



Part (A)
Special Feature

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**THE RULE OF LAW AND DEMOCRATIZATION:
AN ANALYSIS OF THE FORTHCOMING 2010 ELECTION IN BURMA
FROM A HUMAN RIGHTS PERSPECTIVE**

(EXCERPTS)

NOVEMBER 11, 2009

For the past fifty years, military dictators have ruled Burma destroying the economy, abolishing the 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.¹ 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 to implement its military-dominated Constitution, which was forcefully approved in May 2008.

The Burma Lawyers' Council (BLC) has created a comprehensive analysis of the forthcoming 2010 election, scrutinizing the political will of the regime, the history of elections in Burma, international election standards, the flaws of the 2008 Constitution, and the relevance of international laws. The BLC's paper also proposes concrete steps for peaceful democratization of Burma on the rule of law and human rights. The following is excerpts from the longer BLC analysis paper, which will be published soon.

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.²

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, The bizarre move of capitals and the SPDC's brutal crackdown on peaceful protestors demonstrate the lengths to which the regime will go to cement its rule.

THE IMPOSSIBILITY OF FREE ELECTIONS UNDER EXISTING DRACONIAN LAWS

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.³ Additionally, all printers must register with the government,⁴ but registration may be revoked if the printer is found to "[harm] the ideology and views" of the government.⁵ 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-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 that may "endanger the sovereignty and security of the state or public peace and tranquility"—even if they have not yet been committed.⁶ The language is sufficiently vague to allow interpretation befitting the desires of the SPDC. Since the SPDC has historically used a broad interpretation of this law to remove opposition figures from public life, it is 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.



C. 2004 ELECTRONIC TRANSACTION LAW

The 2004 Electronic Transaction Law was promulgated by the SPDC to dictate all use of electronic technology. 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. In this current era, the Internet and mobile phones are powerful tools used to disseminate information widely and cheaply. 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.

A violation of this section may result in seven to fifteen years of imprisonment.⁷ 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.⁸ 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 email communication⁹ 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".¹⁰ The junta has used this law to repress and punish those taking part in free expression, peaceful demonstrations, and forming organizations.¹¹ 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.¹² The Saffron Revolution was an entirely peaceful protest of religious figures that were brutally crushed by the military junta.¹³ 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.



ARE ALL ELECTIONS STEPPING STONES FOR A GRADUAL DEMOCRATIZATION PROCESS?

RESPONSE TO THE INTERNATIONAL CRISIS GROUP

On August 20, 2009, the International Crisis Group (ICG) released a report describing the 2008 Constitution as the "flawed product of a flawed process".¹⁴ 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.¹⁵

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 considering the passivity of ASEAN in dealing with the military. To be noteworthy is that ASEAN itself still adheres to the principle of non-interference in the internal affairs of ASEAN member states¹⁶ despite that promotion and protection of human rights is mentioned as purpose¹⁷. ASEAN leaders did not even reflect the statement made by Mr. Obama, President of the United States, to release Daw Aung San Suu Kyi and political prisoners in their Asia Pacific meeting.¹⁸ With reference to the current status of ASEAN, if an analysis is made such as 'the regional context has also changed',¹⁹ it may be a 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.

CHALLENGES ENCOUNTERED BY BURMA'S CIVIL SOCIETY

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, in the case of Indonesia (which presents similar a similar scenario to that of Burma), student demonstrations with the 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. Particularly, due to the systematic restrictions made by the military regime²⁰, the status of people's organizations currently inside Burma cannot even catch up with that of Indonesia's civil society organizations, existed before the fall of Suharto in 1998.

THE 2008 CONSTITUTION: PROLONGING VIOLENCE AND IMPUNITY IN BURMA

The 2008 Constitution currently purports to grant immunity to military leaders who have committed crimes in violation of the Geneva Conventions and Rome Statute. The Constitution undoubtedly needs comprehensive review for it to respect international human rights law and humanitarian law. The United



Nations Security Council found South Africa's 1983 Constitution null and void, finding that it would aggravate apartheid in the country.²¹ Burma's 2008 Constitution is similarly void for the same reason: the Constitution flouts international law and attempts to further the illegal acts of a brutal military regime.

