other. Rather, it has systematically laid down foundation for the rigid centralization which is usually practiced under the dictatorial systems. The existence of the four sectors will become a reality only when the genuine principles of the Rule of Law prevail. So long as perpetrators who have committed international crimes enjoy impunity endlessly, the application of the Rule of Law will be mockery; and, as a result, the possible emergence civil society after the elections, which will implement the 2008 constitution, in 2010 and the following period, will merely be a myth.

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## IX. THE ECONOMIC DEVELOPMENT AND THE RULE OF LAW

There are presumptions that elections in 2010 and the following period may bring gradual economic development in Burma. Elections are often processes for democratic change, which in turn usually facilitates an open market economic system. After the elections, however, Burma's 2008 Constitution will certainly be implemented. This Constitution contains numerous flaws that will prevent true democracy to flourish and will allow the military to continue its control over the country. As of now, the governing State Peace and Development Council (SPDC) has given no indication that it will revise its highly flawed constitution.<sup>131</sup>

The SPDC's disregard for the rule of law and international norms has impacted its economic prosperity. Burma's economy was recently ranked 5<sup>th</sup> to last in a ranking of economic freedom.<sup>132</sup> Burma is also ranked 138<sup>th</sup> on the United Nations Development Program's Human Development Index, indicating a severe lack of economic and social development in the country.<sup>133</sup> Internationally, Burma's economy is regarded as corrupt and severely mis-managed.<sup>134</sup> This trend will continue as long as the rule of law and good governance do not prevail in Burma.

This compilation will describe the fundamental elements of economic development, and will analyze the 2008 Constitution and its prospects for granting economic freedom to the people of Burma. It will also explore whether the Constitution adequately addresses the current economic problems in Burma and examines the connection between economic stagnation and rampant human rights abuses, pervasive criminality, and the denial of the rule of law.

### A. THE RULE OF LAW

For a market economy system to succeed, it must be based on the rule of law and protected by an impartial judiciary. To a large extent, a successful market economy depends on the trust the market participants have in the legal system to uphold their rights and fairly adjudicate their disputes. There must be an efficient, just and affordable judicial mechanism to resolve disputes, including the disputes involving governments. The mechanism must have strong, enforceable safeguards to ensure that the parties are treated fairly. Disputes must be adjudicated based solely on the facts and the law, not on the identity of the party or the relationship the party has to the government. For example, if a business enters into a contract to purchase goods, it must know that it can obtain a legal remedy if the supplier fails to deliver the goods. Businesses justifiably avoid markets that lack fair, efficient and unbiased courts because of the risk of uncompensated loss.

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<sup>131</sup> Speech delivered by Senior General Than Shwe on Independence Day of Burma, January 4, 2010.

<sup>132</sup> Heritage Foundation, 2010 Index of Economic Freedom, Burma Information on Economic Freedom, <http://www.heritage.org/Index/Country/Burma>.

<sup>133</sup> United Nations Development Program, Human Development Report 2009, Myanmar [http://hdrstats.undp.org/en/countries/country\\_fact\\_sheets/cty\\_fs\\_MMR.html](http://hdrstats.undp.org/en/countries/country_fact_sheets/cty_fs_MMR.html).

<sup>134</sup> *See, e.g.*, Transparency International, Corruption Perceptions Index 2009, [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2009/cpi\\_2009\\_table](http://www.transparency.org/policy_research/surveys_indices/cpi/2009/cpi_2009_table).

## **The Role of Legal and Judicial Institutions to Preserve the Rule of Law**

For a market economy system to succeed, it must include strong institutions that protect the rule of law, an independent judiciary, and property rights. Economies consist of parties each trying to grow and develop, and institutions must ensure that the parties interact with each other and with the government fairly. To a large extent, a successful market economy depends on the trust the market participants have in the legal system to uphold their rights and fairly adjudicate their disputes. There must be an efficient, just and affordable judicial mechanism to resolve disputes, including the disputes involving governments. The mechanism must have strong, enforceable safeguards to ensure that the parties are treated fairly. Disputes must be adjudicated based solely on the facts and the law, not on the identity of the party or the relationship the party has to the government.

In order for an economy to grow, the law and corresponding legal institutions must protect private ownership rights. Citizens and foreigners must be assured that their legally obtained possessions will not be arbitrarily seized, and that they can obtain a legal remedy before a neutral, independent judiciary if the government disregards this law.

### **Case Study**

In the Yaung Chi Oo case in Burma, for example, a private Singapore company made a joint venture with the Burmese government to manufacture beer. The government attempted to nationalize the company before the expiration of their contract. When the parties went to court, the judge ignored the Singapore company's arguments and unjustifiably used its broad discretion under the law to rule for the government.<sup>135</sup> A free market economy cannot succeed in such an environment. The almost complete lack of rule of law and a judicial system that is partial to the government means that domestic and foreign companies must negotiate directly with the government to resolve disputes.

The Yaung Chi Oo case highlights the SPDC's disrespect of property rights. In order for an economy to grow, the law and corresponding legal institutions must protect private ownership rights. Citizens and foreigners must be assured that their legally obtained possessions will not be arbitrarily seized, and that they can obtain a legal remedy before a neutral, independent judiciary if the government disregards this law.

## **The Rule of Law and the Institutional Theory of Economic Development**

The state of Burma's institutions will determine its future economic development. While there are many determinants of economic growth, recent research demonstrates that the quality of institutions is the greatest determinant of economic well-being.<sup>136</sup> Strong institutions enhance

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<sup>135</sup> B.K. Sen & Peter Gutter, *The Burmese Junta's Abuse of Investment Laws*, Legal Issues on Burma Journal, Aug. 2001.

<sup>136</sup> Other theories about economic growth focus on the importance of geography (noting that access to resources, climate, topography, and health issues are often linked to economic development) and the significance of international trade. While geography and trade are indeed important indicators of economic potential, the quality of

the rule of law, property rights, transparency, and the capacity to trade.<sup>137</sup> Institutions come in various forms, including courts which adjudicate disputes and protect property rights, banks that regulate financial transactions, and agencies that protect social interests such as education and health care. Institutions make sure that everyone understands the rules of the economy, that parties play by these rules, and that there are clear, anticipated, and fair procedures when a party breaks one of these rules. While robust institutions in all sectors are important for economic growth, this paper will focus on the importance of legal, judicial, and political institutions.

As legal, judicial, and political institutions become more dedicated to protecting the rule of law, an independent judiciary, property rights, and political fairness, the economy of Burma will develop. Several studies have demonstrated that improvements in the quality of institutions will result in significant improvements in average income, key indicator of a country's wealth.<sup>138</sup> As institutions become stronger, more accountable, and more transparent, they encourage investment and technological progress, which increases economic growth. The connection between strong institutions and economic growth continues: as a nation's economy strengthens, its population puts renewed energy into protecting and improving its institutions.

## **B. GOOD GOVERNANCE**

A properly operating market economy system requires good governance. Good governance means an efficient, independent, accountable and open government without corruption and dedicated to the public good. Good governance focuses on four main areas: accountability, accessible information, transparency and a legal framework for development.

### **(1) Accountability**

Accountability means holding government officials responsible for their actions. The laws must clearly provide for this accountability. A healthy market economy also needs strong anti-corruption laws that unambiguously prohibit the improper receipt of gifts and money. There must be clear regulations for lobbyists so that powerful groups cannot have an unfair advantage in policy making. Impartial and fair treatment by the government is critical for attracting investments and maintaining a fair business environment. Government officials must not accept gifts and other incentives from business that might lead to favoritism or even the appearance of impropriety.

Economic failures are to some extent caused by a lack of transparency, cronyism, and corruption. The World Bank in its 2007 Worldwide Governance Indicators ranked the Burmese government as the lowest in the world.<sup>139</sup> In Burma, there is no accountability, transparency, or independent judicial system.

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domestic institutions play a greater role in economic development than either of these two factors. Dani Rodrik & Arvind Subramanian, *The Primacy of Institutions*, Finance & Development, June 2003 at 31-2.

<sup>137</sup> *Id.* at 32.

<sup>138</sup> *Id.* at 31-2.

<sup>139</sup> World Bank, Worldwide Governance Indicators, 2007, available at <http://info.worldbank.org/governance/wgi/index.asp>.

## **(2) Accessible information**

Information about economic conditions, markets, and government policies must be reliable and accessible to all. For instance, information regarding the government's use of public funds must be available promptly and economically. The government must promulgate laws that require public companies to periodically release important financial information and to make clear to their investors the risks involved in investing.

To keep the people informed, the government must also publish and distribute the financial budget of the country, the decision record of the parliament and the decisions made at different levels of the federal government relating to the development of the country. The information must be clear, accurate, understandable and complete.

Official statistics released by the SPDC indicate that Burma has experienced double-digit growth since 1999, making it the fastest-growing economy in the world.<sup>140</sup> Releasing this type of false information is one of the characteristics of the current government, undermining the market's ability to accurately assess business needs. In Burma, official statistics are notoriously unreliable (and sometimes even deliberately misstated), and collecting data is difficult. Burma does not publish data on its spending or unemployment.

### **Case Studies in Connection with the 2008 Constitution**

The SPDC keeps accurate information from the people. There is no law in Burma that guarantees unequivocally free access to information, and the government has cracked down on journalists and others who seek to make information accessible to the public. Reporters without Borders ranked Burma 171 out of 175 countries in its annual press freedom index.<sup>141</sup> Recently, the regime has served journalists with harsh prison sentences. Ma Hla Hla Win, a 25-year old freelance journalist who supplied information for the Democratic Voice of Burma, was recently sentenced to a 20-year prison term.<sup>142</sup> Ngwe Soe Lin, a reporter for the Democratic Voice of Burma, was also arrested and sentenced to 13 years of imprisonment.<sup>143</sup> The two are just the most recent examples of the regime's intolerance for freedom of the press.

The Electronic Transaction Law is often the basis for such harsh punishment of journalists. The law forbids "doing any act detrimental to the security of the State or prevalence of law and order or community peace and tranquility or national solidarity or national economy or national culture" or "receiving or sending and distributing any information relating to secrets of the security of the State or prevalence of law and order or community peace and tranquility or

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<sup>140</sup> Sean Turnell, Burma's April Fools, Irrawaddy, May 2005, [http://www.irrawaddy.org/article.php?art\\_id=4645](http://www.irrawaddy.org/article.php?art_id=4645).

<sup>141</sup> Reporters Without Borders, Press Freedom Index 2009, <http://www.rsf.org/en-classement1003-2009.html>.

<sup>142</sup> Reporters Without Borders, Appalling 20-Year Sentence for Democratic Voice of Burma Video Reporter, <http://www.rsf.org/Appalling-20-year-jail-sentence.html>.

<sup>143</sup> BBC News, Burma Jails Journalist Ngwe Soe Lin for 13 Years, <http://news.bbc.co.uk/2/hi/8487179.stm>.



national solidarity or national economy or national culture.”<sup>144</sup> Reporters, journalists, and others who seek free access to information are common targets of this law.

The Constitution will perpetuate the crackdown on journalists and free speech rights. Article 354 indicates that free speech will be subject to pre-existing laws, including the Electronic Transactions Law. Such harsh restrictions on access to information in Burma therefore will continue after the enactment of the Constitution.

### C. TRANSPARENCY

Transparency is a call for open government that results in greater accountability, limited corruption and a dialogue between government and private interests over policy development. The government's actions must not be hidden from the public. A market economy and democracy are founded on citizen participation and decision making. The government alone does not drive the focus and future of a country; citizen input is critical to guide the government's path. Meaningful citizen input and participation are not possible however, without a well-informed public, which means that the government must make available as much information as possible. The people must also be able to contribute to the lawmaking and decision making process through a comment and question procedure. In many democratic countries, the public is given a generous time period to review administrative regulations and provide insights that the government may not have. For instance, comments from companies can provide the government with a business perspective while private individuals may be able to identify ways in which their rights may lack protection under a new law.

Burma lacks regulatory and legal transparency. All existing regulations are subject to change with no advance or written notice at the discretion of the regime's ruling generals. The country's decision-makers appear strongly influenced by their desire to support state-owned enterprises, wealthy friends, and military-controlled companies, such as the Myanmar Economic Corporation and Myanmar Economic Holdings, Ltd. The government often issues new regulations with no advance notice and no opportunity for review or comment by domestic or foreign market participants. The regime rarely publishes its new regulations and regulatory changes; instead they communicate new rules verbally to interested parties and often refuse to confirm the changes in writing.

Corruption is a significant barrier to transparency, and is widespread in Burma. Economists and businesspeople consider corruption the most serious barrier to investment and commerce in Burma. Very little enterprises can be accomplished, from the smallest transactions to the largest, without paying a bribe. As inflation increases and investment declines, this problem appears to be worsening. Since 1948, corruption is officially a crime that can carry a jail term.<sup>145</sup> However, the ruling generals apply the anti-corruption statute only when they want to take action against a rival or an official who has become an embarrassment. For instance, in October 2004, the SPDC arrested then-Prime Minister General Khin Nyunt and many of his

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<sup>144</sup> The Electronic Transactions Law (2004), Section 33.

<sup>145</sup> Anti-Corruption Resource Centre, Overview of Corruption in Burma (Myanmar), 23 Mar. 2009, *available at* [www.u4.no/helpdesk/helpdesk/query.cfm?id=205](http://www.u4.no/helpdesk/helpdesk/query.cfm?id=205).

colleagues and family members for corruption.<sup>146</sup> Most citizens view corruption as a normal practice and requirement for survival.

#### **D. POLITICAL INSTITUTIONS**

A properly operating market economy system requires strong political institutions marked by good governance. Good governance means that efficient, independent, accountable and open political institutions exist without corruption and are dedicated to the public good. Political institutions are best formed and strengthened through participation of civil society groups and the general public. Individuals and groups can collectively choose what sort of institutions will work best for them, forming political institutions that will improve their daily lives. In order for civil society to effectively participate in this creation and strengthening of political institutions, there must be easy access to information in the country and individuals must be encouraged to fully participate in their government. Hallmarks of strong political institutions include accountability, accessible information, and transparency.

Independent political institutions are suppressed by the SPDC. The National League for Democracy (NLD), for example, has lost many members to the regime's harassment and intimidation.<sup>147</sup> The main leadership of the NLD, Daw Aung San Suu Kyi and U Tin Oo, remain in detention, severely restricting the freedom of the party. The Constitution will legitimize the regime's restrictions on political institutions. Article 354 of the Constitution purports to allow individuals to form associations and organizations, to publish their thoughts freely, and to assemble peacefully. This article is rendered void by its exception clause, which grants these freedoms only "if not contrary to the laws, enacted for Union security, prevalence of law and order, community peace and tranquility or public order and morality." The exception clause effectively denies independent political institutions from emerging and growing in Burma.

