Legal Journal on Burma

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The BLC Publication Team
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BURMA LAWYERS' COUNCIL
Part (A)
Seeking Criminal Accountability in Burma

(A.1)
Seeking Criminal Accountability,
the Rule of Law and Democratic Transition for Burma

(By Aung Htoo, General Secretary, Burma Lawyers’ Council)

Introduction

The international community, as well as the majority of people in Burma, has an expectation to transform the country from the rule of dictatorship to democracy by peaceful means, including political dialogue. The National League for Democracy (NLD) has repeatedly called for unconditional dialogue, based on principles of mutual respect and national reconciliation. However, with reference to over two decades of experiences in Burma, it is time to scrutinize whether political dialogue, based on genuine national reconciliation that addresses previous human rights abuses effectively and properly, can become a reality under the current circumstances. More importantly, it is also time to observe how peaceful democratization of Burma can be achieved in a way that criminal accountability is sought while laying down a foundation for the rule of law, for long term protection of human rights.

Democratization of Burma: Through Political Dialogue or 2010 Election?

In regard to potentiality of dialogue, from the aspect of the ruling military regime, namely the State Law and Order Restoration Council (SPDC), the major issue is that, on one hand, genuine political dialogue by the regime with any other political forces never materializes, despite the call by the national and international community for almost two decades commencing from 1990; instead, the regime created a sham dialogue between Daw Aung San Suu Kyi and Major General Aung Kyi, which did not go anywhere, in the sense that it has totally and intentionally ignored the creation of a process that would bring about genuine national reconciliation.

On the other hand, the regime has continued to implement its own political roadmap: its military dominated constitution was approved forcibly by vote.
rigging and voter intimidation in the May 2008 referendum. In order to hold the referendum on its scheduled date, the regime reportedly ignored the devastation of Cyclone Nargis, which killed more than 150,000 people and affected about one-third of the country. Their actions may amount to a crime against humanity. Similar practices will assuredly be exercised in the forthcoming election to be held in 2010, legitimizing the military rule and prolonging military dictatorship in accordance with the constitution.

So long as democratization of Burma is expected, centering on 2010 election to be possibly applied as an important process for gradual change, it will be in the trap of the Senior General Than Shwe. From the aspect of militarization, 2008 constitution is much worse than 1974 constitution. In spite of participation in the 2010 election, the political party, which may win majority seats in the legislature, cannot form any government and rule the country.

The international community which argues to take strategic advantage of 2010 election as a gradual transition argues that if politically aware sectors of the electorate stay away, this could further reduce the chances of candidates not aligned with regime. Actually, regardless of whether aligned with regime or not, sitting as elected representatives in legislature, arisen from 2008 Constitution after 2010 election, is nothing but to make rubber stamp to entrench the military dictatorship in accordance with the constitution.

The UN Secretary General's effort to approach the 2010 election 'to be inclusive, free and fair' is generally acceptable but it is quite vague and it does not address the particular situation of Burma. The 2010 election in Burma may be relatively inclusive, free and fair like those held in some other under-developed countries across the world. However, so long as the 2010 election implements the SPDC's 2008 Constitution, long term stability will not be realized, the actual democratization process will never happen, and more importantly, the rule of law which is a major foundation for seeking justice as well as economic development of the people will be perpetually denied.

**The International Community and UN: Lack of Focus on SPDC's 2008 Constitution**

From the aspect of the Rule of Law, major flaws of the SPDC's 2008 Constitution are found as follows:

(1) The Constitution does not guarantee equality. The military, as a privileged class, assumes state powers, in terms of the legislature, executive and judiciary, which is contrary to the major concept of the rule of law, that is, every person is equal before the law.
(2) Independence of the judiciary, which is also a major component for the Rule of Law, will never become a reality. The chief executive has power to appoint and dismiss the Supreme Court Justices at his or her own discretion while judicial tenure is not guaranteed. The existing judicial system, which is subservient to the military, will remain in place.

(3) People will never enjoy human rights. The Constitution deprives people of their basic human rights by stipulating 'exception clauses' Article 354 of SPDC's 2008 Constitution:

Every citizen shall be at liberty in the exercise of the following rights, if not contrary to the laws, enacted for Union security, prevalence of law and order, community peace and tranquility or public order and morality:

(a) to express freely their convictions and opinions;

(b) to assemble peacefully without arms;

in the Chapter of fundamental rights and duties of Citizens. The effectively draconian laws, which strictly prohibit three basic freedoms of citizen - freedom of speech, association and assembly - will continue to exist; furthermore, additional oppressive laws, which will deprive people of their liberty, will come into existence. The Constitution also lacks a rights protection mechanism.

(4) Equal rights and self-determination, stipulated by the ethnic nationalities for some decades, is required for decentralization. It will, however, be perpetually denied. Instead, the Constitution, inter alia, formulates rigid centralization by creating a permanent military institution that will exercise the executive power indefinitely under the name of the National Defense and Security Council.

(5) The military will be above the law. The Constitution has already established a permanent military court, separated from the civilian justice mechanism, for which the military Commander-in-Chief will exercise appellate power. Article 343 of the SPDC's 2008 Constitution:

"In the adjudication of Military Justice:

(6) The Constitution provides blanket amnesty to all members of the SLORC/SPDC military regimes for their previous commission of heinous crimes; as such, impunity will continue to prevail in the country; efforts of victims of crime to seek justice would have been perennially renounced; and, heinous crimes such as violations of the Geneva Conventions, crimes against humanity and war crimes will persist.
Seeking justice is the right of the victims of heinous crimes in any society or state. By articulating the term 'National Reconciliation', no political organization or leader, national or international, should enjoy any authority to approve the SPDC's ploy to achieve blanket amnesty in accordance with the 2008 Constitution, which is totally contrary to international law and international human rights laws.

**Human rights trade-off for democratization should be the way forward?**

The process for democratization of Burma should lay down a foundation for a genuine national reconciliation on the basis of the promotion and protection of human rights by properly dealing with previous abuses, as has occurred in many other countries across the world that have transformed from dictatorships to democracies. In this regard, there are two schools of thought: the first one is that this issue should not be discussed or publicized during the current dialogue processes as the regime would hesitate to make democratic changes and, if necessary, there might also be a human rights trade-off for democratization; and, the second one is that, without dealing with previous human rights abuses properly, the perpetrators will enjoy endless impunity thereby violating individual right to justice of the victims justice and creating a situation in which the perpetrators can commit more human rights abuses in the future without having any concern for being held responsible. In this regards, many academics have pointed out the following:

While diplomats and negotiators involved in efforts to curtail violent disputes previously might have dismissed any focus on past atrocities as an obstacle to stability and the resolution of conflict, today, it is increasingly recognized as an integral and unavoidable element of the peace process. As example, although recent peace accords to conclude civil wars in El Salvador, Bosnia, and, most recently, Guatemala may each have their respective weaknesses regarding accountability, each reflects this paradigm shift by incorporating various mechanism to deal with the legacy of past violations and recognizing that a durable peace would be unattainable without them.\(^{(38)}\)

Prosecuting the human rights violations of a predecessor regime can yield at least half a dozen significant benefits to a democratic government. First, it can substantially enhance the prospects for the establishment of the rule of law. Second, Prosecution can function as a means of educating the citizenry to the nature and extent of prior wrong doing. Third, prosecution is one of the most effective ways of identifying and creating the predicate for the compensation of victims of a predecessor regime's
misdeeds. Fourth, prosecution can provide a means of punishing wrongdoers for their criminal conduct. Fifth, prosecution can enhance a society's ability to deter future violations of human rights. Finally, prosecution may be essential to healing the social wounds caused by serious human rights violations.39

In the case of Burma, a human rights trade-off must not be made simply for democratization. A clear message must be sent to all perpetrators who have seriously violated human rights and have committed heinous crimes even now that they will be prosecuted in national courts or the International Criminal Court, despite the fact that particular cases which are not serious may be considered for amnesty if perpetrators come forward, admit their crimes, uncover the truth and facilitate a peaceful democratization process similar to the case of South Africa.

**Impunity: Denial of the Rule of Law and National Reconciliation**

There are concerns that Senior General Than Shwe and his elite Generals are not naive enough to simply adopt the call of the democratic opposition for 'national reconciliation'40 at the present time while they have the upper hand in assuming political power41.

The essence of the 2008 Constitution is to guarantee impunity indefinitely and the 2010 election will implement it. When impunity prevails, the Rule of Law does not come into existence. Without dealing with these challenging issues, a political dialogue that may lead to genuine national reconciliation will only be a myth. Should impunity prevail and criminal accountability be systematically denied even in the national legal system, Burma will be in a vicious circle and the commission of heinous crimes will continue to occur repeatedly, denying the rule of law and damaging the stability of the state. As a result, development will never become a reality.

So long as the power of Senior General Than Shwe and a group of his lackey generals, who are responsible for having committed a number of heinous crimes, remains unchallenged, the military dictatorship will be entrenched. Then, the term 'national reconciliation' may even be used by Senior General Than Shwe to prolong his power42, a fake dialogue may be created again, and the 2008 Constitution will remain unchanged. Afterwards, the regime will step forward for the 2010 election and may be able to rule the country indefinitely as a military dictatorship, safeguarded by the constitution. If the regime is able to seek legitimacy on the basis of the 2008 Constitution after the 2010 election, democratization of Burma based on the Rule of Law will be a distant dream.
Democratization of Burma: A Brief Analysis of the Strategy of the UN

The current strategy of the international community, mainly the UN, to facilitate democratization of Burma is firstly to persuade the regime to enter into political dialogue after political prisoners are released, secondly to encourage the regime to review its 2008 Constitution, and thirdly to create conditions conducive to a credible election in 2010. With reference to particular situations of Burma mentioned above, it may not be achievable given that it focuses only on national political issues. The military regime may pretend to adopt it in one way or another superficially. It will however be denied essentially, shielding itself with former reason, 'sovereignty of a state' and asking supports of some UNSC member countries.43

Under that strategy, the rigid command of Senior General Than Shwe remains intact and his creation of an environment of fear continues spreading not only within the public but also among all army personal. More importantly, the strategy of the UN, initiated by the UN Secretary General, is contrary to previous resolutions of the UNSC44, and also principles of the Charter of the United Nations45 with reference to South Africa's 1984 Constitution, as follows:

1. Declares that the so-called "new constitution" is contrary to the principles of the Charter of the United Nations, that the results of the referendum of 2 November 1983 are of no validity whatsoever and that the enforcement of the "new constitution" will further aggravate the already explosive situation prevailing inside apartheid South Africa.