Elections are invariably intertwined with the Constitution as it represents the foundation for legitimate governance. Acknowledging the difficulty of power sharing only highlights the necessity of building provisions for equity into the legal framework. The international community has the responsibility to denounce this election and its processes until there is comprehensive review of the 2008 Constitution.

People in Burma had to sacrifice several thousand lives to abrogate the 1974 Constitution. Should the international community support and legitimize any election to be held by the SPDC military regime in 2010 or afterwards which will implement 2008 Constitution, the people of Burma will make even more sacrifices to oppose the 2008 Constitution. The abuses of the past few decades will assuredly continue.

The 2010 Elections are premised on an illegitimate constitution that does not reflect the will of the people and breaks well-founded international laws and peremptory norms. The SPDC will almost certainly carry out elections in 2010, but genuine democratization will not emerge. A veil of political legitimacy may be placed over the dictatorship, but the SPDC will retain its chokehold on the country.

RECOMMENDATIONS

If the SPDC is truly intent on introducing democracy, the following steps must be taken immediately.

First, the 2008 Constitution must be revised. Opposition parties should be given special priority in redrafting sections of the constitution that do not reflect the will of people nor meet international norms found in flourishing, liberal democracies and embodied in international human rights and humanitarian law. Additionally, all attacks on ethnic minorities must cease immediately and leaders should be invited to contribute their input on constitutional revision. Ethnic groups should be given particular consideration to ensure the protection of their communities and entrench their political participation as decision-makers.

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. Again, this must be done as soon as possible so that citizens have sufficient time to be informed of the various political options and, thus, cast an educated vote.

Third, 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.

Fourth, where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.²² Attempts by the SPDC, through the Burma's 2008 Constitution or through other domestic laws/measures, to grant immunity 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.²³ The international community may urge 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 our people's efforts for ending impunity in Burma.

(Endnotes)

¹ 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.

² 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.

³ 1962 Printers and Publishers Registration Law (1962), Part 5.

⁴ 1962 Printers and Publishers Registration Law (1962), Part 4.

⁵ 1962 Printers and Publishers Registration Law (1962), Part 4(10).

⁶ State Protection Law (1975), Article 7.

⁷ *Ibid.*

⁸ 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.

⁹ Interview with U Nyi Nyi Hlaing, Defense Lawyer, Mae Sot (12 November 2009).

¹⁰ The Penal Code (1860), Section 505(b).

¹¹ 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.



¹² '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.

¹³ 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.

¹⁴ International Crisis Group, 'Myanmar: Towards the Elections' (20 August 2009) <<http://www.crisisgroup.org/home/index.cfm?id=6280>> accessed 13 November 2009 at p.26.

¹⁵ See generally, *Ibid*.

¹⁶ Article 2.1 of the ASEAN Charter.

¹⁷ Article 1.1 of the ASEAN Charter.

¹⁸ See Justin McCurry, "Free Aung San Suu Kyi, Obama Tells Burma PM", *The Guardian* (15 November 2009) <<http://www.guardian.co.uk/world/2009/nov/15/obama-aung-san-suu-kyi-release-burma>> accessed 23 November 2009.

¹⁹ International Crisis Group, 'Myanmar: Towards the Elections' (20 August 2009) <<http://www.crisisgroup.org/home/index.cfm?id=6280>> accessed 13 November 2009 at p.22.

²⁰ People's organizations cannot receive fund from the international community directly.

²¹ UN Security Council Resolution 554 (1984).

²² Synopsis; *The Responsibility to Protect*, Report of the International Commission on Intervention and State Sovereignty, December 2001, Published by the International Development Research Centre, <http://www.idrc.ca>.

²³ Comment made by Prof. David Fisher, Professor of International Law, Stockholm University, Sweden;

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