#### **E. ECONOMIC FREEDOM**

In its 2007 Index of Economic Freedom, the Heritage Foundation ranked Burma as the fifth most repressed economy in the world.<sup>148</sup> Burma's economy is 40.1% free, which makes it the world's 153<sup>rd</sup> freest economy out of 157.<sup>149</sup> Burma is ranked 29<sup>th</sup> out of 30 countries in the Asia-Pacific region.<sup>150</sup>

##### **(1) Protecting Intellectual Property**

The government must facilitate the work of innovators by passing intellectual property laws. The rules of the marketplace must be established so that new products or processes are not pirated. Small inventors and large companies will only invest effort and money in research if they know that they will be financially rewarded for their good ideas. In Burma, there is almost

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<sup>146</sup> Junta Accuses Khin Nyunt of Corruption, Irawaddy, 8 Nov. 2004, [http://www.irawaddy.org/article.php?art\\_id=4109](http://www.irawaddy.org/article.php?art_id=4109).

<sup>147</sup> National League for Democracy (Liberated Area), [http://www.nldla.net/?page\\_id=2](http://www.nldla.net/?page_id=2).

<sup>148</sup> Heritage Foundation & Wall Street Journal, 2007 Index of Economic Freedom, *available at* <http://www.heritage.org/index/Download.aspx>.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

a complete stifling of economic innovation by the SPDC. The few instances of innovation are subject to government corruption in the form of forced payments to officials and are often threatened with expropriation or nationalization. Burma's patent, trademark, and copyright laws are all deficient in regulation and enforcement. An intellectual property rights law, first drafted in 1994, still awaits government approval and implementation. Burma has no trademark law, although trademark registration is possible. There is no legal protection in Burma for foreign copyrights.

## **(2) Antitrust law**

An antitrust law must be enacted to prevent companies or organizations from monopolizing the entire economy. This law must be established to (1) prohibit agreements or practices that restrict free trade and competition between business entities; (2) ban abusive behavior by a business dominating a market, or anti-competitive practices that tend to lead to such a dominant position; and (3) supervise the mergers and acquisitions of large corporations. Antitrust law prevents abusive manipulation of the economy by big market participants that seek to hinder competition. It is a critical component of a market economy that keeps the economy running fairly and properly.

## **Case Studies in Connection with the 2008 Constitution**

Burma's economy is characterized by state-run monopolies. Allies of the SPDC have also exerted complete control various economic sectors. Htoo Trading, for example, is closely aligned with the junta and recently received a major contract from the SPDC for the construction of two dams.<sup>151</sup> Htoo Trading also began selling SIM cards for which they have exclusive rights.<sup>152</sup> Htoo Trading chairman U Tay Za is involved in other economic endeavors that exploit his close connections with the SPDC.<sup>153</sup> While U Tay Za's enterprises are thriving, businesses run by ordinary citizens are struggling.

The SPDC is currently trying to privatize, which would normally be a step in the right direction for the formation of a market economy. Instead of proceeding fairly, however, the SPDC is selling parts of its monopolized businesses to its allies. For example, the SPDC recently announced that it is selling off state-owned buildings and factories to private buyers, but

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<sup>151</sup> Wai Moe, Tay Za Granted Electricity Contract, Irrawaddy, 4 Jan. 2010, [http://www.irrawaddy.org/print\\_article.php?art\\_id=17523](http://www.irrawaddy.org/print_article.php?art_id=17523); Wai Moe, Regime Privatizing to Retain Control of Resources, Irrawaddy, 7 Jan. 2010, [http://www.irrawaddy.org/article.php?art\\_id=17541](http://www.irrawaddy.org/article.php?art_id=17541); Xinhua, Myanmar encourages private companies to implement hydropower projects, 5 Jan. 2010, [http://news.xinhuanet.com/english/2010-01/05/content\\_12757356.htm](http://news.xinhuanet.com/english/2010-01/05/content_12757356.htm)

<sup>152</sup> Myo Thein, Businesses Accuse Htoo Trading of Unfair Monopolization, Mizzima News, 22 Jan. 2010, <http://www.mizzima.com/business/3419-businesses-accuse-htoo-trading-of-unfair-monopolization.html>.

<sup>153</sup> Reuters, Myanmar to Privatize Fuel Retailing – Energy Official, 26 Jan 2010, <http://in.reuters.com/article/oilRpt/idINSGE60P04R20100126>; Earth Times, Myanmar to Privatize All Fuel Stations by March, Source Says, 25 Jan. 2010, <http://www.earthtimes.org/articles/show/305634,myanmar-to-privatize-all-fuel-stations-by-march-source-says.html>; Khaing Suu, Junta to Privatize Oil Industry, Mizzima News, 25 Jan. 2010, <http://www.mizzima.com/business/3430-junta-to-privatize-oil-industry.html>; Democratic Voice of Burma, Burmese Junta to Privatize Gas Stations, 26 Jan. 2010, <http://english.dvb.no/news.php?id=3258>.

most of these properties are being sold to SPDC allies at prices below market rate.<sup>154</sup> The SPDC will effectively remain in control of its assets. This is not true privatization, but rather a continuation of government monopoly of the economy. The 2008 Constitution does not counter this faux privatization and serves to further the regime's economic plans.

### **(3) Facilitating the lawful transfer of currency**

The government must not prohibit the lawful transfer of money and properties that are legally owned, whether the transfer originates from inside or outside the country. Every citizen and foreigner living legally in a country must have the right under law to hold and exchange domestic and foreign currency. The unrestricted transfer of legally owned money and property keeps a market economy moving. Quick and cheap transfers lead to more efficient business transactions. A government that attempts to unnecessarily control or even prohibit the movement of money and property hinders business. While some restrictions are reasonable, such as preventing immediate withdrawal of suspicious transfers in order to prevent money laundering, unnecessary government interference must be avoided. In particular, international transfers of money and property must not be unnecessarily delayed.

Holding currency is a prerequisite to participating in a market. There must be no restrictions on any citizen or foreigner that restrict their right to legally obtain, possess, and utilize domestic currency. Additionally, every person must also have the unfettered right to exchange their domestic currency into foreign currency, and vice versa. Today's market is increasingly international. Exchange restrictions harm a country's commerce.

### **(4) The Central Bank and monetary controls**

The free formation of financial and monitoring institutions must be protected by law. Moreover, a central bank must have the capacity and authority to ensure the well-being of a free market economy. A central bank, reserve bank or monetary authority, is in charge of establishing monetary policy. Its primary responsibility is to maintain the stability of the national currency and money supply. The central bank may also control subsidized-loan interest rates and assist the banking sector through loans during a financial crisis. The central bank should also have supervisory powers to ensure that banks and other financial institutions do not behave recklessly or fraudulently.

In Burma, the Central Bank of Myanmar devotes a great amount of effort to lending to the government. Although monetary policy in Burma is formally the responsibility of the Central Bank, the Bank actually has almost no influence over monetary conditions.<sup>155</sup> The Central Bank does not have operational independence from the state, and thus has no credibility. It also has little power, as was evidenced during the 2002-2003 banking crisis, when the authority to handle the crisis was given to an obscure brigade commander instead of the Central

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<sup>154</sup> Wai Moe & Ba Kaung, Junta Puts More State-owned Properties up for Sale, Irrawaddy, 22 Jan. 2010, [http://www.irrawaddy.org/article.php?art\\_id=17642](http://www.irrawaddy.org/article.php?art_id=17642).

<sup>155</sup> Burma's Economic Prospects, Testimony before the Senate Foreign Relations Subcommittee on East Asian and Pacific Affairs, 29 March 2006, by Dr Sean Turnell, <http://www.uscampaignforburma.org/contact-resources/TurnellCongressTestimony.pdf>

Bank.<sup>156</sup> The small amount of government bonds held by the general public (much less than one per cent) indicates the lack of confidence the citizens have in state-created financial assets.<sup>157</sup>

The exchange rate of the Myanmar Kyat is another problem that undermines the effectiveness of the Burmese economy. Burma has a fixed-exchange rate policy that officially links the Kyat to the U.S. Dollar at K6: \$US 1. The only relevant exchange rate to the people on the streets in Burma, however, is the black market rate, which stands at around (K 1,280: \$ US 1) over two hundred times below the official standard. The black market rate changes daily and sometimes hourly, depending on the perceptions of the country's prospects. Instead of engaging in currency reform, the SPDC simply tries from time to time to arrest well-known foreign exchange dealers.

## **F. MACRO-ECONOMIC STABILITY**

Macroeconomics deals with the broad and general aspects of an economy, such as income, output, and the interrelationship among diverse economic sectors. When government spending expands too far, large deficits, excessive borrowing, monetary expansion and problems in the financial sector often result. In turn, these are followed by inflation, overvaluation of the currency, and a loss of export competitiveness. Excessive borrowing can also lead to domestic and external debt problems and crowding out of private investment.

The macro-economic policy-making in Burma has been characterized as arbitrary, often contradictory and ill-informed. Under the military administration, the country has faced macroeconomic instability such as high inflation, a persistent fiscal deficit largely financed by the central bank, a low savings rate, a widening trade deficit, a drastic fall in foreign investment, and a widening gap between official and free-market exchange rates. Burma's macro-economic policy is dominated by the SPCD's constant demand for the country's output, which far exceeds the regime's ability to raise tax revenue. Consequently, the state finances its spending by selling government bonds to the central bank.<sup>158</sup> This policy, i.e. printing more money to satisfy the government's demands, seriously harms the functioning of the market economy.

### **Case Studies in Connection with the 2008 Constitution**

Burma's macroeconomic policy-making has been called capricious, arbitrary, selective and sometimes illogical. For instance, in October 2005, the SPDC suddenly announced an eight-fold increase in the retail price of gasoline.<sup>159</sup> In 2004, to slow the rise of domestic prices, the SPDC announced a ban on rice exports, when just a year earlier the SPDC had tried to implement measure to increase rice exports.<sup>160</sup> The SPDC made several announcements in 2005 that exporters and importers in Burma had to use the Euro rather than the US dollar in their transactions.<sup>161</sup> The SPDC is known for other erratic and unexplainable decisions, including the

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<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

moving of the capital in 2005 from Rangoon to Naypyidaw, a town approximately 200 miles north of the former capital.<sup>162</sup>

The SPDC had a virtually unlimited military budget for the establishment of the new capital, which now includes luxury buildings for the government.<sup>163</sup> While the regime is pouring significant funds into the new capital, the rest of the country remains in severe poverty. Decisions on spending such as these are made solely by the SPDC. The junta has significant power in controlling the nation's economy through its monopoly over spending decisions and institutions of its own creation. The Myanmar Economic Holdings Limited (MEHL), for example, is run by the Defense Ministry and is involved in almost all deals with foreign businesses.<sup>164</sup> The MEHL ensures that the military controls foreign enterprises in Burma to the exclusion of independent parties.

### **Analysis from the Aspect of the 2008 Constitution**

The Constitution ensures that the military will continue to exert control over economic decision making after the elections. Article 229 of the Constitution, for example, describes the formation of the Financial Commission, and notes that the Commission will be promulgated by the President. Because the President will be an individual with a military background,<sup>165</sup> the Commission will likely mirror the military's current economic policies. Additionally, article 230 indicates that the Commission will submit budget proposals to the Hluttaw which will make decisions based on the Commission's information. Because one quarter of the individuals in both chambers of the Hluttaw must be from the military,<sup>166</sup> the Hluttaw will be able to continue the military budgetary practices of the past.

The National Defense and Security Council, described in article 201 of the Constitution, is made up of individuals at the highest level of government including the President, Vice-President, parliamentary speakers, and commanders and ministers of defense services – individuals with a military background. The Council will support the executive in the discharging of the Constitution and other laws, thereby ensuring the military has control over how laws are executed. Any laws relating to economic development will be made and executed by the military, which likely will continue to dedicate significant funds to its own endeavors.

### **The Commission for Economic Observation**

To ensure the stability and development of the country's economy, a Commission for Economic Observation should be formed comprising legal academicians, government representatives, and economists. The commission should be represented by members from different economic interest groups as well as neutral members. This body will advise the government on economic policy based on their observations of growth, obstacles, opportunities and remedies.

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<sup>162</sup> Jonathan Head, BBC, Burma's New Capital City Unveiled, <http://news.bbc.co.uk/2/hi/asia-pacific/6498029.stm>.

<sup>163</sup> *Id.*

<sup>164</sup> Burma Project, Open Society Institute, Burma's Economy, <http://www3.soros.org/burma/CRISIS/econ.html>.

<sup>165</sup> Constitution, *supra* note 2, art. 59(d), stating that the President must be "well acquainted" with military affairs.

<sup>166</sup> Constitution, *supra* note 2, art. 109(b), 141(b).

## **G. PRIVATE OWNERSHIP RIGHTS**

Private ownership rights must be protected by law. Citizens and foreigners must be assured that their legally obtained possessions will not be arbitrarily seized, and that they can obtain a legal remedy before a neutral, independent judiciary if the government disregards this law. The government cannot nationalize businesses or seize private property except in rare circumstances where the public good is at risk and where adequate compensation is paid. The Burmese Foreign Investment Law (FIL) guarantees that no foreign company shall be nationalized during the permitted period of investment. However, the Burma government has forced a number of foreign companies in various sectors to leave the country after it refused to honor the terms of investment agreements.<sup>167</sup> In the late 1990's, two large Japanese firms left Burma after the government kept them from operating according to earlier investment agreements.<sup>168</sup> The government also has seized the assets of foreign and local investors without compensation when the investment turned out to be profitable.<sup>169</sup>

### **Analysis from the Aspect of the 2008 Constitution**

Article 356 of the Constitution purports to protect property rights, stating that “[t]he Union shall protect according to law movable and immovable properties of every citizen that are lawfully acquired.” Note, however, that this article coexists with article 37, which states that “[t]he Union...is the ultimate owner of all lands and all natural resources above and below the ground, above and beneath the water and in the atmosphere in the Union.” Because the state will ultimately own all land and resources, the Constitution serves as a pretext for the future violation of property rights in Burma.