2. Strongly rejects and declares as null and void the so-called "new constitution" and the "elections" to be organized in the current month of August for the "coloured" people and people of Asian origin as well as all insidious manoeuvres by the racist minority regime of South Africa further to entrench white minority rule and apartheid;

Actually, the SPDC's 2008 Constitution is contrary to the principles of the Charter of the United Nations, as it grants blanket amnesty to the perpetrators who have committed heinous crimes while it activates the military dictatorship; the results of the referendum of 10 May 2008 are of no validity whatsoever; and the enforcement of the "2008 Constitution" will also further aggravate the already explosive situation of 'impunity' prevailing inside Burma. However, unfortunately, the UN Secretary General as well as member states of the UNSC are keeping silent about the SPDC's 2008 Constitution, which may impliedly entrench the rule of military dictatorship in Burma, denying peaceful democratization and ignoring efforts of victims to seek justice. The Constitution is also contrary to
the recent development of international law that emphasizes the 'Responsibility to Protect', instead of 'intervention in internal affairs of a state'.

It is time for UNSC to address the issues of Burma from the aspect of the international law and international human rights laws, focusing on heinous crimes, while implementing the UNSC resolutions for this problematic country.

Conclusion

Issues of democratization of Burma, including 'national reconciliation', do not stand in isolation from the prevailing situation of ' impunity' from the aspect of the commission of heinous crimes, which resulted in the deprivation of the Rule of Law. So long as the genuine principles of the Rule of Law are denied, people in Burma will remain in atrocious situations. They have already exerted their best efforts to transform their society peacefully but, unfortunately, under the brutal oppression of the military dictatorship, they still have not yet achieved their objective. They have proven that they deserve peace, freedom, justice and development.

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

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 international community to act, at least, to end impunity in Burma in a way that it may also facilitate the efforts of people in Burma for peaceful democratic transition with a genuine 'national reconciliation', on the basis of the Rule of Law. More importantly, such action of the international community may crack rigid control of Senior General Than Shwe and a group of Generals, impliedly encouraging other military leaders who did not commit any heinous crimes and who may tend to focus on 'professionalism' for reformation within the army. To this end, the following recommendations are made:

(1) The international community must take tougher actions, including an Arms Embargo, against the military regime;
(2) The UN Security Council must declare the SPDC's 2008 Constitution as well as the election to be organized in 2010, as "null and void";
(3) The UN Security Council must send a Commission of Inquiry to investigate the situation of Burma, focusing on international crimes, including crimes against women, which may lead to a Security Council referral of Burma to the International Criminal Court.

Only then will the regime release over 2,100 political prisoners, including Daw Aung San Suu Kyi; a political dialogue aiming to achieve genuine national reconciliation on the basis of the Rule of Law will be established; and a peaceful democratic transition will assuredly be facilitated.

(Endnotes)
1 UN Secretary-General addresses the press following Security Council briefing on Myanmar, 13 July 2009; UNGA has already made several recommendations for political dialogue.
3 The regime never established any political dialogue not only with the NLD but also any other ethnic armed organizations which entered into cease-fires since 1989.
4 Former UN Special Rapporteur on Human Rights in Burma, Prof. Paulo Sao Pinheiro' article, 'End Burma’s System of Impunity' Published: May 27, 2009
5 VOA News Washington 25 October 2007; The official "New Light of Myanmar" newspaper Saturday published a photograph of the dissident figure with a representative of Burma's military government alongside an article about Friday's meetings, VOA News Washington 10 November 2007; Than Shwe did not mention the role of the UN in Burma's inclusive national reconciliation process in his speech, nor did he mention the meetings between Suu Kyi and the junta's liaison officer, Minister of Relation Aung Kyi, "Irrawaddy: no compromise, says junta's mouth peace'- Wai Moe" Nov 19, 2007; Aung San Suu Kyi met Friday with General Aung Kyi, the newly-appointed "minister for relations" with the opposition leader.
6 "In the interest of the nation, I stand ready to cooperate with the government in order to make this process of dialogue a success and welcome the necessary good offices role of the United Nations to help facilitate our efforts in this regard."; Daw Aung San Suu Kyi's statement, The Associated Press, Thursday 8 Nov 2007.
7 Chapter 4,5,6,7, 9,10,11 of the SPDC’s 2008 Constitution.
8 On May 22, 2008, the European Parliament made the following decision: "Takes the view that if the Burmese authorities continue to prevent aid from reaching those in danger, they should be held accountable for crime against humanity before the ICC; calls on the EU member States to press for a UN Security Council resolution referring the case to the Prosecutor of the ICC for investigation and prosecution;"
9 SPDC's 2008 Constitution is the only one legal and political document, out of all constitutions across the world, which legitimizes the military rule systematically in accordance with the constitution.
10 U Thein Oo, chairperson of the Burma Lawyers' Council, in his speech at the POLA
conference organized by the Korean Bar Association, Seoul, Korea, on July 4, 2009.

11 Under 1974 Constitution, elections were held once four years, constituting altogether four times. No democratization could be made; no gradual change took place; and, Burma became one of the least developed countries across the world. Then, 1988 people's uprising occurred and the said constitution was torn apart by the people.

12 Statement was made by Former Major Aung Linn Htut, who took responsibility as a high ranking diplomatic official in SPDC's Burmese embassy in Washington, USA, and later he sought asylum in the United States.

13 In 1974 Constitution, there was no single military official who occupied any formal position in the legislature and executive; and, there existed not an independent military court, which was separated from civilian judicial system.

14 SPDC's 2008 Constitution creates "Presidential System", but it is different from the United States of America. In so doing, the role of the political parties are hugely reduced. Most importantly, people will not enjoy rights to directly vote for the State President, which will exercise executive power; and, it is almost certain that one of the army Generals will become the State President under the fabricated presidential electoral system, which is never practiced in any state across the world; Article 60 of the SPDC's 2008 Constitution. Then, the role of the political parties is extremely minimized.


16 "The Legislature will not be able to balance the power of the president. The president has certain powers, over appointments, the budget, and states of emergency, that would allow executive tyranny"; Position Paper on the National Convention’s Principles for a Constitution for the Union of Burma; Submitted by The Ethnic Nationalities Council (ENC); Prepared on behalf of the ENC by David C. Williams, Director, Center for Constitutional Democracy in Plural Societies; January 15, 2008.


18 The major ethnic armed cease-fire organizations such as the New Mon State Party (NMS), the Kachin Independence Organizations (KIO) and the United Wa State Party (UWSP) have already declared that they would not accept the program of the SPDC to transform their own armies into Border Security Force and place them under the command of the SPDC's Commander-in-Chief of the Defense Services in January, February and April 2009 respectively. Their positions contradict article 339 of the 2008 Constitution which stipulates, 'All the armed forces in the Union shall be under the command of the Defence Services.'

19 The SPDC's 2008 Constitution prohibits the emergence of independent democratic political parties as they are not allowed to establish independent political objectives in accordance with Article 404 (a) as follows: 'A political party shall set the objective of non-disintegration of the Union, non-disintegration of the national solidarity and perpetuation of sovereignty'.

20 In legislative bodies, one fourth of members will at least be occupied by army personnel, nominated by the Commander in Chief of the Defense Services, without necessity for being elected; Article 109, 141 and 161 of the SPDC's 2008 Constitution; Chapter (5) of the SPDC's 2008 Constitution.

21 The real power of executive will not lie with the State President but with the
National Defense and Security Council, which will stand as a permanent military institution, in the Chapter of Executive, in accordance with the constitution;

22 With reference to SPDC's Constitutional Principles, Prof. David C. Williams, Professor of Law, Indiana University, USA, and Director, Center for Constitutional Democracy in Plural Societies provides comments, "The President will dominate the judiciary".

23 The Chief Executive is most likely to be the military who will take responsibility as the State President.


25 "Fourth Core Human Rights Element: Judiciary" elaborated by Mr. Tomas Ojea Quintana, UN Special Rapporteur on Human Rights Situation in Burma, in his report "Human Rights Situation in Myanmar" Special 5, 2008; P. 21.

26 (c) to form associations and organizations; Article 376 of the SPDC's 2008 Constitution:

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


28 One of the main objectives of the National Democratic Front established in 1974; NDF is a political alliance comprising ethnic armed organizations; One of the major agreements in Mae-tha-raw-hta Conference, attended by almost all major ethnic resistance organizations, held on January 7-14, 1997; It is formally recognized by Daw Aung San Suu Kyi, as the General Secretary of the National League for Democracy and it was mentioned in her speech delivered on 50th anniversary of the Union Day, held on February 12, 1997.