## **H. INFRASTRUCTURE DEVELOPMENT**

The government must promote the basic infrastructure of the country. The infrastructural industries, such as electricity, water supply, communication, and transportation, must be used primarily for the development of the people. Infrastructure is vital to a successful market economy. For instance, many goods are transported on highways, transactions are made over the phone and cable lines, companies depend on reliable energy sources, and everyone needs clean water to live. The government must use its resources to improve the country's infrastructure with the aim of helping the people's living conditions and economic prosperity.

### **Case Studies in Connection with the 2008 Constitution**

Burma's infrastructure is currently underdeveloped. Electricity is used mainly for government administration and not for public use.<sup>170</sup> Communication is difficult for ordinary Burmese. Cell phones are rendered inaccessible by their exorbitantly high cost: approximately

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<sup>167</sup> U.S. Department of State, Burma, <http://www.state.gov/e/eeb/ifa/2008/100832.htm>.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> Hla Hla Htay, Burmanet, Agence France Presse: Myanmar Cashes Up on Energy, But Locals in the Dark, <http://www.burmanet.org/news/2007/04/16/agence-france-presse-myanmar-cashes-up-on-energy-but-locals-in-the-dark-hla-hla-htay/>.

1,500,000 kyat or \$1500 US dollars. The regime has gone to great lengths to prevent Burmese people from taking advantage of communication tools. After Cyclone Nargis devastated the country in 2008, for example, the Chinese government donated supplies to survivors, including 2000 radios.<sup>171</sup> The SPDC was worried that people would use the radios to access non-state-run radio stations such as Voice of America, the BBC, Radio Free Asia, and the Democratic Voice of Burma. The regime hired engineers to adapt all 2000 radios so that they could only broadcast state-run radio programs, restricting communication and access to information in the country.

The government remains in exclusive control of many sectors related to the nation's infrastructure, including energy, electricity, mining, transport, communication, and construction.<sup>172</sup> After the election, these sectors will likely remain in the hands of the military.

### **Analysis from the Aspect of the 2008 Constitution**

The Constitution also allows the Hluttaw, similar to Parliament, of which at least one quarter will be nominated from the military, to make laws relating to items listed on Schedule One of the Union Legislative List. This list includes the economic sector, energy and electricity, communication, finance and planning, the judiciary, and other aspects of the nation that directly concern infrastructure development. The Constitution indicates that these fundamental aspects of economic development will be used for the exclusive benefit of the military to the detriment of the public.

### **I. PROTECTING LABOR RIGHTS AND MINIMUM WAGES**

Citizens' labor rights must be protected by law, and all people must have the freedom to work and choose an occupation. First, everyone must have the right to work. Article 23(1) of the Universal Declaration of Human Rights provides that "everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment." The laws must facilitate, rather than hinder, the opportunities of citizens to establish businesses, carry out their economic activities and invest their income in worthwhile endeavors.

A minimum wage that allows workers to cover their basic necessities in accordance with the present cost of living must be protected by law. Other labor laws must be enacted relating to worker rights such as same wages for the same work, proper work hours, leisure, job security, wages based on skill level, and allowance of the formation of labor unions. The U.S. Department of State reported in 2007 that the minimum wage in Burma is the miniscule amount of 500 kyat (roughly \$0.40) per day and that an average worker in Burma earns about 500-1000 kyat (roughly \$0.40 to \$0.80) per day.

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<sup>171</sup> Tai Kyaw, Analysis: Junta's Information Black-out, Democratic Voice of Burma, 4 July 2008, <http://www.dvb.no/english/news.php?id=1505>.

<sup>172</sup> The State-owned Economic Enterprises Law reserves many sectors of the economy, such as banking, insurance, telecommunications, extraction of specified resources, and teak harvesting. State-Owned Economic Enterprises Law (SLORC Law No. 9/89) 1989.



The fair and proper treatment of workers is a fundamental component of a successful market economy. Business rights must be balanced with workers' rights so that both groups can flourish and collaborate in a mutually beneficial relationship. The Universal Declaration of Human Rights provides clear standards for the protection of people's economic security:

- a. Everyone, without any discrimination, has the right to equal pay for equal work. (Article 23(2))
- b. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. (Article 23(3))
- c. Everyone has the right to form and to join trade unions for the protection of his interests. (Article 23(4))
- d. Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay. (Article 24)

The government must ensure that labor laws make these rights a reality and that offending employers are adequately punished for violations. In Burma, independent labor unions are illegal. Workers are not allowed to organize, negotiate, or otherwise exercise control over their working conditions. Although government regulations set a minimum employment age, wage rate, and maximum work hours, many managers do not follow these regulations. The government uses forced labor in many areas of its work.

## Case Studies

The current state of labor protections in Burma is dismal. The SPDC forcibly extracts labor from its citizens, which is illegal under international law. The International Labour Organization has concluded that there is a peremptory norm prohibiting forced labor.<sup>173</sup> This means that forced labor is outlawed everywhere in the world, and that any country that conducts or supports forced labor in its territory has committed a breach of an international obligation and possibly an international crime.<sup>174</sup> In clear disregard for well-settled international law, the SPDC has used forced labor to a shocking degree. The Democratic Voice of Burma recently reported that cases of forced labor in Burma have increased by fifty percent.<sup>175</sup> The SPDC has harassed those who confront the regime's trend of using forced labor, and the regime even jailed a lawyer, U Po Phyu, who was representing a client in a forced labor case.<sup>176</sup>

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<sup>173</sup> International Labour Organization, Forced Labour in Myanmar (Burma): Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29), art. 203, 2 July 1998, *available at* <http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar.htm>.

<sup>174</sup> *Id.*

<sup>175</sup> Democratic Voice of Burma, 50 Percent Rise in Burma Forced Labor, 18 Nov. 2009, <http://english.dvb.no/news.php?id=3065>.

<sup>176</sup> International Labor Organization, Draft Conclusions Concerning the Fifth Item on the Agenda (Myanmar), 2009.

## Analysis from the Aspect of the 2008 Constitution

Article 359 of the Constitution purports to ban forced labor, except for “...duties assigned by the Union in accord with the law in the interest of the public.” This article mirrors other domestic laws that support the use of forced labor. Burma’s domestic law demonstrates a departure from international norms and authorized forced labor in a surprising number of situations. Contrary to international law, Burma’s Village Act and Town Act include provisions that allow for forced labor and are so vaguely worded that many acts of forced labor are rendered “legal.”<sup>177</sup> There is a domestic law that provides significant punishment for “illegal” forced labor, or that done outside the bounds of the Village Act and Town Act.<sup>178</sup> Because the Acts are written so broadly, many acts of forced labor would not be considered illegal and under domestic law perpetrators would not be subject to a penalty. The Constitution will perpetuate the illegal use of forced labor.

While organized labor could lessen the use of forced labor in the country, Article 354 of the 2008 Constitution effectively denies the emergence of independent labor unions. The article includes an exception clause that allows the formation of organizations or associations only if it is “not contrary to the laws, enacted for Union security, prevalence of law and order, community peace and tranquility or public order and morality.” This exception clause indicates the supremacy of pre-existing national laws and policies regarding the formation of independent organizations, therefore inhibiting the future emergence of labor unions and other independent organizations.

## J. FREEDOM TO TRAVEL ABROAD

The law must protect the right of every citizen to legally travel and live abroad. Countries that not only allow, but also encourage, their citizens to gain international experience reap the benefit in increased cultural understanding and networking opportunities which inevitably lead to economic advantages. In Burma, passports are difficult and expensive to obtain without government connections. Passports generally must be obtained through an agent and, since 1996, women under 30 have not been able to apply for work passports.<sup>179</sup> Passports allowing overseas study are only issued if the applicant is officially sponsored by the

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<sup>177</sup> The Village Act states that “[e]very headman shall be bound to perform the following public duties, namely: (g) to collect and furnish, upon receipt of payment for the same at such rates as the Deputy Commissioner may fix, guides, messengers, porters, supplies of food, carriage and means of transport for any troops or police posted in or near or marching through the village-tract or for any servant of the Government travelling on duty: provided that no headman shall requisition for personal service any resident of such village-tract who is not of the labouring class and accustomed to do such work as may be required; (n) generally to assist all officers of the Government in the execution of their public duties; and (o) generally to adopt such measures and do such acts as the exigency of the village may require.” The Act then proceeds to list the punishment for citizens who refuse to comply with orders of forced labor. Village Act, sec. 8(1), 12 (1908). The Towns Act also requires citizens to perform “public duties” such as assisting a headman in the execution of his public duties. Towns Act, sec. 9 (1907).

<sup>178</sup> Burma Penal Code, sec. 374, Vol. IV (1994).

<sup>179</sup> GS12, Migration & Trafficking of Women & Girls, *available at* [www.burmalibrary.org/docs/GS12.migration-and-trafficking.pdf](http://www.burmalibrary.org/docs/GS12.migration-and-trafficking.pdf).

government.<sup>180</sup> The time that it takes to receive the passport can take between a few days and many months, depending on the applicant's age and the amount of bribes paid.<sup>181</sup>

## **K. HUMAN RESOURCE DEVELOPMENT AND THE ROLE OF TECHNOLOGY**

Every citizen must enjoy the opportunity to receive human resource development provided by the government. Safeguards must be in place to make certain that these services are accessible without discrimination. A strong market economy depends on the adequate development of a skilled workforce. The government must use sufficient resources to enhance the population's ability to contribute to the economy.

Every citizen must also have the right to study modern communication methods, such as internet and e-mail, and explore, collect and distribute information using these methods. Restrictions on technology inhibit market economies. Today's international markets depend heavily on modern communication methods for their efficiency, accuracy and reliability. Business opportunities on the internet are unparalleled in history. A society needs to know how to find these opportunities, take advantage of them and create the opportunities of tomorrow. The markets economies that do not keep up with the quickly changing technology in the business world remain narrow and experience slower growth.

## **L. ECONOMIC DEVELOPMENT WITHIN THE CONSTITUENT UNITS OF THE UNION**

The government must take steps to balance economic development between rural and urban states and divisions. Urban areas naturally develop more quickly than rural ones as a result of population imbalances. While the government must not unnecessarily meddle in a market to force rural development when there is little demand, it must also formulate policies to ensure that all of its citizens are able to enjoy a reasonable standard of living. For instance, essentials such as electricity, water and transportation routes must be accessible by rural inhabitants even though a private company may not find it economically feasible to extend services to the area. In such a case, the government may need to intervene to make sure its rural citizens are able to participate in the country's development. Similarly, development must be fairly spread throughout the states and divisions without favoritism. Currently the ethnic minority areas in Burma suffer from economic neglect. Furthermore, agriculture, which provides the livelihood for the majority of the Burmese people, is chronically (and, often deliberately) under supported.

### **Case Studies in Connection with the 2008 Constitution**

Economic development in ethnic areas is often thwarted by the regime's rampant forced relocation of minority groups in rural areas.<sup>182</sup> International law prohibits the forced displacement of civilians unless it is strictly for civilians' security or for an imperative military

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<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> See Amnesty International, Myanmar: Crimes Against Humanity in Eastern Myanmar, 2008, available at <http://www.amnesty.org/en/library/info/ASA16/011/2008>; Harvard Law School, International Human Rights Clinic, Crimes in Burma, 2009.

objective.<sup>183</sup> The SPDC is currently violating international law by its continued acts of forced relocation. The regime jailed U Aye Myint, a human rights defender, for helping farmers resolve land disputes.<sup>184</sup> In that particular case, the SPDC confiscated agricultural land and then accused the farmers of destroying public property when they encroached on their former land. This case is one example of how the regime is forcibly relocating its population and not providing any legal recourse to victims. The Constitution lays the foundation for continued abuses. The Article 37 of the Constitution states that the Union is the ultimate owner of all land and resources in the nation, indicating government's absolute control over all land following the elections in 2010 and the following period.

## **M. OPENING THE DOMESTIC MARKET TO THE INTERNATIONAL ECONOMY**

A country's laws must ensure participation in the international economy through trade, foreign direct investment (FDI) and Overseas Development Assistance (ODA). Nowadays, no country can develop without opening up to the international economy. Economic mismanagement by the SPDC means that Burma attracts little foreign investment. The little money that does arrive is strongly concentrated in the gas and oil sectors, and other extractive industries. Little employment results from these investments, and there is negligible technology and skill acquisition. To make matters worse, all of the revenues from Burma's exports of gas and oil are collected by the regime. Very little FDI makes its way to industry, and even less to agriculture.

Burma is regarded by the international business community as a high risk destination for foreign investment, and a difficult place to do business. In a recent report on economic freedom, the Washington-based Heritage Foundation ranked Burma third from the bottom (above only Iran and North Korea) with regard to restrictions on business activity. According to the Foundation, "pervasive corruption, non-existent rule of law, arbitrary policy-making, and tight restrictions on imports and exports all make Burma an unattractive investment destination and have severely restrained economic growth."<sup>185</sup> Some investors report that their Burmese military partners make unreasonable demands, provide no cost-sharing, and sometimes force out the foreign investor after an investment becomes profitable.<sup>186</sup>

To illustrate the importance in good policy-making, the Asian Newly Industrialized Countries (NICs) share an important common feature of having an open and outward-looking economic strategy. Evidence of this policy is demonstrated by their high export to gross domestic product ratios. A focus on exports has enabled them to raise their total productivity factor. In contrast, Burma has not exploited the advantage of international trade due to its closed door policy.

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<sup>183</sup> Geneva Conventions, Protocol II, art. 17;

*The Guiding Principles on Internal Displacement*, Office for the Coordination of Humanitarian Affairs, available at [http://www.reliefweb.int/ocha\\_ol/pub/idp\\_gp/idp.html](http://www.reliefweb.int/ocha_ol/pub/idp_gp/idp.html).

<sup>184</sup> Asian Human Rights Commission, Burma: A Human Rights Defender Jailed for Helping Farmers Over Land Disputes with Officials, 13 Nov. 2009, <http://www.ahrchk.net/ua/mainfile.php/2009/3311>.

<sup>185</sup> Heritage Foundation & Wall Street Journal, 2006 Index of Economic Freedom.

<sup>186</sup> See U.S. Department of State, *supra* note 43.

Moreover, the Asian NICs have depended on various forms of foreign capital flow to supplement their domestic capital formation. With a very low level of saving, Burma needs foreign investment and foreign aid to fill both its savings-investment gap and foreign exchange gap. The actual FDI into Burma has been slow compared with China and Vietnam as a result of frequent changes in rules, import restrictions, and other restrictions on the movement of goods and services or trade practices. Dealing with the different ministers causes further delays and operational costs.<sup>1</sup>

### **The Minimum Elements Necessary to be Enshrined in the Future Constitution of Burma for the Development of Country's Economy Based on a Market Economy System**

- (1) For a market economy system to succeed, it must be based on the rule of law and protected by an impartial judiciary.
- (3) Private ownership rights must be protected by law. Moreover, an antitrust law must be enacted to prevent companies or organizations from monopolizing the entire economy.
- (4) The government must not favor one company over another. The government must establish a conflict resolution office or other judicial mechanism related to the economy to resolve disputes fairly between companies and employees, governments or local authorities.
- (5) The free formation of financial and monitoring institutions, including a central bank, must be protected by law. The amount of money used in the country and the printing and production of the money must be operated by a central bank.
- (6) The parliament must independently manage the country's budget, deciding how much income is obtained from taxes and other methods and how much money is spent, and release this budgetary information to the public.
- (7) The government must not confiscate the legally owned property of citizens, whether moveable or immovable, or land leased and property owned by foreigners, without paying fair market value.
- (8) In order to develop a country's economy, the law must protect the citizens' ability to freely produce goods and trade domestically and internationally from interference by other businesses and organizations.
- (9) The law must protect the right of every citizen to make a living and choose an occupation, as well as to legally travel and live abroad for work and study purposes.
- (10) Every citizen must have the right to study modern communication methods, such as internet and e-mail, and explore, collect and distribute information using these methods.

- (11) No one shall prohibit the lawful transfer of money and properties that are legally owned, whether the transfer originates from inside or outside the country.
- (12) Every citizen and foreigner living legally in a country must have the right under law to hold and exchange domestic and foreign currency.
- (13) The government must promote the basic infrastructure of the country. The infrastructural industries, such as electricity, water supply, communication, and transportation must be used primarily for the development of the people. Every citizen must enjoy the same opportunity to receive human resource development promoted by the government, including an education and health care services, regardless of their race, class, nationality, or social background.
- (14) A properly operating market economy system requires good governance, including transparency, accountability, and restraint from corruption.
- (15) To keep the people informed, the government should annually publish and distribute the financial budget of the country, the decision record of the parliament and the decisions made at different levels of the federal government relating to the development of the country. The people must have the right to access information related to the government's performance and activities and provide comments and questions.
- (16) Everyone shall have the same job opportunities based on their level of education and skill. Free education must be guaranteed by law in order to produce the skilled workers necessary for a market economy system.
- (17) A minimum wage that allows workers to cover their basic necessities in accordance with the present cost of living must be protected by law. Labor laws must be enacted relating to worker rights such as same wages for the same work, proper work hours, leisure, job security, wages based on skill level, and allowance of the formation of labor unions.
- (18) To ensure the stability and development of the country's economy, an agency such as a Commission for Economic Observation should be formed by law comprising legal academicians, government representatives, and economists.
- (19) The government must facilitate domestic and foreign competition, inventors, skilled workers, and research relating to economic development.
- (20) To operate a market economy system properly, the government must restrain itself from interfering in and prohibiting economic activity. The government must try to balance the economic development between rural and urban states and divisions.

## **N. CONCLUSION**

When analyzing Burma's economy, one must not forget that economic development is linked with the status of human rights. Any improvements in a highly militarized state will only strengthen the junta's grip on the nation and will not translate into meaningful development for the people of Burma. The population can only take advantage of increased economic opportunity when the SPDC ends its trend of committing international crimes and oppressing political opponents and ethnic groups. Significant advances in economic development will only occur when the current climate of criminality and oppression ends and perpetrators are brought to justice. Because the Constitution and the elections will continue the abuses of the SPDC and enshrine impunity for criminals, they will destroy Burma's capability to effectively develop its economy.

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## **X. THE ROLE OF JUDICIARY IN PROMOTING HUMAN RIGHTS AND THE RULE OF LAW**

In Burma, the ruling State Peace and Development Council (SPDC) has institutionalized human rights abuses through what has been commonly characterized as Burma's "injustice system."<sup>187</sup> Arbitrary arrests and unlawful prosecutions, used by the regime to silence its critics and discriminate against ethnic minorities and women, are perpetuated by the state's judiciary, which serves merely as "an appendage of executive authority."<sup>188</sup>

### **A. THE INDEPENDENT AND IMPARTIAL JUDICIARY: THE FOUNDATION FOR THE RULE OF LAW**

In the realm of human development, one of the core principles and drivers of economic growth, political modernization and the protection of human rights is the rule of law -- a legal-political regime under which the law restrains the government by promoting certain liberties and creating order and predictability regarding how a country functions.<sup>189</sup> In the most basic sense, it is a system that protects the rights of citizens from arbitrary and abusive use of government power and has the effect of furthering democracy.<sup>190</sup>

Since its inception, the SPDC promised to usher in a functioning democracy, including an August 2003 announcement of a seven-step road map towards a democratic transition. Thus, it had a duty to establish and promote the rule of law as an indispensable part of its legal-political system. Indeed, as a state party to the Geneva Conventions and as a UN member state, the government in Burma has had an ongoing international legal obligation to protect its civilians by, among other things, a politically independent and impartial judiciary, an institution which is crucial to the establishment of the rule of law.<sup>191</sup> It is necessary for resolving disputes among citizens as well as between citizens and the government in an unbiased, transparent, predictable and interpretive methodology.<sup>192</sup> Political independence is achieved through the separation of powers, which ensures that the courts are respected by all parties to the dispute, especially by the government itself.

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<sup>187</sup> The Asian Legal Resource Center, "*BURMA: Institutionalized denial of fundamental rights and the 2008 Constitution of Myanmar Asian Legal Resource Centre (ALRC)*," September 1, 2009.

<sup>188</sup> *Id.*

<sup>189</sup> See e.g. "What is the Rule of Law?" The University of Iowa Center for International Finance and Development, by Helen Yu and Alison Guernsey; Stephenson, Matthew. "*Rule of Law as a Goal of Development Policy*," World Bank Research (2008).

<sup>190</sup> R. Rigobon & D. Rodrik, '*Rule of Law, Democracy, Openness, and Income: Estimating the Interrelationships*', NBER Working Paper No. W10750 (September 2004).

<sup>191</sup> See e.g. "*The Rule of Law Inventory Report*," Hague Institute for the Internationalisation of Law (HiiL), Hague Academic Coalition (2007-04-20).

<sup>192</sup> "*The Rule of Law Inventory Report*," at Pg. 17.



## **B. A BRIEF BACKGROUND OF BURMA'S JUDICIARY**

### **1947 Constitution and Burma's Judiciary**

With independence of Burma, 1947 constitution came into force and that was landmark in Burma's journey to democracy. The Judicial system was based on Common Law tradition. The Union Judiciary Act<sup>193</sup> governed the judiciary. The main difference was the establishment of the Supreme Court, as the Highest Court of the land. It was the Court of final appeals but the feature of the system was that it was vested with powers to enforce fundamental rights guaranteed in the constitution. Burma's Judiciary then was independent and impartial and separation of powers was practiced.<sup>194</sup>

### **1974 Constitution and Burma's Judiciary**

In the aftermath of the 1962 military coup, the judiciary lost its independence. Then the military regime applied 1974 constitution and people's judicial system was created.<sup>195</sup> Accordingly, separation of powers was no longer practiced in accordance with the constitution.<sup>196</sup>

### **Burma's Judiciary after 1988 Military Coup**

Following the 1988 popular democratic uprisings, the military staged a coup again in September 18, 1988. Then, the Constitution was abolished and judiciary has been instituted under its total control. Judiciary Law 5/2000 (the "Judiciary Law"), implemented by the SPDC in 2000, provides the framework for the current legal system. Although under the Judiciary Law the judiciary is charged with "administering justice *independently* according to law," (emphasis added),<sup>197</sup> the Judiciary Law undermines, if not eliminates, the separation of powers and leaves the civil society in Burma with no legitimate means of challenging the executive authority.

### **Burma's Judiciary and Independence Issue**

From judicial aspect, "independence" issue has never been placed for debate in any public meeting or media or law schools or otherwise. Particularly, 'independence from executive' is an untouchable topic for all legal communities and academicians who are knowledgeable, while it is unfamiliar with the general public who do not have enough knowledge on judicial norms. The principle, "Administering justice *independently* according to law," provided not only in Judicial Law 2000 but also in Article 19(a) of the 2008 Constitution<sup>198</sup>, does not actually guarantee institutional independence of judiciary. In today's Burma, judiciary does not exist as an

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<sup>193</sup> The Union Judiciary Act 1948; Burma Code Volume 1, Page 191.

<sup>194</sup> Union Judiciary, Chapter 8 of the 1947 Constitution, Page 35.

<sup>195</sup> 1974 Constitution, Chapter 7, Page 49.

<sup>196</sup> Article 73 (d), 79, and 109 of the 1974 Constitution

<sup>197</sup> Judiciary Law, 2000, The State Peace and Development Council Law No. 5/2000, 27 June 2000, Chapter II, Article 2.

<sup>198</sup> The report of the UN Special Rapporteur on the situation of human rights in Myanmar, Tomas Ojea Quintana, 5 September 2008; P. 21, para 104, "The new Constitution, if correctly interpreted, provides for due process of law and for an independent and impartial judiciary (Article 19)."

independent institution, while the judicial proceedings themselves are also not independent in practice.

### **The Judiciary Law 2000**

The Judiciary Law 2000 has no provision for how judges are to be appointed, how they can be removed, or their conditions of service. These matters are not provided in any other current law or constitution in Burma, and so are left to the military's discretion. All appointments and dismissal were made only at the whim of ruling junta freely without publicizing any ground, consulting with the legal community, and receiving any suggestion from elected representatives. The current Chief Justice was appointed by the military in 1998. This was done by a military decree, which also effectively dismissed over 60 judges. On November 14, 1998, the SPDC "permitted to retire" to five, out of six judges in the Supreme Court, without providing any reason for their resignations and the vacant positions were replaced with four judges. The possibility of 80% of the Supreme Court judiciary simultaneously retiring is so unlikely that the event raises questions as to the independence and autonomy of Burma's judiciary.

Then, on July 1999, another six judges were added<sup>199</sup> and then total number of Supreme Court judges was eleven. Since then on, no news was officially released by the junta that any one or more of Supreme Court judges were dismissed or forced to resign repeatedly. After that, in February 2003, more five judges were appointed and as such total number of Supreme Court judges was 16. It was against the existing Judicial Law 2000; because, total number of Supreme Court judges to be appointed in total is twelve. All the processes for appointment and dismissal of Supreme Court are done at the whim of junta. The term "judicial tenure" is mockery for the current judiciary in Burma. Furthermore, there is no judges' association to protect the security of judicial tenure.

It is clear that the military regime has no tolerance for independent judges. Judges that seek to perform their judicial duties as impartial adjudicators cognizant of the democratic separation of powers are typically dismissed while others bow to pressure from the military to retain their appointments. As to the removal of judges at lower levels, it is difficult for international observers to know how bad the situation is, as this information is kept from the international community.

### **C. THE SPDC USES THE JUDICIARY TO DEPRIVE CITIZENS OF A RIGHTS TO A FAIR TRIAL IN ORDER TO SUPPRESS POLITICAL DISSENT**

The Universal Declaration of Human Rights (1948) recognizes that:

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 - 10)

The SPDC currently uses the judiciary as a means of suppressing political dissent. Indeed, in a crackdown that started in October 2008, Burma's courts have sentenced over 200

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<sup>199</sup> SPDC Order No 3/99 issued on July 8, 1999.

political and labor activists, internet bloggers, journalists, and Buddhist monks and nuns to lengthy jail terms.<sup>200</sup> In 2009, the judiciary sentenced four political activists for the alleged “crimes” of wearing white clothes, calling for Buddhist prayers and organizing a letter-writing campaign to inform the generals of the plight of the people. As a result of their humanitarian actions, the activists had been tortured, spent a year of detention without charge, without access to family and lawyers, had a trial without representation (their lawyers were imprisoned for contempt for trying to represent them) and were sentenced for hundreds of years of imprisonment for their supposed crimes. They are representative of thousands of other prisoners wrongfully and inhumanely detained by the Burmese junta.<sup>201</sup>

### **Judges Must Enforce SPDC Directives, Including Discriminatory Laws**

In many instances, military authorities dictate verdicts in political cases, regardless of the evidence or the law. In addition, the existence of unjust laws -- enacted to deprive citizens of universally recognized rights -- further restricts the judiciary’s independence, because judges are required to interpret these laws in line with the military dictates by using fabricated evidence.

One such law is the 1975 State Protection Law, which allows the military to preemptively arrest and charge people for crimes that may “endanger the sovereignty and security of the state or public peace and tranquility”—even if they have not yet been committed. This provision has been frequently used by the courts to imprison political opponents of the military junta. For example, the renowned National League for Democracy (“NLD”) leader and Nobel Peace Prize laureate Suu Kyi was jailed in May 2003 under this arbitrary provision.

Another example is the 2004 Electronic Transaction Law, the purported aims of which are to support modernization, increase opportunities for development in various social sectors, and enable communication with international organizations, regional organizations, foreign countries, government departments. In reality, this law was promulgated by the SPDC in order to charge and sentence political opponents of the military. Specifically, Section 33 of this law outlines “Offences and Penalties” for the misuse of electronic transaction technology including:

- (a) doing any act detrimental to the security of the State or prevalence of law and order or community peace and tranquility or national solidarity or national economy or national culture;
- (b) receiving or sending and distributing any information relating to secrets of the security of the State or prevalence of law and order or community peace and tranquility or national solidarity or national economy or national culture.<sup>202</sup>

The utilization of the above provisions to prosecute political activists who simply use the internet or mobile phones has become routine. Recently, a supposed violation of this law was used to sentence prominent pro-democracy leader Min Ko Naing, Chairperson of the All Burma Federation of Student Unions and 88 Generation Students group, and nearly forty other

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<sup>200</sup> “*Human Rights Watch, Burma: Lawyer's Testimony Highlights Distorted Justice*,” 16 December 2008, available at: <http://www.unhcr.org/refworld/docid/494b62ea26.html> [accessed 2 February 2010].