29 With reference to SPDC's Constitutional Principles, Prof. David C. Williams, Professor of Law, Indiana University, USA, and Director, Center for Constitutional Democracy in Plural Societies provided comments, "Ethnic minorities will not control the upper house. The Upper House will also be powerless. States will not be allowed to write their own constitutions. Sub-national government other than the states will also be responsible to the union president, rather than to the citizens of those sub-national governments." (January 15, 2008)

30 Articles 201, 214, 340, 410, 412 (a), 427, 410, 412, 427 of the SPDC's 2008 Constitution

31 Article 293 of the SPDC's 2008 Constitution

(b) the decision of the Commander-in-Chief of the Defense Services is final and conclusive.

32 "This clause won't protect them from international prosecution, but it shows they're worried about it," says Mark Farmaner, director of the advocacy group Burma Campaign UK; "Putting Burma's Junta on Trial", By Andrew Marshall http://www.time.com/time/printout/0,8816,1915174,00.html; Friday, Aug. 07, 2009.

33 Article 445 of the SPDC's 2008 Constitution: " ------------------------ . No proceeding
shall be instituted against the said Councils or any members thereof or any member of the Government, in respect of any act done in the execution of their respective duties."

35 The International Committee of the Red Cross issued a global alert on Burma, on June 29, 2007, verifying the regime's criminal violations of the Geneva Conventions, stating 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.


38 Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights; Neil J. Kritz, Senior Scholar on the Rule of Law, United States Institute of Peace.

39 Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions: Stephan Landsman; Clifford Professor of Tort Law and Social Policy, DePaul University College of Law.

40 NLD's call for 'national reconciliation' inside the country may be the right way to secure the operational status of Party, while persuading the military leaders who did not commit any heinous crime and who may tend to focus on 'professionalism' within the army.

41 Khin Ma Ma Myo provided comment that for now it may not be the right time to call for 'national reconciliation'; her comment was issued on August 12, 2009; To contact, khinmamamyo@gmail.com.

42 Senior General Than Shwe, as the Chairperson of the SPDC, issued a statement on August 10, 2009, instructing the Ministry of Home Affairs to reduce the term of house arrest for Daw Aung San Suu Kyi. There, he used the term, inter alia, 'not to impose prejudice each other'. Then, NLD highlighted it in its declaration issued on August 12, 2009 referring to its former and current policy on 'national reconciliation'.

43 After Daw Aung San Suu Kyi was rendered penalty by the court on August 11, 2009, China commented that the international community shall have to pay respect to judicial power of a national court.

44 The UN Security Council resolution 1325 has highlighted the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity and war crimes; Forum of Burmese in Europe (FBE) sent a letter to UNSG on July 24, 2009. Statement of Global Justice Centre, based in New York, USA, August 13, 2009, 'UN Secretary General's call for 'National Dialogue' instead of criminal accountability violates international law including the Security Council's clear mandates for criminal accountability in Security Council Resolution 1820.'


46 On 30 January 2009, UN Secretary General Ban Ki-moon issued a report on "Implementing the Responsibility to Protect" (RtoP).

48 Former UN Special Rapporteur on Human Rights in Burma, Prof. Paulo Sao Pinheiro' article, 'End Burma’s System of Impunity' Published: May 27, 2009
49 Indonesian military, which deeply exercised the military dictatorship in Indonesia, has already shifted to focus on 'professionalism. Similar case will assuredly happen for Burma, with reference to a number of internal conflicts which had already taken place within SPDC's top Generals in Burma.
50 Call of Souhayr Belhassen, President of the International Federation of Human Rights (FIDH) and Debbie Stothard, Coordinator of Alternative ASEAN, on August 19, 2009.
52 (1) The Women's League of Burma (WLB) calls for General Than Shwe to be charged with war crimes and crime against humanity under new UNSC resolution; 24 June, 2008. (2) The Women's League of Burma (WLB) joined by sixty four leading women's organizations sent a letter to the Secretary General and members of the United Nations Security Council calling for the prosecution of Senior General Than Shwe at the International Criminal Court (ICC), and an immediate end to the longstanding impunity that has been afforded to the brutal military junta in Burma; 7 August, 2009. (3) Human Rights Watch as well as member organizations of Network for Human Rights Documentation in Burma (ND-Burma), such as Roma (3) and Human Rights Education Institution of Burma (HREIB), have sufficiently raised the issue of child soldiers in Burma, which certainly constitutes 'Crime against Humanity'.
53 (1) Demand by the Ad Hoc Commission on Depayin Massacre, jointly formed by the National Council of the Union of Burma and the Burma Lawyers Council, May 2003; Demand by the Women League of Burma, 24 June, 2008 and 7 August, 2009; BLC and the Global Justice Center (GJC) issued a statement as of "International Lawyers call for Criminal Accountability for Burma/Myanmar regime" for the crimes perpetrated by the military leaders under international criminal law September 27, 2007: The (GJC) denounces the Secretary-General's Response to the Conviction of Aung San Suu Kyi as contrary to his mandate under the U.N. Charter; August 13, 2009.

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Seminar on Criminal Accountability in Burma:

“Advancing Human Rights and Ending Impunity in Burma: Which External Leverages?”

The Burma Lawyers’ Council (BLC) and International Federation for Human Rights (FIDH) organized a seminar on Advancing Human Rights and Ending Impunity in Burma for key Burmese and international organizations from 4-5 May, 2009 in Bangkok, Thailand.

In the seminar, the organizations attended were BLC, FIDH, Global Justice Center (GJC), National Council of the Union of Burma (NCUB), National Coalition Government of the Union of Burma (NCGUB), Women League of Burma (WLB), Network for Human Rights Documentation in Burma (ND-Burma), Ethnic Nationalities Council (ENC), Forum for Democracy in Burma (FDB), Members of Parliament Union (MPU), Coalition for the International Criminal Court (CICC), Amnesty International, Human Rights Watch (HRW), Representative from the International Criminal Court, ALTSEAN Burma, USCB (US Campaign for Burma), Burma Campaign UK (BCUK), Shwe Gas Campaign Committee, TBBC, HREIB (Human Rights Education Institute of Burma), Karen Human Rights Group (KHRG), Forum for Burmese in Europe (FBE), All Arakan Students and Youth Committee (AASYC), Human Rights Now – Japan, Malaysia Bar Council’s Human Rights Committee, Chin Human Rights Organization, Earth Rights International, International Center of Transitional Justice (ICTJ), Burma Information Network, CICC focal point in China, Asian Institute for Human Rights (AIHR), ASEAN Inter-Parliamentary Myanmar Caucus, and Christian Solidarity Worldwide (CSW). The total number of participants is 87.

Ms. Cynthia Gabriel, Vice President of the FIDH, U Thein Oo, Chairperson of the BLC and Mr. Kraisak Choonhavan, President of the ASEAN Inter-Parliamentary Caucus for Democracy in Myanmar-AIPMC delivered opening speeches. On the first day, the participants discussed Section (1): “Burma and the ICC: A case for referral?” and Section (2): “Documenting international crimes in Burma”.

In the second day, the participants also discussed Section (3): “Sanctions by the Security Council under Chapter VII: what are the alternatives for Burma” and Section (4): “Overview of the situation in Burma and regional dynamics”.

In the morning section of second day, BLC General Secretary U Aung Htoo along with WLB’s Presidium Member Daw Thin Thin Aung made presenta-
On 6 May, the BLC and GJC hosted a strategic workshop that focuses on formulating advocacy strategies for UN Security Council members and developing a concrete global strategy to achieve an ICC referral.

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End Burma’s System of Impunity

By Paulo Sergio Pinheiro
Published: May 27, 2009

SAO PAULO, BRAZIL — The Nobel Peace Prize laureate, Daw Aung San Suu Kyi, has spent 13 years under house arrest in Myanmar. This week, the Burmese junta is likely to extend her detention for up to five years under the trumped-up charge of allowing a visitor into her compound.

During eight years as United Nations Special Rapporteur on Myanmar, I repeatedly called on the Burmese junta to release Mrs. Aung San Suu Kyi and Burma’s 2,100 other political prisoners, to no avail. It is imperative that she be released immediately for the country’s process of reconciliation to move forward.

But while Suu Kyi has deservedly received a great deal of international attention over the past two decades, Myanmar’s ethnic minorities — more than one-third of the population — have suffered without international outcry. For Myanmar’s process of national reconciliation to be successful, the plight of the minorities must also be addressed.

Over the past 15 years, the Burmese Army has destroyed over 3,300 villages in a systematic and widespread campaign to subjugate ethnic groups. U.N. reports indicate that Burmese soldiers have frequently recruited child soldiers, used civilians as minesweepers and forced thousands of villagers into slave labor.

An official policy of impunity has empowered soldiers to rape and pillage. According to one account, in December 2008 a Burmese soldier marched into an ethnic Karen village in eastern Myanmar and abducted, raped and killed a 7-year old girl. Authorities refused to arrest the soldier; instead, officers threatened the parents with punishment if they did not accept a cash bribe to keep quiet.

In 2002, I received a report about 625 women who were systematically raped in Myanmar’s Shan State over a five-year period. There was not a single account of successful prosecution.

I repeatedly documented the military’s many abuses in reports to the U.N. General Assembly and the U.N. Commission on Human Rights. My work is only
one example of U.N. efforts in Myanmar — 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 clear that the attacks in Myanmar will continue. It is equally evident that the country’s domestic legal system will not punish those perpetrating crimes against ethnic minorities.

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. The Security Council took similar steps with regard to Rwanda, Bosnia and Darfur. The situation in Myanmar is equally as critical. Creating a commission of inquiry will accomplish three important goals:

First, it will make the junta accountable for its crimes with a potential indictment by the International Criminal Court. Second, it will address the widespread culture of impunity in Burma. Third, it has the potential to deter future crimes against humanity in Myanmar.