<sup>201</sup> “*Human Rights Watch, Burma: Lawyer's Testimony Highlights Distorted Justice.*”

<sup>202</sup> The Electronic Transactions Law (2004), Section 33.

dissidents to sixty-five years in prison.<sup>203</sup> Similarly, in early January 2009, NLD Chairman Min Aung was sentenced to an additional 15 years of prison under the same act.<sup>204</sup>

Under Section 505(b) of the archaic Burmese Penal Code, people can be charged for any statement, rumor, or report made “with intent to cause, or which is likely to cause, fear or alarm to the public or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquility”.<sup>205</sup> The junta has used this law to repress and punish those taking part in free expression, peaceful demonstrations, and forming organizations.<sup>206</sup> Most notably, Section 505(b) was used in-part to charge U Gambira, leader of the All Burma Monks’ Alliance and key activist in the 2007 Saffron Revolution – a peaceful protest -- with a total of 68 years in prison.<sup>207</sup>

### **Legal Counsel Can’t Perform Adequately**

In a well-functioning legal system established under the rule of law, “there must be a recognized, organized and independent legal profession, which is legally empowered and willing to provide legal services.”<sup>208</sup>

Under the SPDC, lawyers, like judges, do not enjoy effective freedom to perform their professional functions. There have been numerous instances of the military intimidating and harassing lawyers, including detaining, arresting and prosecuting a lawyer, or revoking his license on suspicion of his involvement in a politically motivated case. For example, lawyer Saw Kyaw Kyaw Min had been defending 11 clients, all members of the NLD. In late October 2008, a Rangoon court sentenced him to six months in prison under Section 228 of the Burmese Penal Code for contempt of court, forcing him to first spend weeks in hiding and then flee to Thailand. According to the Human Rights Watch report, Saw Kyaw Kyaw's punishment was for failure to instruct his clients, on the judge's order, to turn around after his clients turned their backs on the judge to protest the unfair way were being questioned by the prosecution. The report further stated that three other lawyers - Nyi Nyi Htwe, U Aung Thein, and U Khin Maung Shein - were arrested and sentenced to terms of four to six months in prison on the same charges.<sup>209</sup>

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<sup>203</sup> *‘Min Ko Naing & “’88 Generation Students” Given 65 Years’* Mizzima (15 November 2008) <<http://www.mizzima.com/news/inside-burma/1307-min-ko-naing-a-88-generation-students-given-65-years.html>> .

<sup>204</sup> *“Taungnugok NLD chair’s jail term extended by 15 years,”* DVB (5 January 2009) <<http://english.dvb.no/news.php?id=2062>>

<sup>205</sup> The Penal Code (1860), Section 505(b).

<sup>206</sup> Human Rights Watch *‘2100 by 2010: Free Burma’s Political Prisoners’* Human Rights Watch (16 August 2009) <<http://www.hrw.org/en/free-burmas-prisoners/background>> accessed on 2 November 2009.

<sup>207</sup> *‘U Gambira to Serve Total of 68 Years in Prison’* Mizzima (21 November 2008) <<http://www.mizzima.com/news/inside-burma/1343-u-gambira-to-serve-total-of-68-years-in-prison.html>> accessed on 10 November 2009.

<sup>208</sup> *“The Rule of Law Inventory Report,”* at Pg. 17.

<sup>209</sup> *Human Rights Watch ‘2100 by 2010: Free Burma’s Political Prisoners.’*

Particularly shocking is the SPDC's record on retribution involving courageous attorneys who represent victims who suffered human rights abuses at the hands of members of the military, including sexual misconduct, forced labor and child soldiering. Often lawyers are threatened and even arrested for simply taking on such cases. In one such case, on January 19, 2009, lawyer Pho Phyu, who has represented political activists in the past, was arrested shortly after his dismissal by the authorities as defense lawyer for labor activists who were arrested after reporting a case of forced labor by local authorities to the International Labor Organization ("ILO").<sup>210</sup>

During court proceedings, defense attorneys are usually forced to play a largely symbolic and sinister role in the administration of justice. Although they are permitted to call and cross-examine witnesses, their task is usually limited to striking a deal with the judge to obtain a lenient sentence for their client, often through state-sanctioned bribes. Lawyers who are not prepared to participate in the corrupt court system by paying bribes risk prosecution under the Contempt of Court Act for their alleged improper attitude towards the judges.

### **Due Process and Fair Trial Guarantees Are Ignored in Practice**

Principle 2 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment states:

Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose.<sup>211</sup>

Under the SPDC and SLORC's rule in Burma, however, these important principles of the rule of law are consistently ignored. Although there are concrete procedures for arrest and detention contained in the Burmese Criminal Procedure Code, these are frequently not followed in practice. The arrest and pre-trial detention process often includes arbitrary arrest by military personnel; prolonged interrogation accompanied by torture and ill-treatment; incommunicado pre-trial detention, and the denial of access to lawyers, families, and adequate medical care.

This pattern is particularly evident where persons are arrested on political grounds. Political prisoners are routinely held for periods longer than 24 hours without a warrant or special order from a magistrate, and do not have the opportunity to challenge the lawfulness of their detention before a court. It is common for suspects and detainees to receive no information concerning the charges against them or the legal provisions under which they are brought.

As stated previously, the unlawful detention process often involves the victims' inability to challenge the legality of their detention with proper legal advice, even though the Judiciary Law Chapter IV, Article 5(f) states that the administration of justice in Burma will be based, in part, on "guaranteeing in all cases the right of defense." For example, throughout the case of Suu

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<sup>210</sup> "Lawyer Pho Phyu arrested," DVB, Jan. 19, 2009, <[http://english.dvb.no/print\\_news.php?id=2111](http://english.dvb.no/print_news.php?id=2111)> accessed on February 2, 2010.

Kyi lawyers are often denied access to courtrooms, and in the case of human rights defender U Myint Aye and two co-accused, who were sentenced to life imprisonment for an alleged bombing plot, the first defendant was not represented in court despite his attempts to have a lawyer. His original counsel was also charged and imprisoned in a separate case.<sup>212</sup>

Even in circumstances where detainees are permitted to contact a lawyer, widespread poverty and the absence of an effective legal aid system renders this right meaningless in practice. Thus, there is no right to a lawyer in Burma's judicial system, and accused people are rarely able to obtain their advice and services before or during trial.

### **Prosecutors Are An Extension Of The Military Regime**

Violations of universally recognized tenets of criminal law and procedure continue during the conduct of criminal trials. In each trial, the state's case is made by a public prosecutor, a lawyer employed by the state. According to the international standards, a prosecutor must maintain some degree of independence from the governmental apparatus, properly investigate and conduct their functions impartially and without discrimination, and see to it that violations of the law, which do not result in complaining victims, can be brought before the courts.<sup>213</sup>

This is clearly not the case under the rule of the SPDC. The prosecutor is not accountable to any ethical or professional standards; thus, he has the power to decide not to prosecute cases, no matter how awful the crime or clear the evidence that it occurred as charged, especially if the potential case will shed an unfavorable light on the government. At trial, the prosecutor has the power to exclude favorable evidence and witnesses in cases where the state wants to protect the accused member of the military. During criminal trials, many people accused of crimes in Burma reported that they were not allowed to call key witnesses to testify on their behalf. Indeed, in the case of Suu Kyi, the Court allowed only one defense witness. By contrast, the prosecution presented 17. Similarly, in the case of against U Tin Min Htut, who was accused of writing a letter to the United Nations Secretary General in which he criticized the government, a line of police testified for the prosecution but the defendant was unable to present witnesses.<sup>214</sup>

Thus, the manipulation or disregard of the procedural law in criminal prosecution in Burma renders the international and local requirements for due process meaningless.

Currently in Burma, the police, an important institution to operate a criminal justice system and to support the smooth function of an independent judiciary, have lost its image to stand as a neutral body that treats everyone the same. The whole police institution has been dominated by ex-army and army personnel in its leading role. Police are totally subservient to the

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<sup>212</sup> See e.g. The Asian Legal Resource Center, "*BURMA: Institutionalized denial of fundamental rights and the 2008 Constitution of Myanmar Asian Legal Resource Centre (ALRC)*," September 1, 2009.

<sup>213</sup> "*The Rule of Law Inventory Report*," at Pgs. 16-17.

<sup>214</sup> The Asian Legal Resource Center, "*BURMA: Institutionalized denial of fundamental rights and the 2008 Constitution of Myanmar Asian Legal Resource Centre (ALRC)*," September 1, 2009.

military. They dare not take action against the military personnel who commit crime over civilian people.

#### **D. POLICE: A TOOL FOR OPPRESSION**

Burma Police Manual, Article 1056, provides that the police are obligated to build a cordial and cooperative relationship with the citizenry. They must work together with the people to create a secure society. It is clear that under this Article, the police must not presume that they are somehow superior to ordinary people. Their relationship is not one of master and servant, or shepherd and sheep. Unfortunately, the current situation in Burma is not consistent with Article 1056. Rather than the collaboration called for in the Manual, many police officers impose their view of law enforcement upon the citizens without receiving any community input. This results in unsafe communities where the police have an adversary relationship with the community members.

Burma Police Manual, Article 1060, provides that police officers cannot have other jobs. Accordingly, any breach of this provision constitutes a criminal offence, punishable three months imprisonment or fine, not more than the amount of three months salaries, or both. This Article seeks to ensure the independence and neutrality of the police force by requiring officers to serve only one master. The current chief of the Burma police, Brigadier Khin Yi, is violating Article 1060. In addition to his police post, he is also a Brigadier in the army. He must either resign as chief of police or resign from the army. Other countries, even military governments such as Thailand's, respect the independence of the police. After the recent coup in Thailand, no military official took over the top police position.

Pursuant to Section 32 of Police Act and Section 38 of Rangoon Police Act, any Magistrate or District Superintendent or Assistant or Deputy Superintendent of Police, or Inspector or officer in charge of a police-station, may stop any procession or public assemblies for maintenance of law and order. Nevertheless, it can happen only when the concerned people violate the conditions of a license granted under Section 31(3) of Police Act and Section 37(3) of Rangoon Police Act. As the police did not allow application processes for licensees to this end contrary to provisions in Police Act, any public procession or assembly shall not be deemed to be an unlawful assembly. As such, any arrest of peaceful demonstrators is unlawful.

The Chapter V of the Code of Criminal Procedures, which is the effective national law in Burma, provides how arrest can be made. Accordingly, arrest without warrant or without an order from a Magistrate can be made for suspects categorized in section 54 of that law. Arrest of innocent civilian who participated in peaceful demonstration, took place in Rangoon on April 22, 2007 was unlawful as it was not in accordance with provisions enshrined in the section 54 of the Code of Criminal Procedure. Ensuring full compliance with the instructions of the military officials, the police wearing civilian suits made such unlawful arrests.

Burma Police Manual, Article 1142, Chapter 48, Part 1, states that all police must wear their police uniforms while on duty (with exceptions made for positions such as undercover detectives). Brigadier Khin Yi violates this provision of the Manual as well. He always wears his military uniform, even when he is serving the police force. Anyone who sees him knows that

he is under the thumb of the SPDC military regime. He wholly lacks the neutrality and independence so important for a police officer, and even worse, the police chief. This master-servant relationship between the SPDC and the Burma police force undermines both the dignity of the profession and the trust that the people have for the police. Understandably, the people of Burma cannot trust a police force that is simply a pawn for the military junta. As such, current position of police in society does not facilitate the emergence and functioning of independent and competent judicial system in Burma. Similar situation will remain the same as the SPDC's 2008 Constitution does not address this crucial issue relevant to police.

#### **E. VICTIMS PROSECUTED OR INTIMIDATED BUT PERPETRATORS NOT PUNISHED**

As part of its ongoing campaign to cover up the military's human rights violations, the government actively discourages complaints regarding military abuses by retaliating against anyone who speaks up through victim intimidation tactics, including threatening and/or prosecuting victims and witnesses. There is a firmly ingrained culture of impunity for heinous crimes committed by members of the military under the direction or blind eye of the SPDC and the intimidation and prosecution of victims leaves them without recourse and, even more disturbingly, punishes them for the violence they have already suffered.

The commission of heinous crimes and culture of impunity have been most severe in rural ethnic areas and are related to activities surrounding ongoing armed conflict.<sup>215</sup> For example, Burmese women's organizations have documented 875 cases of rape from 1988 to 2006 and believe that number is a mere fraction of the total number because of the difficulty in accessing communities under SPDC control and the fear and stigma that keeps women and girls from reporting rape. Many times rape victims have been imprisoned and tortured after making formal complaints or bringing their story to the press.<sup>216</sup>

Similar patterns have been observed in the cases of forced labor and child soldiering in Burma. The government does not appear to have applied the penal code of military regulations in any child soldiering cases, which could have resulted in imprisonment. Thousands, if not tens of thousands, of child soldiers are believed to be serving in the army; their parents are often silent because reporting these cases to the authorities is often counter-productive. When a researcher for an international organization asked a community leader whether parents report their children's forced conscription into the army, the man responded that it was too dangerous because local authorities would punish the parents, and the ILO and the UN would be powerless to protect them.<sup>217</sup>

Thus, the authorities continue to maintain a culture of impunity not only by restricting access to complaints mechanisms, but by harassing and taking legal action against those who bring complaints against the military.

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<sup>215</sup> "Impunity Prolonged: Burma and its 2008 Constitution," International Center for Transitional Justice (September 2009), Pg. 17.

<sup>216</sup> *Id.* at Pgs. 11-14, 29.

<sup>217</sup> *Id.* at Pg. 28.



## **F. THE ROLE OF THE JUDICIARY WILL REMAIN THE SAME**

As a result of the continued domination by the military, the Burmese judicial system will continue to lack powers afforded to its counterparts in liberal democracies. Similar to the language of the Judiciary Law, the language of the new constitution will remain hollow in light of the unfavorable context for its implementation. The 2008 Constitution proposed to adhere to the following judicial principles:

- (a) to administer justice independently according to law;
- (b) to dispense justice in open court unless otherwise prohibited by law;
- (c) to guarantee in all cases the right of defense and the right of appeal under law.

Considering that the Judiciary Law of 2000 had language which was almost identical to the provisions above, it is reasonable to assume that without the proper separation and balance of powers, judicial independence and impartiality will remain nonexistent.<sup>218</sup> This is especially true in light of the fact that many of the oppressive laws that have been passed by the SPDC used to detain thousands of political activists who oppose the regime will remain – as operative and potent weapons of persecution -- in the same hands. Since the 2004 Electronic Transaction Law and the 1975 State Protection Law are not contrary to the Constitution, they will remain in operation and will continue to bound judges to their application to prosecute and sentence political dissidents.<sup>219</sup>

Furthermore, pursuant to the Constitution, the Supreme Court, the highest judicial body in Burma, will be prohibited from interpreting the legality of the constitution, which is a necessary check to the executive and legislative branches in functioning democracies.<sup>220</sup> This omission renders “rule of law” obsolete.

### **The Judiciary Will Remain a Non-independent Tool**

Burma's 2008 Constitution ensures that the judiciary will remain a non-independent tool of the government. The articles of the Constitution that relate to the appointment and removal of judges indicate that the President will have excessive control over the make-up of the Supreme Court. The Constitution states that the President will nominate individuals for the positions on the Supreme Court, High Courts of Regions and States, and the Constitutional Tribunal of the Union.<sup>221</sup> The article then instructs the Union Assembly (Pyidaungsu Hluttaw), similar to Parliament, to approve of the President's nominees.<sup>222</sup> While many developed democracies allow the President to make such nominations, the Constitution takes a marked departure from international norms by declaring that the Parliament must approve a given nominee unless he or she fails basic qualifications. The Constitution effectively eliminates the check Parliament

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<sup>218</sup> UNHRC ‘Human Rights Situations that Require the Council’s Attention, Report of the Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana’ (2009) UN Doc A/HRC/10/19.

<sup>219</sup> Constitution of the Republic of the Union of Myanmar (2008), Article 446.

<sup>220</sup> Constitution of the Republic of the Union of Myanmar (2008), Article 295.

<sup>221</sup> Constitution of the Union of Myanmar, art. 299(c)(i), 308(b)(i), 327.

<sup>222</sup> *Id.*, art. 299(c)(ii), 308(b)(ii), 328.

would have over the President regarding judicial nominations and grants the President exclusive control over the composition of the country's courts, including its Supreme Court. The Constitution lets the President's power over the judiciary seep through all the levels of the country's courts.

### **The Impeachment Practice Will Remain the Same**

The impeachment provisions in the Constitution are also problematic. They allow for impeachment by the President or Parliament for vague reasons including "inefficient discharge of duties."<sup>223</sup> The President of the Parliament can wield such a vague phrase to impeach judges who appear unfavorable to the government. Another ground for impeachment of judges at the Supreme Court, High Courts of Regions and States, and the Constitutional Tribunal of the Union is a lack of loyalty to the Union.<sup>224</sup> The President or Parliament presumably would have the ability to decide whether a judge was demonstrating a lack of loyalty to the state. This part of the Constitution allows the President and Parliament to remove judges who appear to depart from the leadership's agenda. The 2008 Constitution therefore allows the executive and legislative branches to unduly interfere with the composition of the judiciary. No Constitutional provision exists to limit such interference. Judges in this system would remain forever under the watch of the President and Parliament, unable to make decisions that depart from their policies.

### **Lack of Judicial Tenure Will Remain the Same**

In a number of democratic countries, judges at the high levels of the judiciary are nominated for life. Life tenure allows judges to make decisions without concern of falling under political disfavor. Judges in such a system are independent from other branches of government. The ability of the President and Parliament to remove judges for vaguely defined reasons effectively denies judges life tenure. The Constitution also includes strict age limits on judges at the Supreme Court and High Courts of the Region and State which keep term lengths to a maximum of 20 years.<sup>225</sup> Judges nominated to the Constitutional Tribunal of the Union are limited to five-year terms.<sup>226</sup> Even if there were no interference by the executive or legislative branch, judges still would be denied life tenure even at the highest levels of the judiciary.

### **The Executive's Control Will Remain the Same**

The Constitution will allow the President ultimate control over the nation's judicial system at all levels. The executive would have the power not only to install favorable individuals in judicial positions but would also have the ability to remove such individuals at whim. Such a system does not allow the courts to promote human rights and the rule of law. Judges under the design of the 2008 Constitution will remain under the control of the government and will not be able to exercise their obligation to fairly seek justice.

### **Financial Control Will Remain the Same**

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<sup>223</sup> *Id.*, art. 302, 311, 334.

<sup>224</sup> *Id.*, art. 301, 310, 333.

<sup>225</sup> *Id.*, art. 301 (listing qualifications for judges at the Supreme Court), art. 310 (listing qualifications for judges at the High Courts of Regions and States).

<sup>226</sup> *Id.*, art. 335.

The judicial sector is not financially independent from the executive. The Constitution calls for a financial commission that would be led by the President and other members of the executive branch.<sup>227</sup> This commission would provide funding to the judicial sector. Because the executive would control the financing of the judiciary, the President could determine whether courts have the adequate resources to protect human rights and the rule of law. Under the Constitution, the executive could seemingly decide to underfund courts so that they are unable to fulfill the rights of citizens.

### **Denial of Public Hearing Will Remain the Same**

A constitution should protect the fundamental rights and freedoms of the people. One of these fundamental rights is the right to a public trial – one of the hallmarks of free judicial systems around the globe. Public trials deter inappropriate behavior on the part of the court, maintain public confidence in the judicial system, allows the public to know that justice is being administered fairly, and allows accurate reporting of court proceedings.<sup>228</sup> Such openness protects the accused in criminal trials by ensuring that the court proceedings are fair and allow the free dissemination of information to the public. Courts often have the ability to keep trials private if a public trial would be detrimental to the ends of justice.

Burma's criminal law provides for public trial in most situations. Section 352 of the Code of Criminal Procedure describes the situations in which a trial can be shielded from the public, which include if it is necessary to protect minors, secret technical processes, rape victims, matters related to national security, other witnesses, or future prosecutions. However, the law does not prohibit the existence of a trial held where the public cannot have easy access. In Burma, under the rule of the military regime, a large number of trials were held in the campus of prison or jail where the public hesitates to visit.

One notable example is the trial of democracy leaders Min Ko Naing, Ko Ko Gyi and others, leaders of the 1988 uprising after they were arrested with numerous others in August 2007 during a protest march.<sup>229</sup> The demand of the student leaders for public trial then was rejected by the court. Although human rights groups argued for their trial to be public, the courts conducted the trial outside of the public watch.<sup>230</sup> In situations such as this, judges can convict and sentence opposition leaders behind closed doors upon instructions from the junta to oppress its political opponents.

The lack of public trials has serious consequences for Burma's judiciary.<sup>231</sup> When courts hear politically motivated cases outside of the public view, the junta has immense control in the outcome of the case. Civil society groups are unable check whether the trial is fairly adjudicated. Information that comes out from the trial is limited to the official decision; independent actors

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<sup>227</sup> *Id.*, art. 229, 230.

<sup>228</sup> See U Aung Htoo, *The Status of Trials in Burma: A Brief Analysis from the Fair Trial Perspective*, available at <http://www.ncgub.net/NCGUB/articlec21a.html?story=20081124133256315>.

<sup>229</sup> *Id.*

<sup>230</sup> See Min Lwin, *88 Generation Students Go On Trial*, *Irrawaddy*, 3 Sept. 2008, [http://www.irrawaddy.org/article.php?art\\_id=14169](http://www.irrawaddy.org/article.php?art_id=14169).

<sup>231</sup> Radio interviews with U Nyan Win, a lawyer of the National League for Democracy, in Feb 20, 2010.

are rendered unable to give opinions about the trial. The lack of public trials allows the junta to be the sole source of information about what happened at a given judicial proceeding. Keeping trials out of the public view is a mechanism through which the authorities can use the court system to control the population.

The SPDC's 2008 Constitution will not bring about a change in the status quo. There is no right to public trial enshrined in the 2008 Constitution, which signifies that closed trials will continue to mark Burma's legal system in the future. After the implementation of the Constitution in the upcoming elections, in politically motivated cases, closed trials will remain permanent figures in Burma's legal system.

### **The Judiciary Will Remain Silent with Regards to the Conduct of the Military**

According to the new Constitution, the "Defense Services has the right to independently administer and adjudicate all affairs of the armed forces."<sup>232</sup> Therefore, the judiciary, including the Supreme Court, will not have jurisdiction over military justice, which is handled by a system of court martial, in which the commander-in-chief has the power of a unilateral decision which is "final and conclusive."<sup>233</sup> Due to the regimented and hierarchical organization of military command, and the subordination of military judges to superiors, the formation of such a court lacks the necessary standards of independence and impartiality.<sup>234</sup> Indeed, the establishment of separate military tribunals denies access to courts for victims of atrocities committed at the hands of the military under the direct command of the Commander-in-Chief of the Defense Services, who has been and will be a member of the SPDC.<sup>235</sup> Interestingly, the Constitution fails to account for the fact that the Commander-in-Chief can himself be guilty of civil and even criminal misconduct; failing to provide for any removal mechanisms should any such conduct come to light.

The lack of any appellate jurisdiction by any civilian judicial authority runs counter to the practices of democratic countries governed by the rule of law. In the United Kingdom, for example, although all military forces are subject to the jurisdiction of military courts, the elaborate appeals process permits appeals from Court Martial courts to be made to The Court Martial Appeal Court, made up mostly of judges from the civilian Court of Appeal for England and Wales, and subsequently to the Supreme Court of the United Kingdom – the court of final appellate jurisdiction for all courts, military and civilian alike.<sup>236</sup> The same is true in the United

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<sup>232</sup> Constitution of the Republic of the Union of Myanmar (2008), Article 20.

<sup>233</sup> Constitution of the Republic of the Union of Myanmar (2008), Article 319.

<sup>234</sup> Amnesty International, 'Fair Trials Manual: Chapter 29.6 Military Courts' *Amnesty International USA* <<http://www.amnestyusa.org>> accessed 24 October 2009.

<sup>235</sup> "Impunity Prolonged: Burma and its 2008 Constitution," International Center for Transitional Justice (September 2009), Pg. 35, "Under this formulation major human rights violations including rape, forced labor, and recruiting child soldiers appear to fall under the jurisdiction of the courts-martial, with the commander-in-chief having the final say."

<sup>236</sup> Armed Forces Act 2006, Explanatory Notes.

States; after all appeals in the military courts have been exhausted, the Supreme Court is the final authority on issues of law arising out of any subordinate military court. According to the Indian Army Act, army courts can try personnel for all kinds of offences except for murder and rape of a civilian, which are tried by civil courts.<sup>237</sup> Finally, in some countries, such as Germany and France, court martial does not exist during the time of peace and civilian courts are used exclusively even in matters involving those respective countries' military forces.<sup>238</sup>

Not only does the current model deviate from the military court laws of established democracies, it even contradicts the law in place in Burma under the 1959 Army Act. Specifically, that law gave the Chief Justice of the Supreme Court the power to form an appellate court, comprised of justices of the Supreme Court, certain army officials and legal academicians not affiliated with the government, in order to adjudicate cases involving the military.<sup>239</sup> Unfortunately, this essence of sensible legislation will be permanently repealed so long as the 2008 Constitution is effective.

## **G. THE CURRENT STATUS OF JUDICIARY IN BURMA AND 2008 CONSTITUTION**

Burma's judiciary has been unable and unwilling to deal with rampant, systematic and heinous human rights violations taking place on Burma's soil under the auspices of those regimes. Judicial independence and impartiality remain nonexistent.<sup>240</sup> The courts, through SPDC directives, serve mainly to oppress political opponents and ethnic minorities. Judges and lawyers are unable to perform their professional functions impartially for fear of reprisals, should they be identified as opponents of the regime. Due process and fair trial guarantees are ignored in practice and procedures for arrest and detention are frequently violated, particularly where persons are arrested on political grounds.

Although it purports to institute a system of checks and balances, including an independent judiciary, the new Constitution will only serve to further human rights violations and render the judiciary impotent by: entrenching the present military regime and giving it unfettered powers to conduct its own affairs unchecked by the judiciary; giving the SPDC (or its successor) unabridged powers during so-called states of emergency, including the right to strip individuals of constitutionally guaranteed protections in the 2008 Constitution; providing amnesty for the criminal regime, thus keeping thousands of victims away from any domestic recourse; and requiring judges to continue enforcing other existing laws that conflict with democratic principles and have been used by the regime to commit human rights violations.

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<sup>237</sup> *Id.*

<sup>238</sup> "What is Court Martial?" January 29, 2010, [www.ndtv.com/news/India](http://www.ndtv.com/news/India)

<sup>239</sup> The Burma Army Act of 1959, Section 211.

<sup>240</sup> UNHRC 'Human Rights Situations that Require the Council's Attention, Report of the Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana' (2009) UN Doc A/HRC/10/19.

As fourth core human rights element, Mr. Tomas Ojea Quintana, UN Special Rapporteur on the situation of human rights in Myanmar, provided recommendations for judiciary in September 2008, as follows:<sup>241</sup>

- (a) Exercise full independence and impartiality, particularly in cases involving prisoners of conscience;
- (b) Guaranteeing due process of law, including public hearings, in trials against prisoners of conscience;
- (c) Refraining charging individuals for alleged infringement of national laws which are under review according to recommendation No. 1;
- (d) Establishing effective judicial mechanisms to investigate human rights abuses in order to fight impunity;
- (e) Seeking international technical assistance with a view to establishing an independent and impartial judiciary that is consistent with international standards and principles.

However, unfortunately, a single recommendation has not yet been met given that the military regime ignores them evidently.

## **H. CONCLUSION**

If there is one thing that's clear from the 2008 Constitution, which is a product of a discriminatory, criminal regime, it is that it will do next to nothing in the way of implementation of the Rule of Law in Burma. From the above analysis it will appear that the striking feature of the existing Judiciary in Burma is its mockery of justice. In order to transform Burma into a democratic, peaceful nation, the Rule of Law must be established, comporting with the paramount principles of the Separation of Powers and Independence of the Judiciary. Two things need to happen to reach that lofty goal. One, there must be a new Constitution, written with the participation of and accepted by all politically viable parties, that guarantees the separation of powers, the independence of the judiciary and which facilitates the enactment of judicial laws, and which protects and promotes the rule of law based on democratic principles. Second, there must be a government that promotes the rule of law and respects international law and the constitution which it adopts. Thus, the SPDC's 2008 Constitution must be revised before the elections in 2010 and the following period are convened in order to account for the above criticisms.

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<sup>241</sup> The report of the UN Special Rapporteur on the situation of human rights in Myanmar, Tomas Ojea Quintana, 5 September 2008; P. 21, para 105.

## XI. THE IMPUNITY ISSUE AND THE RESPONSIBILITY OF THE INTERNATIONAL COMMUNITY

Possibly the most problematic and disturbing barrier to genuine democratization in Burma is the existing culture of impunity. The trend of international crimes taking place in Burma have been well documented by Human Rights Watch (HRW), Amnesty International (AI), the International Committee of the Red Cross (ICRC), International Federation of Human Rights (FIDH), the UN, and many others. The problem of impunity in the face of international crimes demands a domestic and international response. Unfortunately, both mediums have proved ineffectual.