For two decades, ethnic minorities in Myanmar have suffered while our diplomatic efforts failed to bear fruit. The time has come for the Security Council to act.

Paulo Sergio Pinheiro was the United Nations special rapporteur on human rights in Myanmar from 2000 to 2008.

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In May, 2009, five leading international jurists released an immensely thorough report on the numerous violations of international law that have been committed by Burma’s ruling military junta, the State Peace and Development Council (SPDC). The report entitled *Crimes in Burma* was commissioned by five of the world’s most renowned jurists (Justice Richard J. Goldstone (South Africa); Patricia M. Wald (United States); Sir Geoffrey Nice QC (United Kingdom); Judge Pedro Nikken (Venezuela); Hon. Ganzorig Gombosuren (Mongolia)), on behalf of the International Human Rights Clinic at Harvard University, the United States’ wealthiest and most prestigious academic institution. The jurists each represent a different continent—Africa, Asia, Europe, and North and South America—and each has extensive experience in international human rights law. At the outset of the report, they write: “Each of us has dealt directly with severe human rights abuses in the international system, and we have seen the painful consequences of inaction.”

Inaction was indeed on of the principal focus of the report, as the report not only sought to document the abundance of human rights violations that have taken place in Burma, but moreover, it aimed to illustrate the extent to which these crimes are well-known to the international community. Toward this end, the report employed a unique methodology. The jurists restricted themselves exclusively to documents created by the United Nations in order to establish what the international organization can evidently be said to be aware of. Furthermore, they only focused on harms that have occurred after the signing of the Rome Statute and the founding of the International Criminal Court in 2002 so as to reveal violations of international law that have taken place after the establishment of a mechanism charged with the mandate of prosecuting them.

Their conclusions are startling and glaringly expose the shameful inaction of an international community that is fully aware of the human rights abuses that continue to plague the people of Burma. The report tells a grim story of life in Burma over the past decade and a half:

…epidemic levels of forced labor in the 1990s, the recruitment of tens of thousands of child soldiers, widespread sexual violence, extrajudicial killings and torture, and more than a million displaced persons. One statistic may stand out above all others, however: the destruction, displacement, or damage of over 3,000 ethnic nationality villages over the past twelve years, many burned to the
ground. This is comparable to the number of villages estimated to have been
destroyed or damaged in Darfur.

Yet, for too many years, the world has done little to address these human rights
abuses. Meanwhile, the ruling military junta, including its leader General Than
Shwe, has avoided justice and accountability. The scale and severity of the
violations require sustained effort—for the abuses continue.

Perhaps even the most appalling feature of the report is the extent of the United
Nations’ knowledge of these abuses that it reveals. They write:
We have been struck by the finding that for years the United Nations (UN) has
been on notice of severe, indeed widespread and systematic abuses that appear
to rise to the level of state policy. Over and over again, UN resolutions and
Special Rapporteurs have spoken out about the abuses that have been reported
to them. The UN Security Council, however, has not moved the process for-
ward as it should and has in similar situations such as those in the former Yugo-
slavia and Darfur. In those cases, once aware of the severity of the problem, the
UN Security Council established a Commission of Inquiry to investigate the gravity
of the violations further. With Burma, there has been no such action despite
being similarly aware (as demonstrated in UN documents) of the widespread
and systematic nature of the violations.

The importance of the report being commissioned by such esteemed interna-
tional human rights jurists cannot be overemphasized. They pay close attention
to the lack of any rule of law in Burma and the absence of an independent
judiciary, and thus they assert the international community’s responsibility in
seeking justice for the people of Burma. They state: “the UN has emphasized
the culture of impunity and inoperability of the Burmese judiciary that benefits
the perpetrators of the widespread and systematic violations, thus legitimatizing
the intervention of the international community to seek redress.”

Ultimately, the jurists resoundingly declare that it is high time that the Security
Council take action. They declare: Based on this report’s findings and recom-
mendations, we call on the UN Security Council urgently to establish a Commis-
sion of Inquiry to investigate and report on crimes against humanity and war
crimes in Burma. The world cannot wait while the military regime continues its
atrocities against the people of Burma. The day may come for a referral of the
situation in Burma to the International Criminal Court or the establishment of a
special tribunal to deal with Burma. Member States of the United Nations should
be prepared to support such action. The people of Burma deserve no less.

To read the full report, it can be found online at:

* * * * * * * * *
July 1, 2009

Dear Secretary General Ban Ki-moon:

Your upcoming visit to Myanmar is a historic opportunity to underscore to Senior General Than Shwe the utmost seriousness with which the United Nations regards Myanmar’s failure to address violations of international humanitarian law. You should make clear that ending impunity is necessary to ensure the maintenance of peace and security.

Under the direction of Senior General Than Shwe, the regime’s use of the judiciary to eliminate political opponents constitutes a crime against humanity. The arrest and imprisonment of Daw Aung San Suu Kyi and other political prisoners must be addressed in this context in order to ensure that the cycle of crime is not perpetuated.

International law clearly imposes a duty on the United Nations, and you as its representative, to abstain from any discussion of the 2010 elections, which arise out of a constitution that includes “serious breaches of obligations under peremptory norms of general international law.” Specifically, Article 445 of the Myanmar 2008 Constitution grants general amnesty, including for the most serious crimes of concern to the international community, and as such is a breach. States have an obligation not to “recognize as lawful a situation created by a serious breach...nor render aid or assistance in maintaining that situation.”

The Security Council applied an earlier form of this doctrine in 1984 when denouncing the constitution drafted by the apartheid government of South Africa. The Council declared that the “so-called ‘new constitution’ is contrary to the principles of the Charter of the United Nations...that the results of the referendum...are of no validity whatsoever,” and rejected the subsequent elections as “null and void.” As you stated on the tenth anniversary of the Rome Statute of the International Criminal Court, “[i]mpunity for crimes can never be tolerated: amnesties for international crimes are unacceptable.”

Further, as Myanmar is the site of one of the world’s longest running internal armed conflicts, it falls under the legal requirements of Security Council Resolutions 1325 and 1820, which impose additional obligations including criminal ac-
countability and exclusion of amnesty provisions for sexual violence as a tactic of war.6

We urge you to make clear to Senior General Than Shwe that impunity for international crimes inflicted on the people of Myanmar has now come to an end. You should call upon the Security Council to address the situation of ending impunity as a threat to peace in Myanmar and urge the government to accept the jurisdiction of the International Criminal Court and cooperate with any ensuing investigation.

Sincerely,

[Signatures]

Aung Htoo
General Secretary, Burma Lawyers’ Council

Janet Benshoof
President, Global Justice Center

The Burma Lawyers' Council is an independent organization which was formed in a liberated area of Burma in 1994 to promote and assist in the educating, implementing, restoring, and improving basic human rights, democratic rights, and the rule of law in Burma.

The Global Justice Center is an international human rights organization that provides strategic and timely legal expertise to leaders in transitional democracies as part of a global, transnational strategy to enforce international equality guarantees.

(Endnotes)

1. ILC Articles on the Responsibility of States for Internationally Wrongful Acts in Report of the International Law Commission on the Work of its Fifty-third Session, U.N. GAOR, 56th Sess., Supp. No. 10, at 43, U.N. Doc. A/56/10 (2001) Ch. 3. Commentaries to the ILC Articles, Ch. 3, para. 1, “Chapter III of Part Two is entitled Serious Breaches of Obligations Under Peremptory Norms of General International Law. It sets out certain consequences of specific types of breaches of international law, identified by reference to two criteria: first, they involve breaches of obligations under peremptory norms of general international law; second, the breaches concerned are in themselves serious, having regard to their scale or character.” See also, M.C. Bassinouni & E.M.
Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (1995) (*International crimes that rise to the level of jus cogens violations create inderogable legal obligations including to prosecute or extradite. A general amnesty for those crimes is in direct violation of this obligation.*)


3. ILC Articles, Art. 41.


* * * * * * * * *
From: Women's League of Burma <wlb@womenofburma.org>
Subject: It's Time for the UN to Act on Burma: Women's Groups Around the World Call on the UNSC to Prosecute Senior General Than Shwe
To: wlb@womenofburma.org
Date: Friday, August 7, 2009, 1:38 AM

Media Release

Embargo till 12 noon on 7th August Thailand STD Time

It Is Time for the United Nations to Take Strong Action on Burma

Women's Groups around the World Call on the UNSC to Prosecute Senior General Than Shwe at the International Criminal Court

7 August, 2009

The Women's League of Burma (WLB) joined by sixty four leading women's organizations sent a letter to the Secretary General and members of the United Nations Security Council calling for the prosecution of Senior General Than Shwe at the International Criminal Court (ICC), and an immediate end to the longstanding impunity that has been afforded to the brutal military junta in Burma.

The letter states that:
Well-documented reports of past violations, continued systematic repression, and an incapacitated judicial system stand as solid witness to the necessity of strong international intervention. We call for the UN Security Council to start with a Commission of Inquiry to investigate the horrific campaign of terror by the military regime and to refer Senior General Than Shwe and his cronies to the International Criminal Court for all crimes including his imprisonment of Nobel Laureate Daw Aung San Suu Kyi in violation of international law.

The Secretary General's historic Report on July 15, 2009 on Security Council resolution 1820 makes clear that gender crimes by the military are covered by the firm legal mandates of Security Council resolution 1820. These include the rights to criminal accountability, the prohibition of any amnesty for the military, and in this case an ICC referral. The report discusses in two places and these words speak volumes.
At page 7:
In Myanmar, recent concern has been expressed at discrimination against the minority Muslim population of Northern Rakhine State and their vulnerability to sexual violence, as well as the high prevalence of sexual violence perpetrated against rural women from the Shan, Mon, Karen, Palaung and Chin ethnic groups by members of the armed forces and at the apparent impunity of the perpetrators.