### A. INTERNATIONAL CRIMES

The SPDC military junta has not only prevented international crimes from taking place, but has been instrumental in the propagation of such offenses.

#### A. 1. Conscripting Children into the National Armed Forces

Human Rights Watch, for example, issued a report in 2002 on the rampant use of child soldiers in Burma.<sup>242</sup> The report documented the cruel and inhumane treatment of children who were illegally and forcible recruited to serve in the state military.<sup>243</sup> According to Human Rights Watch, Burma may have more child soldiers than any other country in the world.<sup>244</sup> The widespread use of children in the military is but one example of the regime's criminality and exploitation of its citizens. Despite ratification of the Convention on the Rights of the Child (CRC),<sup>245</sup> the *Tatmadaw* continues to enlist child soldiers in direct contravention of Article 38.<sup>246</sup>



*Inside of basic Army Training*

*Child Solders in Burma*

<sup>242</sup> Human Rights Watch, *My Gun Was As Tall As Me*, (2002), <http://www.hrw.org/legacy/reports/2002/burma>.

<sup>243</sup> *Id.*

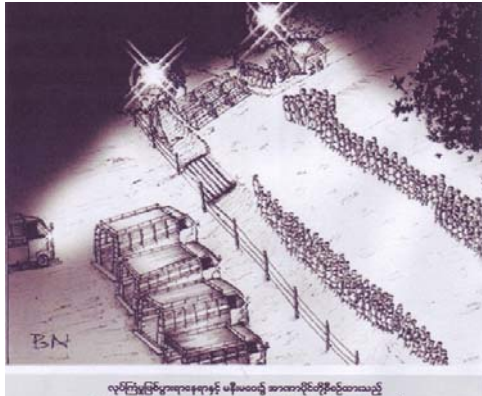
<sup>244</sup> *Id.*

<sup>245</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CRC) art 38.

<sup>246</sup> International Human Rights Clinic at Harvard Law School, *'Crimes in Burma'* (2009)

<<http://www.law.harvard.edu/programs/hrp/documents/Crimes-in-Burma.pdf>> accessed 4 December 2009.

## A. 2. The Depayin Massacre



လူပျိုကြီးရွယ်အိုများနှင့် မိမိတို့၏ အာဇာနည်ကို ဖယ်လှောင်ရန် စောင့်ဆိုင်းနေသော လူတို့သည် ဝန်ထုပ်ဝန်ပိုးများကို ဖြိုခွဲနေကြသည်။  
 USDA and Local Authorities are planning to use violence in the Depayin Massacre

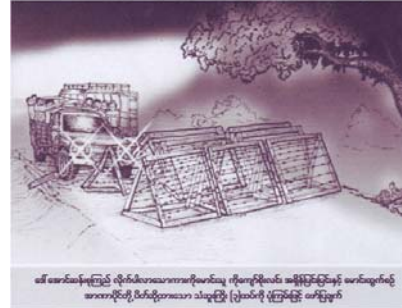


The photo of USDA and Local Authorities are waiting Daw Aung San Sui Kyi and NLD Youth Leaders to use violence in the Depayin Massacre

The SPDC has even been bold enough to orchestrate large, targeted attacks against opponents such as the Depayin Massacre,<sup>247</sup> which resulted in at least 100 and possibly as many as 300 NLD supporters killed.<sup>248</sup> The Depayin Massacre, which occurred on 30 May 2003, represented a planned assault on Daw Aung San Sui Kyi and NLD members.<sup>249</sup> Near the end of a successful NLD political campaigning circuit, members of the pro-military Union Solidarity and Development Association (USDA) intensified harassment of the NLD convoy, resulting in lethal violence. Attackers armed with iron rods and sharpened bamboo stakes wore white armbands to distinguish themselves from victims. During the massacre, Aung San Sui Kyi supporters formed a human chain to protect her vehicle, bearing the brunt of blows aimed deliberately at their heads.<sup>250</sup> After her car escaped, killings continued until the civilian targets were scattered. From there, witnesses in hiding saw police and military load the dead bodies into trucks, as well as clean the scene.<sup>251</sup>



မိမိတို့၏ အာဇာနည်ကို ဖယ်လှောင်ရန် စောင့်ဆိုင်းနေသော လူတို့သည် ဝန်ထုပ်ဝန်ပိုးများကို ဖြိုခွဲနေကြသည်။



NLD Youth Leaders protect to Daw Aung San Sui Kyi in the Depayin Massacre

The Depayin Massacre is one example of the widespread and systematic pattern of extrajudicial killings in Burma. To date, Burmese authorities have taken no action to investigate the murders of Depayin or find the perpetrators. This is just one of

<sup>247</sup> UNCHR 'Question of the Violation of Human Rights and Fundamental Freedoms in any Part of the World, Situation of Human Rights in Myanmar, Report submitted by the Special Rapporteur, Paulo Sérgio Pinheiro' (2004) UN Doc E/CN.4/2004/33.

<sup>248</sup> 'The Depayin Massacre Two Years On, Justice Denied' *ASEAN Inter-Parliamentary Myanmar Caucus* (30 May 2005) <<http://www.aseanmp.org/docs/resources/Depayin%20Massacre.pdf>> accessed 4 December 2009.

<sup>249</sup> UNCHR 'Question of the Violation of Human Rights and Fundamental Freedoms in any Part of the World, Situation of Human Rights in Myanmar, Report submitted by the Special Rapporteur, Paulo Sérgio Pinheiro' (2004) UN Doc E/CN.4/2004/33.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*



many glaring examples of how the precedents of lawlessness and impunity have been set. As a result, other cases of flagrant rights violations continue, such as killings as collective punishment, torture, enforced disappearance, arbitrary detention, forced labor, and forced displacement.<sup>252</sup> A society existing under these conditions mean a perpetual lack of human security and violation of human rights.

### **A. 3. Violations of the Geneva Convention highlighted by the ICRC**

The International Committee of the Red Cross (ICRC) issued a global alert on Burma on June 29, 2007 verifying the regime's criminal violations of the Geneva Conventions.<sup>253</sup> The alert stated that such violations were personally observed by ICRC delegates, that all confidential bilateral negotiations had broken down, and that the crimes by the government were likely to be ongoing.<sup>254</sup>

### **A. 4. Crimes Against Humanity Documented by the Amnesty International**

Amnesty International also has documented the SPDC's crimes against humanity. In a 2008 report, Amnesty International described the crimes that have victimized approximately 140,000 Karen civilians, and noted the increase in attacks following the 2007 Saffron Revolution and Cyclone Nargis in 2008.<sup>255</sup> The crimes documented by Amnesty International include unlawful killings, torture and other ill-treatment, enforced disappearances and arbitrary arrests, the imposition of forced labor including portering, the destruction of homes and villages, the destruction or confiscation of crops and food stocks, and other forms of collective punishment.<sup>256</sup>



These widespread and systematic violations of international human rights and humanitarian law may constitute crimes against humanity.<sup>257</sup>

### **A. 5. Sexual Violence and Other International Crimes**

The nature of sexual violence has reached levels tantamount to crimes against humanity and war crimes.<sup>258</sup> The International Human Rights Clinic at Harvard Law School issued a report detailing the human rights violations in Burma that can be defined as crimes against humanity or war crimes.<sup>259</sup> The report focuses on sexual violence, forced relocation, extrajudicial killings,

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<sup>252</sup> 'Crimes Against Humanity in Eastern Myanmar' *Amnesty International*

<<http://amnesty.org/en/library/info/ASA16/011/2008/en>> accessed 5 December 2009.

<sup>253</sup> International Committee of the Red Cross, Myanmar: ICRC Denounces Major and Repeated Violations of International Humanitarian Law, <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/myanmar-news-290607>.

<sup>254</sup> *Id.*

<sup>255</sup> Amnesty International, Crimes Against Humanity in Eastern Myanmar (2008), <http://www.amnesty.org/en/library/info/ASA16/011/2008>.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> UNHRC 'Human Rights Situations that Require the Council's Attention, Report of the Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana' (2009) UN Doc A/HRC/10/19.

<sup>259</sup> International Human Rights Clinic, Harvard Law School, Crimes in Burma (2009).

and torture, and claims that the widespread and systematic nature of the crimes demands international action.<sup>260</sup>

The International Federation for Human Rights, Burma Lawyers' Council, and Altsean-Burma issued a report on the international crimes in Burma, and argued that there must be a Commission of Inquiry to investigate the crimes and start the process of criminal accountability.<sup>261</sup>



Human Rights Abuse in Burma



## A. 6. Forced Labor

The SPDC also extracts forced labor from its citizens in blatant violation of international law.<sup>262</sup> The International Labour Organization (ILO) initiated a Commission of Inquiry to investigate the use of forced labor in Burma.<sup>263</sup> The organization's report noted that the SPDC treats its civilians "as an unlimited pool of unpaid forced labourers and servants at their disposal."<sup>264</sup> The use of forced labor is built on a foundation of coercion and government intimidation, which is supported by the lack of democracy and the rule of law.

Each of these reports and statements represent the voices of the victims of Burma. The main goal of much of this reporting and advocacy work is to stop human rights abuses and hold perpetrators accountable for their crimes. Unfortunately, victims still have no effective recourse

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<sup>260</sup> *Id.*

<sup>261</sup> International Federation for Human Rights, Burma Lawyers' Council, Altsean-Burma, Burma/Myanmar: International Crimes Committed in Burma: The Urgent Need for a Commission of Inquiry (2009).

<sup>262</sup> See International Labour Organization, Forced Labour in Myanmar (Burma), Report of the Commission of Inquiry Appointed Under Article 26 of the Constitution of the International Labour Organization to Examine the Observance by Myanmar of the Forced Labour Convention, 1930 (No. 29), 2 July 1998, available at <http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar.htm>.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* sec. 542.

to justice in Burma even though the regime's criminality is widespread and known by the international community.



#### **A. 7. Recommendations made by Former UN Special Rapporteur**

Former UN Special Rapporteur on Human Rights in Burma, Professor Paulo Sao Pinheiro, provided his recommendation as follows<sup>265</sup>:

Since 1990, U.N. representatives have visited the country 37 times in an attempt to facilitate dialogue and promote human rights. They have exhausted all domestic and diplomatic remedies without achieving human rights protection and national reconciliation in Myanmar. And while the U.N. General Assembly and the U.N. Human Rights Council have passed over 35 resolutions regarding Myanmar, the U.N. Security Council has yet to pass a single one. The United Nations will not be successful until the Security Council acts to directly address our stagnant efforts. ----- It is time for the United Nations to take the next logical step: The Security Council must establish a commission of inquiry into crimes against humanity and impunity in Myanmar.

#### **A. 8. Recommendations made by the European Parliament**

On May 22, 2008, the European Parliament recommended the ICC as a mechanism to hold the SPDC accountable for crimes.<sup>266</sup> The Parliament called on European Union Member States to press for a United Nations Security Council resolution referring the situation to the ICC for investigation and prosecution.<sup>267</sup>

#### **A. 9. Response Provided by the ICC Prosecutor**

Under the initiative of the Coalition for the International Criminal Court (CICC), the delegates of civil society organisations from the States that founded the ICC held a meeting with the ICC Chief Prosecutor Mr. Luis Moreno-Ocampo.<sup>268</sup>

<sup>265</sup> Former UN Special Rapporteur on Human Rights in Burma, Prof. Paulo Sao Pinheiro' article, 'End Burma's System of Impunity' Published: May 27, 2009

<sup>266</sup> European Parliament Resolution, P6\_TA-PROV(2008)0231, 22 May 2008.

<sup>267</sup> *Id.*

<sup>268</sup> ICC Chief Prosecutor made this statement at the African Meeting Hall of World Forum Conference Centre, the Hague, the Netherlands, on 23 November 2009 during the Eighth session of the Assembly of States Parties to the International Criminal Court.

The Chief Prosecutor, after collectively receiving questions from a total of fifteen nations, responded first to the questions regarding Burma. He stated in his first response that he cannot initiate investigations *proprio motu* because Burma has not ratified the Rome Statute as of yet; as well, because the UN Security Council has not handed over the Burmese military government officials to ICC. Using the word, “However” he explained in detail the conditions that might allow initiation of investigations *proprio motu*. Most importantly, there can be conditions that will allow the Chief Prosecutor to initiate investigations *proprio motu* when prosecuting a citizen that belongs to one of the one hundred and ten States that have signed and ratified the Rome Statute if there are evidences brought forward against that citizen which prove that that citizen has cooperated with and supported the SPDC which itself has committed heinous crimes.<sup>269</sup>

## **B. LACK OF DOMESTIC REMEDY AND INTERNATIONAL LEGAL OBLIGATIONS**

Domestically, Burma’s judiciary is unequipped and unwilling to deal with human rights violations. Judicial independence and impartiality remain nonexistent.<sup>270</sup> Additionally, provisions of the 2008 Constitution do not address these inadequacies and, in fact, aggravate the situation by establishing immunity for criminals.<sup>271</sup> While some countries have enacted amnesty laws following periods of grave conflict (e.g. Chile, Argentina, Paraguay, Peru, etc.), no country has attempted to embed such a measure into its national constitution. Furthermore, several of those amnesty laws have since been repealed, with violators being legally prosecuted. Most importantly, however, amnesty laws do not conform to international standards regarding state responsibility to prosecute criminal actions.

As a state party to the Geneva Conventions and as a UN member state, Burma has international legal obligations to protect civilians that must be adhered to. Additionally, as a party to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), UN Security Council (UNSC) Resolutions 1325, 1674, and 1820 should be specifically highlighted.<sup>272</sup> These resolutions emphasize the particular vulnerability of women, and seek to end gender-based violence by placing females in genuine decision-making positions, as well as by strengthening national mechanisms for protection. Reports of crimes in Burma continue to draw global attention, with the CEDAW committee expressing its concern over the “high prevalence of violence against women and girls, such as widespread domestic violence and sexual violence, including rape”.<sup>273</sup> The committee further noted: “such violence appears to be socially legitimized and accompanied by a culture of silence and impunity”.<sup>274</sup> Despite claims to

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<sup>269</sup> *Id.*

<sup>270</sup> UNHRC ‘Human Rights Situations that Require the Council’s Attention, Report of the Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana’ (2009) UN Doc A/HRC/10/19.

<sup>271</sup> Constitution of the Republic of the Union of Myanmar (2008), Article 445.

<sup>272</sup> UNSC Res 1325 (31 October 2000) UN Doc S/RES/1325; UNSC Res 1674 (28 April 2006) UN Doc S/RES/1674; UNSC Res 1820 (19 June 2008) UN Doc S/RES/1820.