At page 9:
In, women and girls are fearful of working in the fields or traveling unaccompanied, given regular military checkpoints where they are often subject to sexual harassment.

At page 10:
Furthermore, in countries such as Afghanistan, Côte d'Ivoire, the Democratic Republic of the Congo, Iraq, Kosovo, Liberia, Myanmar, Nepal, Sierra Leone, the Sudan and Timor-Leste, the effective administration of justice is hampered not only by a lack of capacity, but also by the fact that some justice officials do not give serious consideration to reports of sexual violence.

At page 12:
In, although there has been documentation and identification of military personnel who have committed sexual violence, including relevant dates and battalion numbers, disciplinary or criminal action is yet to be taken against the alleged perpetrators.

Accordingly, UN Security Council resolution 1820 affirms the urgent need to end impunity and protect civilians in conflict and post conflict situations. Impunity for sexual violence committed during conflict perpetuates impunity and WLB calls on the Security Council to act on the mandate of UN Security Council resolution 1820 and halt the systemic use of rape and other sex crimes against the ethnic women of who have been brutalized for decades with no redress or reparations.

This letter is being issued to coincide with the open debates at the Security Council on the Secretary General's Report, and underscores that for the women of debate must lead to immediate action and the only access for justice for them is the ICC.

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*********
Dear Mr Secretary-General,

We, Burmese democratic and human rights activists in Europe, welcome the leadership you have shown during your recent visit to Burma. We express our appreciation for your long-standing support to improvement of human-rights and humanitarian situations in Burma, and are grateful to you for strongly conveying of the messages of the international community to Burmese military regime.

We cautiously agree with the proposals you put forward to the Burmese military regime – release of political prisoners, ‘resumption’ of a political dialogue and credible & legitimate elections - but we believe that the release of all political prisoners, including Daw Aung San Suu Kyi, will not be in itself signify that there is real change. We have seen in the past that the release of Daw Aung San Suu kyi (twice) and other pro-democracy leaders such as Min Ko Naing and other student leaders were released but were then detained again despite breaking no law. The releases in themselves did not lead to meaning and full dialogue, despite the National League for Democracy agreeing to talks with no pre-conditions. Now it is vital that the UN should send a clear and loud message to SPDC that:

   In addition to the release of all political prisoners, three basic freedoms, in terms of expression, association and assembly, be guaranteed in accordance with constitutional norms and the Universal Declaration Of Human Rights. Independence of the judiciary is also essential.
A substantive dialogue between the Government and the opposition has never taken place, except for a sham dialogue between Major General Aung Kyi and Daw Aung San Suu Kyi fabricated by the SPDC. As such, the term 'resumption' is not appropriate. In addition to asking for political dialogue, UN should manifestly demand SPDC to create political environment in which a genuine dialogue can really occur, including cancellation of draconian laws, such as the 1975 State Protection Act.

The UNs’ way to approach the 2010 election - the creation of conditions conducive to credible and legitimate elections - is insufficient. Instead of solely focussing on the process of the election, now it is time for UN to highlight the criminality of SPDC's 2008 Constitution, with reference to Article 445 which provides self-amnesty to all SLORC/SPDC authorities. So long as that constitution is in place, 2010 election is meaningless to our people from the aspect of human rights, even if it is held under the supervision of the international community. In effect the constitution legalises dictatorship, and all repressive laws will remain in place. At a minimum, you should insist on the implementation of proposals by your Special Advisor, Mr Ibrahim Gambari to form a "Constitutional Review Commission", which will include the participation of democratic opposition, mainly NLD and genuine ethnic leaders.

We are in solidarity with you in the belief that the political process in Burma must be all inclusive and serves the interest of all the people of Burma, and that the regime must take necessary steps on your specific proposals in the very near future to ensure the inclusiveness and credibility of the political process. We are very pleased to notice that, during the post-briefing press conference, you emphatically stated that without participation of Daw Aung San Suu Kyi, without her being able to campaign freely, and without her NLD party being able to establish party offices all throughout the provinces, the 2010 election cannot be regarded as credible and legitimate.

Even during your recent visit to Burma, we could see very clearly that the regime made their hardest efforts to manipulate the visit as if it is a form of endorsement on their fake election plans for 2010. From our experience we know that the regime is very manipulative and deceitful, and over the past 20 years has broken its word to the United Nations time and again.

Furthermore, in addition to talking about the regime’s 2010 election plans, we also would like the United Nations to also pressure the Burmese military regime to give due recognition to the results of Burma’s last free and fair elections in 1990. If and when a constitutional review is carried out on the regime’s pro-military constitution, representatives must not be hand-picked by the Generals as they were in the National Convention.

The 2008 Constitution was passed forcibly by vote rigging and voter intimidation.
in the May 2008 referendum, while at the same time millions were made home-
less by post-cyclone floods. The constitutional review must be led by the people’s
representatives who have been democratically elected in the 1990 elections, as
it is the mandate and the responsibility of people’s elected representatives to
draft and/or amend a country’s constitution.

Moreover, we also would like to suggest that the United Nations Security Coun-
cil establish a Commission of Inquiry on crimes against humanity and war crimes
committed in Burma, and if the inquiry establishes that crimes have taken place
it should refer the situation of Burma to the International Criminal Court. Even
the UN actors, particularly the UN Special Rapporteur on Burma, have high-
lighted the culture of impunity around sexual violence perpetrated by the Bur-
mese military as an area of serious concern and particularly alarming. Such
culture of impunity occur not only around sexual violence, but also around extra-
judicial killings and torture, which have never been investigated and those re-
sponsible have never been prosecuted. The pattern and manner of these atroci-
ties obviously constitute international crimes.

In addition, we would as well like to draw your attention to your report issued on
30 January 2009 on “Implementing the Responsibility to Protect” (R2P), in
which you committed to turn the concept into policy, which we profoundly wel-
come. Accordingly, it is the responsibility of States to protect their populations
from crimes against humanity, war crimes, ethnic cleansing and genocide. As
you are well aware, there are reliable documents, including UN documents, of
the widespread and systematic violations of forced displacement, sexual vio-
lence, extrajudicial killings and torture occurring in eastern Burma. It is obvious
that the military regime in Burma is not taking any responsibility to protect the
populations of Burma from the brutalities of its own army, and therefore the
Security Council has the responsibility to take timely and decisive actions to
prevent and halt crimes against humanity and war crimes.

We are of the firm opinion that

(a) the Security Council and the General Assembly should appoint a
Commission of Inquiry to investigate and report on alleged violations of interna-
tional law, and if necessary to refer to the International Criminal Court under
the Rome Statute;

(b) the UN Security Council resolution 1325 has highlighted the respon-
sibility of all States to put an end to impunity and to prosecute those responsible
for genocide, crimes against humanity and war crimes. The SPDC's 2008 Con-
stitution totally denies that responsibility; grants self amnesty for the perpetra-
tors; and has nurtured endless impunity in Burma, contrary to UNSC resolution
1325. As such, UNSC is responsible to declare SPDC's 2008 Constitution 'null
and void' as was the case for 1983 Constitution of South Africa in accordance
with the UNSC resolution 554 (1984) of 17 August 1984; and
(c) it is the responsibility of the Secretary-General to provide Members of the Security Council and General Assembly with the information about potential R2P situations and to ensure that they act in a timely and decisive manner. Lastly, but not least, we would like to reiterate that the United Nations Security Council will need to take concrete measures to ensure that Burmese military regime genuinely cooperates to help translate your proposals into tangible actions and results.

We look very much forward to your positive response at your earliest convenience, and express our sincere gratitude for your kind efforts.

Yours sincerely,
On behalf of the Forum of Burmese in Europe,

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The Forum of Burmese in Europe (FBE) represents a network of Burmese communities across Europe and is advocating for democracy, social justice and human rights in Burma. The FBE strongly rejects the military dictatorial rule in Burma and has been working closely together with the democratic forces around the world.

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RESOLUTIONS

1. 13th FBE conference rejects the SPDC military regime's 2008 constitution, which strengthens the military rule and the military dictatorship in Burma and which provides self-amnesty to SLORC/SPDC authorities, who have committed international crimes.

2. 13th FBE conference rejects the 2010 election, which will implement 2008 Constitution.

3. 13th FBE conference condemns the recent attack of Democratic Karen Buddhists Association (DKBA) to KNU, with the background support of the SPDC, which will lead to ethnic cleansing.

4. 13th FBE conference totally agrees to global arms embargo.

5. The direct transfer of military dictators who committed crimes in Burma from UN Security Council to ICC is totally agreed by 13th FBE conference and FBE is keen to cooperate with any organisation which is going to do it. We also urge the United Nations Security Council to establish a Commission of Inquiry on crimes against humanity and war crimes committed and being committed in Burma, and if the commission finds that crimes have taken place the UN Security Council should refer the situation of Burma to the International Criminal Court.
6. To claim the issue of ‘responsibility to protect’ to the UN Security Council and FBE will support and cooperate with any organisation which is going to campaign on the issue of ‘R2P’

7. FBE demands and supports to form the parallel Parliament of the Union of Burma and the parallel Government of the Union of Burma, which respect the voices and desires of the public as well as the responsibility of the government to protect its own citizens, based on the rule of law, standing against the SPDC’s legislative and executive bodies to be instituted in accordance with the 2008 Constitution.

(The Forum of Burmese in Europe (FBE) represents a network of Burmese communities across Europe and is advocating for democracy, social justice and human rights in Burma. The FBE strongly rejects the military dictatorial rule in Burma and has been working closely together with the democratic forces around the world.)

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Impunity No More

By Luis Moreno-ocampo
Published: July 1, 2009

THE HAGUE — In 1998, more than 100 states adopted the Rome Statute to end impunity for those crimes that we had thought, over and over, would never happen again, only to see them occur, again and again: genocide, crimes against humanity and war crimes.

The states accepted their shared duty to punish massive atrocities and created a new actor, a judicial actor, on the international scene: a permanent International Criminal Court, which would step in when national courts failed to act.

An independent, permanent court with a global reach was the object of strong debate in Rome and, for some states, a motive to oppose the court.

The drafters of the Rome Statute were not naïve idealists. They were the ultimate realists. In their lifetimes, they had watched the Khmer Rouge kill millions, they had let Srebrenica happen and they had let Rwanda happen. They had failed the “never again” promises of their fathers.

During their careers as political leaders, diplomats and negotiators, they had tried every solution: They shook hands with devils, sent them off to golden exiles, tried to appease them with promises of immunity, power and wealth. Each time they gambled on impunity and each time they lost.

They learned the need to adjust tactics to a lasting solution. By integrating in one justice system states and an independent international court, the drafters provided incentives for states to prosecute the worst crimes themselves. If the states didn’t do it, the I.C.C. would.

Less than four years after its adoption in Rome, more than 60 states ratified the statute and it entered into force. In 2003, 18 judges representing the five continents were appointed, and I was given responsibility to be the prosecutor. Together, we had to transform the idea of ending impunity into a reality.

During our first year, we found that the gravest crimes under our jurisdiction were committed in Uganda and Congo. The presidents of these countries decided to refer those situations to the court. One year later, in March 2005, Britain and France spearheaded the U.N. Security Council decision to refer Darfur to the court.
No one could have predicted the speed of this integration between the international system of peace and security and the new permanent system of international justice.

Central African Republic and the Ivory Coast also asked for an intervention by the court. Georgia, a party to the Rome Statute, but also Russia, a non-party, sent the court more than 3,000 communications regarding allegations of war crimes committed in Georgia. This year, the Palestinian National Authority accepted the jurisdiction of the court. A month ago the Arab League sent the court its first-ever fact-finding report on crimes committed in Gaza.

Supported by dozens of states — parties and nonparties — we are investigating those most responsible for the most serious crimes and collecting evidence in ongoing conflicts. As a result, the court has issued 13 arrest warrants and one summons.

The days of fearing a frivolous court are over. But there are new challenges created by a serious, operational institution. Arrest has become the biggest test. Some individuals sought by the court are enjoying the protection of their own militias, such as Jean Bosco Ntaganda in Congo. Others, like President Omar Hassan al-Bashir and Ahmad Harun of Sudan, are officials of governments eager to shield them from justice.

They are still committing massive crimes. But their destiny is to face justice. The court is not going away. But the victims do not have the luxury of time. In Congo, in Darfur, rapes — rapes of women, rapes of girls — are destroying entire communities, entire generations, now.

There is hope. Congo executed arrest warrants against three militia leaders for enlisting child soldiers and making sexual slavery a weapon of war. Belgium has executed on its territory an arrest warrant against Jean-Pierre Bemba for his massive campaign of rape and pillage in the Central African Republic. The first trial is under way and a second and third are starting soon.

Decisions of the I.C.C. are felt well beyond the courtroom. The monitoring of allegations of crimes that my office is conducting in Afghanistan, Colombia, Ivory Coast, Kenya, Palestine and Georgia can promote national justice efforts. Colombia is prosecuting hundreds of paramilitaries and guerrillas. In Kenya, our existence triggered discussions on accountability for crimes committed during the last elections. Impunity is no longer an option. Armies around the world, even from non-signatory countries, are adjusting their standards and rules of engagement to the Rome Statute. This is the way to prevent crimes. The law makes the difference between a soldier or a terrorist, a policeman or a criminal. Ratifications keep growing. This week, Chile becomes the 109th state party.
But universal ratification is required to apply one standard all over the world. Today the court has no jurisdiction to investigate alleged crimes committed in Iraq, Lebanon, Sri Lanka, Burma or Somalia.

The states of 1998 supported the idea of the court. The states of 2009 are beginning to show the leadership required to implement the concept. They are aware that the court has a strong constituency: a new generation of global citizens in the making. Thousands of teenagers and 20-somethings from different countries, gathered in a group called “Invisible Children,” are calling for the execution of the I.C.C. arrest warrant for Joseph Kony, the leader of the Lord Resistance Army, a man who abducted thousands of children in the last 23 years, turning boys into killing machines and girls into his so-called “wives.”

Step by step, the Rome Statute is in motion, moving ahead. Even critics of the court are talking about ending impunity. Sometimes the process is painful and sometimes it is controversial, but it is changing international relations forever.

Luis Moreno-Ocampo is the prosecutor of the International Criminal Court.

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The New ASEAN Inter-governmental Commission on Human Rights:

A Toothless Tiger, or an Important Step Forward for the Region?

By Shane Bristow, volunteer of BLC

On July 20, 2009, the ASEAN Ministerial Meeting in Phuket, Thailand, adopted the Terms of Reference (TOR) for the long-awaited human rights arm of the Association of Southeast Asian Nations (ASEAN).1 ASEAN Secretary General Dr. Surin Pitsuwan proclaimed that "Democracy and human rights are two basic principles enshrined in the [ASEAN] Charter and we are now taking steps towards the fulfillment of these principles for our peoples."2 However, the extent to which this new body will be able to effectively address human rights concerns in the region is an issue of great disagreement among ASEAN’s member nations, the international media and civil society organizations. While some feel that any progress at all in the area of human rights protection in Southeast Asia should be lauded, others have claimed that the new body is essentially powerless to enforce a minimum standard of human rights, or even to investigate and bring to light any human rights violations that may occur in the region. This article seeks to review the initial reaction of interested parties to the TOR, to review the TOR themselves to determine what powers and restraints the new body will be operating under, and to highlight a few of the ongoing human rights dilemmas that the new body will face. Finally, it is concluded that while the TOR certainly could have been stronger and the new body will start out without the power to investigate violations or enforce rights, it should not be dismissed as altogether useless, and its future utility will depend on ASEAN’s ability to follow through on its promise to strengthen the body in an "evolutionary" manner.3

Reaction

Reaction to the TOR has been mixed. There was some disagreement within the member nations of ASEAN themselves as to how strong a body should be created and to what extent the comprise that eventually resulted would be able to adequately address human rights concerns. Indonesia, in particular, sought a stronger protection mandate for the new body. In fact, Indonesian representatives at the negotiations were almost unwilling to sign-on, but assented when assured that the body and its work would undergo continuous re-
 Indonesian Foreign Minister Hassan Wirajuda explained that "We would not have been involved if there were no guarantee that its procedures and mechanisms will later be improved, especially with regard to the protection aspect." Other representatives seemed happy that any agreement was reached at all. Thai Prime Minister Abhisit Vejjajiva noted that even though the Commission would at first be concerned with only the promotion, not protection, of human rights, "It’s better to make a start than to leave it hanging, with no progress at all." Reaction from international rights groups and regional observers has been less positive. Amnesty International expressed concerns with various aspects of the TOR. First, they noted that any action that the Commission takes shall be by consensus, so that any member state can veto a measure that would seek to expose or to stop rights violations within their borders. Amnesty representative Donna Guest pointed out that "Key concerns are a lack of a clear protection mandate for the AICHR; lack of binding requirements for independence and expertise of AICHR members; and an emphasis on 'regional particularities' and 'non-interference in the internal affairs' which could undermine respect for universal human rights standards." Rafendi Djamin, head of the Solidarity for Asian Peoples’ Advocacy Task Force, voiced similar concerns, noting that the Commission lacked even the power to make country visits to explore possible rights violations. The Wall Street Journal’s Editorial Board expressed an even graver concern, asserting that the Commission could actually be used as a "rubber-stamp" for authoritarian regimes in the region to legitimize abuses that would be considered human rights violations under international law. Some praise of the new Commission came from Navi Pillay, the United Nations High Commissioner for Human Rights. In a press release she lauded the new organization, and urged ASEAN nations to take full advantage of it. "I strongly encourage ASEAN states to appoint Commission members who are independent and impartial, and have proven expertise in human rights," the High Commissioner said. "I also hope that national selection processes will allow for wide consultation and participation by all sections of society." Pillay did express some concern that the Commission did not have a clear protection mandate, but she also stressed that regional organizations like ASEAN can play a crucial role in expanding international norms and addressing local problems that the United Nations is not equipped to handle.

**Terms of Reference**

A review of the TOR themselves should shed some light on how powerful the Commission will be at its inception. First, §1.1 states that the mission of the Commission will be to "promote and protect" human rights and fundamental freedoms for the people of ASEAN. Some significance has been read into the order of these goals. It is clear that, at least at its onset, the Commission’s "promotion" mandate will be primary, and that any powers of "protection" will come later. Further, the body is not authorized to promote human rights ideals unconditionally. Rather, §1.4 states that the Commission shall "promote human
rights bearing in mind national and regional particularities and mutual respect for different historical, cultural and religious backgrounds, and taking into account the balance between rights and responsibilities." This section implies a certain margin of appreciation for different cultures and customs in the region, so that what is a rights violation in one member country may not be a violation in another. Such relativism is common to international bodies trying to implement rights standards across diverse jurisdictions, but this clause must be implemented cautiously to avoid making the Commission completely powerless to speak out about any rights violations whatsoever. After all, if a Member State can simply claim that they are following local custom, who is ASEAN to disagree? Rather, the commission must assume at least some universality of basic rights. Remember that here we are only talking about "promotion", so a member nation's sovereignty is not at risk if the Commission were to speak out about perceived violations that ASEAN as a whole finds more objectionable than the member state in question. The tension between universal rights and differences in local culture is made more explicit in §1.6, where we learn that another primary function of the Commission will be "To uphold international human rights standards as prescribed by the Universal Declaration of Human Rights, the Vienna Declaration and Programme of Action, and international human rights instruments to which ASEAN member states are parties." The Universal Declaration of Human Rights, as the name implies, is not qualified by concerns for local custom or culture, and protects very basic rights including the rights to life, liberty, property and freedom from torture. So the TOR seems to recognize that there are at least some rights that should not be viewed through the relativistic lens described in §1.4.