<sup>273</sup> UN Committee for the Elimination of All Forms of Discrimination against Women, ‘Concluding observations of the Committee on the Elimination of Discrimination against Women’ (7 November 2008) UN Doc CEDAW/C/MMR/CO/3.

<sup>274</sup> *Id.*

investigate abuses and administer justice, the junta has failed to produce any meaningful remedies.

While some pressure has come from the international community, the regional ASEAN has been disappointingly silent on the issues of human rights and impunity. Though ASEAN has long declared “non-interference in the internal affairs of ASEAN member states”<sup>275</sup> as a core *principle*, the passivity of the organization’s member states simultaneously reveals blatant incompatibilities with its purported goals. Of particular note, Article 1(7) of the Charter highlights the *purpose* of ASEAN as a means to “strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms”.<sup>276</sup> The ASEAN Charter was created as a legal framework to regionally reinforce irrefutable norms enshrined in many international treaties.

The principle of non-interference in the face of grave human rights violations, additionally, runs counter to the international responsibility to protect—an obligation of all UN member states according to UN Security Council Resolution 1674.<sup>277</sup> Thus, under the provisions of its own Charter, as well as to fulfill their international legal responsibilities, ASEAN members are required to take action regarding the human rights situation in Burma. The predicament of Burma presents an opportunity for ASEAN to display its political will and place significance behind a stated intention to improve the lives of people in Southeast Asia. It is time for the organization to put the promotion and protection of human rights into practice in adherence to international laws.

### C. NULLIFICATION OF THE 2008 CONSTITUTION AND FORMATION OF COMMISSION OF INQUIRY

The importance of a constitution, as the foundation for national law, cannot be overemphasized. Constitutional Law scholar, Yash Ghai,<sup>278</sup> explains that the purpose of drafting a new constitution in areas of conflict is to address the mechanisms causing the current unsatisfactory state of affairs.<sup>279</sup> Ghai further notes that the constitutional drafting process is usually considered a participatory reconciliation and trust-building exercise.<sup>280</sup> Both of these aspects were neglected in the case of Burma.



Senior General Than Shwe:  
The Most Wanted Perpetrator for The International  
Crimes Being Committed in Burma

<sup>275</sup> *Id.*, art 2(e).

<sup>276</sup> ‘The ASEAN Charter’ (20 November 2007) <<http://www.aseansec.org/publications/ASEAN-Charter.pdf>> accessed 6 December 2009.

<sup>277</sup> UNSC Res 1674 (28 April 2006) UN Doc S/RES/1674.

<sup>278</sup> Ghai is head of the Constitution Advisory Support Unit of the UN Development Program in Nepal and Special Representative of the UN Secretary General for Human Rights in Cambodia.

<sup>279</sup> Yash Ghai, ‘The 2008 Myanmar Constitution: Analysis and Assessment’ (2009) <[http://www.tacdb-burmese.org/downloads/2008\\_Myanmar\\_constitution\\_analysis\\_and\\_assessment.pdf](http://www.tacdb-burmese.org/downloads/2008_Myanmar_constitution_analysis_and_assessment.pdf)> accessed 7 December 2009.

<sup>280</sup> *Id.*

Since the drafting process and subsequent constitution have failed to achieve their purposes, it is reasonable to request the nullification of the 2008 Constitution by the UN Security Council. Precedence for such a move can be found in UNSC Resolution 554 regarding South Africa's 1983 apartheid-entrenching constitution.<sup>281</sup> The 1983 constitutional proposals would have deprived the indigenous African majority of all fundamental rights, including citizenship, and enflamed tensions between the various ethnic groups.<sup>282</sup> As a result, the UN Security Council pointed out the incompatible nature of the document with the UN Charter and declared the results of the constitutional referendum invalid.<sup>283</sup> Furthermore, the UNSC rejected the constitution and "all insidious maneuvers by the racist minority regime...to entrench white minority rule and apartheid".<sup>284</sup> The South African government at the time attempted to enact domestic laws that were intrinsically counter to international laws in order to block a vital sector of their population from political participation and decision-making.

In the same way, the Burmese military junta has oppressed the people of Burma for half a century and the widespread desire for government change is undeniable. Now, though the SPDC had the opportunity to begin reconciliation through the creation of a new constitution, they instead chose to entrench their own political position. Similar to apartheid-era South Africa, the SPDC constitution excludes vital involvement from ethnic groups. More importantly, however, the junta is responsible for crimes against humanity—just as the white Afrikaners propagating apartheid were. With Resolution 554, the UNSC was speaking out against a ruling regime in South Africa that acted in clear opposition against the will of the people. The UNSC further acknowledged that the only solution for a just and lasting peace would be the "establishment of a non-racial democratic society based on majority rule, through the full and free exercise of adult suffrage by all the people in a united and non-fragmented South Africa".<sup>285</sup> With sustained support from the international community, the South African population was eventually able to reform their society and establish a new government based on democratic ideals. The same transition could occur in Burma if the international community would apply pressure to the SPDC through tangible steps beyond strongly worded statements.

Over time, the international community has voiced its criticism of the Burmese military rulers. Most significantly, 442 Members of Parliament from 29 countries issued a statement demanding the United Nations Security Council establish a Commission of Inquiry to investigate crimes in Burma.<sup>286</sup> The letter acknowledged the SPDC's systematic attacks against ethnic groups and urged the United Nations to take action. These parliamentarians represent the global awareness and concern over international crimes in Burma.

However, substantial action has yet to materialize. After the SPDC withheld aid in the wake of Cyclone Nargis, the European Union (EU) stated in a Parliamentary Resolution that the junta should be held accountable for crimes against humanity and called on EU member states to

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<sup>281</sup> UNSC Res 554 (15 November 1983) UN Doc A/RES/38/11.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> UNSC Res 554 (15 November 1983) UN Doc A/RES/38/11.

<sup>286</sup> Letter to Ban Ki-moon from Ambassador Michel Kafando et al., 10 Dec. 2009, *available at* <http://uscampaignforburma.org/wp-content/.../12/442-MPs-Letter-to-UNSC.pdf>.

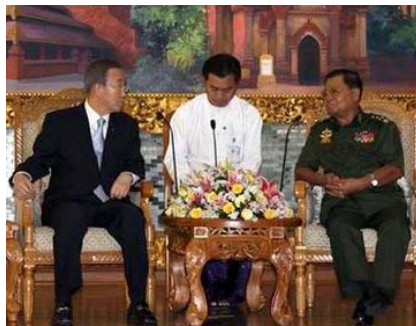
press for a Security Council referral to the ICC.<sup>287</sup> The deprivation of food and medicine to victims of Cyclone Nargis qualifies as a crime against humanity under Article 7(2)(b) of the Rome Statute.<sup>288</sup> Since the SPDC has made no move to investigate the human rights violation of this event, along with many other allegations of international crimes, a commission of inquiry should be formed by the UN Security Council, with reference to the following resolution, *inter alia*, made by the UN General Assembly on 29 October 2009 which:

Strongly calls upon the Government of Myanmar to take urgent measures to put an end to violations of international human rights and humanitarian law, including targeting of persons belonging to particular ethnic groups, the targeting of civilians by military operations, and rape and other forms of sexual violence, and to end impunity for such acts.<sup>289</sup>

The International Tribunal on Crime Against Women in Burma, a quasi-legal event, which was conducted by Nobel Peace Laureates and international human rights laws experts in New York on March 2, 2010, called for ending impunity of Military Regime.<sup>290</sup> The event highlighted the egregious human rights crimes, including rape as a weapon of war, and called for policymakers to demand a last resort: the International Criminal Court.<sup>291</sup>

#### **D. THE RESPONSIBILITY OF UN SECRETARY GENERAL BAN KI-MOON AND THE INTERNATIONAL COMMUNITY TO END IMPUNITY**

The SPDC alternates between denying all allegations of rights violations and claiming state sovereignty in domestic affairs, along with the non-intervention principle. Impunity arising from the 2008 Constitution, however, should not be regarded as an “internal affair” of the state. Such impunity would protect perpetrators of war crimes and crimes against humanity from facing justice; the gravity of such crimes—in the purview of the UNSC—disqualify the issue from being handled domestically. Similarly, under Article 99 of the UN Charter, the UN Secretary-General Ban Ki-moon has the responsibility to bring the issue of impunity in the 2008 Constitution to the attention of the UN Security Council as a violation of international human rights and humanitarian law.<sup>292</sup> Any impunity resulting from the 2008 Constitution would represent a serious breach of peremptory norms, as well as a flagrant repudiation of the



UN Secretary General Ban Ki-Moon and  
SPDC Senior General Than Shwe

<sup>287</sup> European Union (European Parliament) ‘European Parliament resolution of 22 May 2008 on the tragic situation in Burma’ (22 May 2008) 2009/C 279 E/16.

<sup>288</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute) art 7.

<sup>289</sup> UNGA ‘Situation of human rights in Myanmar’ (29 October 2009) UN Doc A/C.3/64/L.36.

<sup>290</sup> Press release issued by Nobel Women's Initiatives; International Tribunal on Burma Calls for End to Impunity of Military Regime; March 3, 2010; Rachel Vincent: Mobile: + 1-613-276-9030, rvincent@nobelwomensinitiative.org

<sup>291</sup> *Id.*

<sup>292</sup> Charter of the United Nations and Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) art 99.

essence of the UN Charter and Geneva Conventions. The international community has the responsibility to protect the people of Burma from future abuses. The Secretary General issued a report detailing three pillars for the enactment of states' responsibility to protect when there is a threat of crimes against humanity, war crimes, genocide, or ethnic cleansing.<sup>293</sup> The report indicates that countries have the primary responsibility for protecting their own citizens.<sup>294</sup> Other states have the responsibility to guide them in this effort.<sup>295</sup> Under certain circumstances, the international community will need to make a "timely and decisive response" in order to prevent international crimes.<sup>296</sup> The United Nations and the international community should remember their obligations under the responsibility to protect and make sure that international crimes end in Burma.

## **E. CONCLUSION**

It is almost certain that the SPDC will carry out elections in 2010, but genuine democratization will not emerge. Implementation of the 2010 elections is meant to legitimize the 2008 Constitution. As of March 7, 2010, there had been no sign of the SPDC planning to revise the constitution including, at minimum, the abrogation of the amnesty provision. Recognition of the 2010 election by the international community—on the hopes of a gradual evolution towards democratic change—will only imply compliance with prevailing immunity. Furthermore, the commission of international crimes will remain ignored, the rule of the military dictatorship will be entrenched, and peace and security will be threatened not only in Burma, but also in the greater Asia region.

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<sup>293</sup> United Nations General Assembly, Report of the Secretary General: Implementing the Responsibility to Protect, A/63/677, 12 Jan. 2009.

<sup>294</sup> *Id.* at 10-14.

<sup>295</sup> *Id.* at 15-22.

<sup>296</sup> *Id.* at 22-28.



## XII. RECOMMENDATIONS

The Elections in 2010 and the following period are premised on a constitution that does not reflect the will of the people and, thus, does not have any basis for legitimacy. If the SPDC military regime is truly intent on introducing democracy, the following steps must be taken immediately.

**First**, the 2008 Constitution must be revised and sections of the constitution that do not reflect the will of people nor meet international norms found in flourishing, liberal democracies, international human rights law, and humanitarian laws must be redrafted. Additionally, all attacks on ethnic minorities must cease immediately and leaders should be invited to contribute their input on constitutional revision. To this end, the SPDC should undertake a transparent, inclusive and comprehensive review of compliance of the constitution, while fully engaging with the democratic opposition and ethnic groups.<sup>297</sup> In order for the new government to hold any legitimacy, the flaws of the constitution must be rectified immediately. Otherwise, the nullification of the 2008 Constitution by the UN Security Council shall be made.

**Second**, all political prisoners including Daw Aung San Suu Kyi must be released. The SPDC must allow political parties and candidates the freedom to organize and campaign without unreasonable restriction, including equal access to media. The election laws and actual election process must meet international standards. The UN Electoral Assistance Division should be requested to participate in helping the SPDC conform to such standards, and long-term international monitors should be invited to observe the election proceedings.

**Third**, as impunity prevails in Burma, the rule of law is totally denied. As a result, trust building and mutual respect will never become a reality. So long as perpetrators enjoy impunity, a cycle of repeated crimes cannot be prevented and genuine national reconciliation will merely be a myth. In support of a democratic transition, concept of forgiveness may be practiced on the condition of implementing victim oriented programs, on one hand, and reforming state institutions from the status, which operates as the apparatus of terrorist state, to that of the ones which protect the rights of people on the basis of the rule of law, on the other.

**Fourth**, any attempt by the SPDC to grant immunity through the 2008 Constitution, or through other domestic laws and measures, for war crimes, crimes against humanity or other crimes falling within the jurisdiction of the ICC will have no legal bearing on any Security Council process of inquiry or referral.<sup>298</sup> The international community should redouble pressure on the UN Security Council to form an International Commission of Inquiry to investigate the international crimes taking place in Burma in order to effectively facilitate efforts for ending impunity and restoring the Rule of Law.

After decades of military rule and countless human rights violations, citizens in Burma deserve a government that undertakes the primary responsibility for the protection of its people. During the 1988 popular democratic uprising, people in Burma had to sacrifice several thousand

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<sup>297</sup> UNGA 'Situation of human rights in Myanmar' (29 October 2009) UN Doc A/C.3/64/L.36.

<sup>298</sup> Interview with David Fisher, Professor of International Law, Stockholm University, Sweden, 11 November 2009.

lives to abolish the 1974 Constitution. Should the international community support and legitimize any election by the SPDC that will bring the 2008 Constitution into effect, the unnecessary loss of life will assuredly continue.

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<sup>i</sup> Some additional economic data and other information for this article have come from the following sources: Burma/Myanmar: The Role of The Military in the Economy, by David I. Steinberg, Burma Economic Watch, Issue 1, 2005; Profile of Burma's Banks, by Sean Turnell, Burma Economic Watch, Issue 1, 2006; U.S. Department of State, 2007 Investment Climate Statement – Burma, <http://www.state.gov/e/eeb/ifd/2007/80685.htm>; Burma's Economic Prospects, Testimony before the Senate Foreign Relations Subcommittee on East Asian and Pacific Affairs, 29 March 2006, by Dr Sean Turnell, <http://www.uscampaignforburma.org/contact-resources/TurnellCongressTestimony.pdf>; Gathering Strength: Women from Burma on their Rights, by Brenda Belak (2002).