Next, the TOR sets forth a list of principles by which the Commission shall operate. Here again the order of the provisions probably provides some insight into the mindset of the drafters. The first three principles listed explicitly restrict the power and reach that the new body will exercise. §2.1(a) emphasizes "respect for sovereignty, equality, territorial integrity and national identity of ASEAN Member States." The next principle listed, §2.1(b) is "non interference in the internal affairs of ASEAN Member States." Similarly, §2.1(c) states that the Commission shall operate with "respect for the Right of every Member State to lead its national existence free from external interference, subversion and coercion." Taken together, these three guiding principles seem to stress that the Commission shall have no real power to impose its will on any Member State that does not completely assent to whatever action is contemplated. One has to wonder how any international body, let alone a human rights protection organization, can function when these are the most important values listed in its charter. It is not until after these principles of non interference are listed that the TOR mentions the principles guiding the actual work of the Commission, including the promotion of human rights and adherence to democracy and the rule of law.
Further enumerated principles give some sense of how the Commission will work with Member States. §2.8 states that the "primary responsibility to promote and protect human rights and fundamental freedoms rests with each Member State." This is undoubtedly true as a practical matter, but this clause presupposes a willingness on the part of each Member State to value human rights principles and to advance them in their territories. A "constructive and non-confrontational approach" to human rights promotion is put forth in §2.4. Here again the Commission seems to rely on actual cooperation and good will of Member States to implement human rights norms that the Commission seeks to embrace. The extent to which they will actually find this cooperation remains to be seen. The last principal, listed in §2.5, is the "adoption of an evolutionary approach that would contribute to the development of human rights norms and standards" in the region. Those who feel that the TOR are not nearly strong enough as an enforcement mechanism can hope that this clause is taken seriously by Member States, and that as time passes, a clearer set of accepted rights standards, and tools for ensuring that everyone enjoys them, are established.

Next, what will the new Commission actually do? Sections 4.1 through 4.13 spell out the functions that the body is authorized to carry out. These include developing strategies to promote human rights, developing an ASEAN declaration of human rights, increasing public awareness of human rights issues, promoting capacity building of civil society organizations, facilitating dialog and cooperation between Member States on rights issues and producing periodic reports on its activities. Critics note that what is not included is the power to actually investigate rights abuses. §4.10 states that the Commission shall "obtain information from Member States on the promotion and protection of human rights." This clause appears to indicate that the information the Commission can gather is entirely through self reporting. Here again a high level of transparency and cooperation is assumed to guarantee a functioning body. It is unclear though, whether there will be any remedy if Member States less inclined to enforce human rights norms or to report on internal matters to the international community are not cooperative. However, §4.14 does state that the Commission shall "perform any other tasks as may be assigned to it by the ASEAN Foreign Ministers Meeting," so it is possible that other powers, like the ability to investigate a particularly serious claim or rights violation, could be granted on an ad hoc basis.

Just as with the Chairmanship of ASEAN itself, the Chair of the Commission shall rotate between the Member States, as explained in §5.9. This method of rotation has presented problems for ASEAN in the past, as was the case when Burma (Myanmar) was set to take over the Chairmanship in 2006. Eventually, under regional and international pressure, Burma gave up its turn as Chair, attempting to deflect criticism that its human rights record would reflect poorly on ASEAN as a whole. 13 This problem is likely to reoccur, especially now that
holding the Chair of ASEAN also means heading the human rights body. It would certainly be a perverse outcome if a nation universally recognized as a human rights abuser were allowed to sit as Chair of the new ASEAN human rights organ.

As noted earlier, another concern among rights activists is that the Commission will only be able to act by consensus, as described in §6.1. As such, any Member State can veto any initiative by the Commission that it finds objectionable. This is likely to be problematic if the Commission ever seeks to target rights promotion or protection at an individual Member State. The Commission has to, in essence, do its work without ever offending anyone. However, §9.6 does state that the TOR shall be reviewed in five years, so perhaps if action by consensus proves unworkable for the Commission, change will come at that time.

**Challenges**

Asia and the Pacific are the only regions in the world without a human rights enforcement body. While tribunals including the European Court of Human Rights, the Inter-American court of Human Rights, and the African Court on Human and Peoples’ Rights are established and functioning to investigate and prosecute rights violations, the countries of ASEAN and the larger region are just now beginning to build an international consensus toward a stronger rights enforcement regime. One reason Southeast Asia has yet to create strong international institutions is the history of colonialism in the region. Until fairly recently, nations were under foreign rule and could not independently enter into rights treaties and mechanisms. Now that Sovereignty has been won, in many cases through years of suffering and war, the notion of international intervention in the domestic affairs of any one nation is anathema to the region. Hence, the principle of non-interference has been stressed in the ASEAN charter and the workings of the organization throughout its history, and is now enshrined in the TOR of the new rights Commission. However, there is a building consensus to embrace international human rights norms, especially as more countries in the region see economic and democratic reform. Regardless of how powerful or effective the TOR allow this first incarnation of the rights Commission to be, there are certainly great challenges to be met in the region when it comes to human rights.

First and foremost is the ongoing and well-documented rights abuses taking place in Burma. Among other atrocities, the military junta that rules the country has launched a sustained ethnic cleansing campaign in several of its eastern provinces. Rights violations include: extrajudicial killings, torture, murder as collective punishment, enforced disappearances and arbitrary arrests, forced labor, forced displacement, destruction of crops and villages, systematic rape by the military and arbitrary levies and fines. Additionally, rights activists have ac-
cused the government of being complicit in the deaths of thousands of victims of
cyclone Nargis in 2008, after the junta initially refused to allow foreign aid into
the country.\textsuperscript{16} The military continues to hold over 2,100 political prisoners, in-
cluding Nobel Laureate Aung San Suu Kyi.\textsuperscript{17} Despite increasingly frequent and
insistent calls from the international community and its neighbors to allow for
more transparency and a more open attitude towards human rights, the junta
has shown no willingness to change its ways. This situation will be a major test
of the new ASEAN rights Commission. Though non-interference will remain a
guiding principle, it will be impossible to say that the Commission has been a
success if the rights situation in Burma has not improved in a few years time as
a result of the creation of the new body.

Human trafficking is an ongoing problem in the region, and ASEAN has recog-
nized it as a priority.\textsuperscript{18} ASEAN members in 2004 acknowledged that economic
and social factors in the region had led to an epidemic of exploitation in the form
of the forced migration of the poor, especially women and children, who are
transported and sold as domestic servants or sex workers. The new human
rights Commission has pledged to work towards the fulfillment of those rights
included in the Universal Declaration of Human Rights, which list liberty and
freedom from slavery as fundamental. Thus, human trafficking should be a top
priority for the new Commission, as it is a problem that is not confined to one
Member State.

Ongoing ethnic conflicts in the region present another challenge for the new
rights body. Almost every ASEAN nation is dealing with some kind of ethnic or
religious insurgency, and these types of conflict often lead to human rights abuses.
ASEAN governments are struggling to balance a respect for the rule of law and
the need to provide security for their people with international human rights
norms when dealing with militant religious groups like the Muslim separatists in
southern Thailand and Abu Sayyaf in the Philippines. As has been seen repeata-
edly since the inception of the "Global War on Terror," it is all too easy to cast
aside human rights rules when dealing with these groups. If the new rights
Commission is going to fulfill its mandate, it will need to help ASEAN Member
States find ways to promote peace and reconciliation within their borders with-
ut violating human rights standards. These are but a few of the challenges
facing the new body. The larger question will be whether ASEAN has estab-
lished an entity that is strong enough and adequately flexible in its ability to
address all human rights concerns in the region along with new situations as
they arise.

Conclusion

It is clear that the new ASEAN Intergovernmental Commission on
Human Rights is not, in the near term, going to function as a strong investigator
or tribunal of human rights. That does not mean, however, that the body should
be dismissed as totally useless before its work even begins. While there are certainly great challenges to human rights norms in the region, there is also a very strong historical current of non-interference that the new body will have to work against if it is going to be successful in implementing international rights standards. Ultimately, the body will be what the Member States make of it.

Much will depend on the quality of representatives each nation sends to the Commission. If the members are merely tools of their home country, unwilling to speak out or raise objections without the consent of their superiors, then the Commission will probably not accomplish much. If, however, experienced and strong-minded rights activists are appointed to the body, and are able to act with autonomy, then there is more hope. Member States should seek to appoint individuals who will represent their interests, but at the same time be willing to carry out the stated goal of helping ASEAN to fully embrace the rights listed in the Universal Declaration of Human Rights. Likewise, once in session, the commission itself will play an important part in determining how strong a body it is. There is much room to maneuver within the terms "promote and protect." What issues will the Commission take up? How will they go about their task of fostering an understanding of rights in the region? Basically, will they be passive, or aggressive? Hopefully, given the right representatives, the Commission will take it upon itself to widen its sphere of influence as much as possible from its inception.

Finally, activists and the public should remember that this is not the end of the road, but the beginning. The TOR expressly states that the body is meant to be "evolutionary," and that the rules governing the Commission will be reviewed in five years. That gives everyone a goal to work towards; if the body proves to be too weak, then Member States and civil society organizations should make every effort to lobby for change at the time of review. In the meantime, all interested parties should do everything they can to make the Commission effective. Member States and rights organizations should provide cooperation and resources to the best of their ability, regardless of whether or not the commission looks exactly as they would have wished. Ultimately, the adoption and enforcement of international human rights norms in the region will depend on all government and private stakeholders helping ASEAN and each other reach a commonly accepted accord between legitimate and valued principles of sovereignty and non-interference and the universal need to protect the most fundamental human rights to which everyone is entitled, regardless of ethnicity or nationality.

(Endnotes)

2 Ibid.
5 Ibid.
8 Ibid.
17 See more at Assistance Association for Political Prisoners (Burma). www.aappb.org.

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Fair Trial and Judicial Issue

(B.1)

Trial of Daw Aung San Su Kyi

B.K. SEN

Burma’s leader Daw Aung San Su Kyi was first put under house arrest 20 years ago. In 1990, 19 years ago, her National League for Democracy (NLD) swept the last elections winning over 87.69% of the seats it had contested, or 392 out of 447 seats. Other ethnic parties were sympathetic to the NLD won 65 seats taking the tally to 485 out of a total of 492 constituencies. The highlight of the election was that it was held by SLORC, State Law & Order Restoration Council that is the military government at that time which had seized power in a Coup. Also it had set up its stooge party to contest the election. The result of the election was a clear repudiation of the military rule. Instead of governing the country whose people had given her party an overwhelming mandate, she had been under virtual detention for last two decades. This was done under its own law, The State Protection Law. It enables detention for a period of 5 years. But from that time on detention was extended in violation of its own law as she was considered a threat to the State.

Further extension would have been ludicrous after 4 extensions. To overcome this dilemma SPDC has to find a way out especially in the context of the forthcoming General Election which it scheduled to be held in 2010. Her freedom would upset its apple cart; something had to be done with her. Hence the trial is conducted so that the SPDC can return their picked candidates in the election. It is only in this background that the trial can be understood. Anyone will be convinced that it would end in her conviction and she would remain in the prison when the election would be held ensuring the continuation of rule by the military generals. In other words the trial is a mockery and when it goes on the forthcoming evidence will confirm the analysis made. The focus therefore now should be to drop the trial and free her.

She is being tried on charge after an American barged into the house where she was detained. She awaits the verdict of a sham trial in which she was charged with breaking the terms of her detention after "an uninvited American, a nut, swam across to her lakeside home: The American was an intruder and there was a security failure on the part of the authorities Action should be taken
against those who failed in their duties. Instead Daw Aung San Su Kyi has become the victim. Moreover there is no allegation against her that she entered into a conspiracy to induct the intruder inside her house for political motive which endangers the State. She was not harboring a rebel nor she was plotting to overthrow the State by armed force. In fact the military leaders are on trial and it will unfold how vindictive they are An American review of Myanmar policy is under way, but the official silence on her trial hints at certain confusion. There is no doubt that the trial will become historic surpassing that of Saya San whom the British colonialists hanged for fighting for country's freedom. The trial of Dimitrrov during World War II was a big international event. He was charged for masterminding in putting the German Parliament on fire by Hitler. The spirited defense against the false charge and the intervention of Soviet Russia forced the trial being dropped. People all over are watching every step of the military leaders, building pressure so that the trial is eventually dropped and Daw Aung San Su Kyi be set free.

The annual summit of the ASEAN was held in Thailand and its Prime Minister said that ASEAN will not consider expelling Myanmar over the detention of the pro; democracy leader. U.S Secretary of State on the contrary told that the regional bloc should consider kicking out the military; ruled member State if it does not free the Nobel Laureate, who is in trial in prison. She said we know there is growing concern about military cooperation between N. Korea and Burma which we take very seriously. It would be destabilizing for the region, and it would pose threat to Burma's neighbor. If the military leaders are so powerful wanting to go nuclear, then why go for Daw Aung San Su Kyi? The answer is simple, she is mightier than them. The trial has to be launched by the SPDC to keep the ASEAN leaders feel that what the military leaders are doing is in conformity with law and ASEAN leaders can be kept divided. The trial of Do Aung San Su Kyi has become a hot issue and international pressure must nudge the generals to drop the trial, free her and enable her to carry on with her peaceful activities. The movement for: STOP the TRIAL: DROP the TRIAL will provide a turning point in the transition to democracy.
Putting Burma's Junta on Trial

By Andrew Marshall
Friday, Aug. 07, 2009

Last month two famous defendants — one adored, the other despised — appeared in courts nearly 10,000 km apart. Charles Taylor, the former president of Liberia, is being tried by a special tribunal in The Hague for murder, rape, torture, and other war crimes allegedly committed during the decade-long conflict in neighboring Sierra Leone. Taylor — known as "Pappy" to child soldiers who, say prosecutors, were abducted, drugged and dispatched to commit atrocities on his orders — used his first appearance on the stand on July 14 to dismiss the charges as "disinformation, misinformation, lies, rumors." (Read "'Lies and Rumors': Liberia's Charles Taylor on the Stand.")

Meanwhile, and much more convincingly, Aung San Suu Kyi was protesting her innocence before a court in Rangoon. The Burmese democracy icon faces up to five years in prison for violating the terms of her house arrest after an American man swam to her lakeside home in Rangoon. The charges are farcical, the verdict a foregone conclusion: Suu Kyi is expected to be declared guilty on Aug. 11. But some in Burma's embattled democracy movement will turn to The Hague for solace. Taylor is the first African head of state to face an international war crimes tribunal. Could Senior General Than Shwe, leader of the Burmese junta, be the first Asian? (Read "Viewpoint: Why Foreigners Can Make Things Worse for Burma.")

This is not as far-fetched as it might initially seem. A compelling case for investigating war crimes in Burma is made in a May 2009 report by the International Human Rights Clinic at Harvard Law School. Called "Crimes in Burma," its authors are heavy-hitters: they include one former judge and two former prosecutors from the International Criminal Tribunal for the former Yugoslavia, including the British lead attorney in the case against Slobodan Milosevic. Referring only to U.N. documents, the report lays out the "systematic and widespread" atrocities committed in Burma in recent years: killings, torture, rape, "epidemic levels" of forced labor, a million people homeless, the recruitment of tens of thousands of child soldiers, and — here they draw comparisons with Darfur — the displacement or destruction of more than 3,000 ethnic nationality villages. These abuses were usually committed during armed conflict, which "strongly suggests" they are war crimes and crimes against humanity, says the report.
A precedent for acting on such abuses has been set by the former Yugoslavia, Rwanda and Darfur, the authors continue. They assert that with such overwhelming evidence from its own documents, the U.N. Security Council should establish a commission to investigate war crimes in Burma, then create a special tribunal to try those responsible for them. "The [U.N. Security] Council is the only body that can take the action necessary to respond adequately to the crisis in Burma," conclude the authors, before warning of "the painful consequences of inaction."

The Security Council held its first-ever debate on Burma in 2005, but has done little but talk since. The chances of the U.N.'s most powerful body establishing a Burmese war crimes commission are slim so long as permanent members China and Russia exercise their veto. But this shouldn't stop the U.S., U.K., and France from demanding one. It would certainly be noted in Naypyidaw, the junta's remote new capital. As the ongoing persecution of Suu Kyi amply demonstrates, Burma's generals are impervious to global condemnation. But don't be fooled by common depictions of them as blinkered, paranoid and xenophobic. "These caricatures ignore the fact that the regime contains intelligent officers who are close observers of the international scene," observed Andrew Selth of Australia's Griffith University last year. And there is some evidence that international justice is something those officers view with alarm. (Read about the 2007 crackdown in Burma.)

Just look at the military-drafted constitution, which was "approved" by a sham referendum in the wake of Cyclone Nargis in 2008. It not only formalizes the junta's rule, by reserving for the military a quarter of seats in the new parliament after elections next year. It also grants junta officials immunity from prosecution. "This clause won't protect them from international prosecution, but it shows they're worried about it," says Mark Farmaner, director of the advocacy group Burma Campaign UK. (See pictures of Burma after Cyclone Nargis.)

So does the regime's sudden interest in a little-known exile group called the Burma Lawyers' Council. In May, at a Bangkok hotel, it held a three-day seminar entitled "Advancing human rights and ending impunity in Burma." Among the subjects discussed by the 100 or so delegates were the criminal accountability of individual junta members and how the U.N. Security Council might be persuaded to investigate Burmese war crimes. Days before the seminar began, the junta outlawed the lawyers' group, which previously had barely blipped on Naypyidaw's radar, then requested Thailand to halt the seminar. It went ahead, but the harassment continued. As Burmese spies prowled the hotel lobby, delegates heard reports that agents had been dispatched to kidnap or kill the group's chairman Aung Htoo. He was smuggled out of the seminar and spent three weeks in hiding in Thailand before fleeing for Sweden.
Aung Htoo says a war crimes commission "very much concerns the Burmese leadership." He believes the prospect might cause reform-minded officers to break ranks and topple Than Shwe. Of course, it could also have the opposite effect, causing the generals to tighten their grasp on power — although ethnic minorities suffering ongoing military atrocities in eastern Burma might think this was a risk worth taking. "At the moment Burmese soldiers know they can act with impunity," says Farmaner. "A threat of consequences might change behavior on the ground."

The sad and wretched history of Burma is relentless. Its civil war — the world's longest — rages on. Ceasefires between the junta and other insurgent groups are looking shaky. Piecemeal and uncoordinated sanctions by the U.S. and Europe have failed. Suu Kyi's party, the National League for Democracy, is comatose, and more than 2,000 political prisoners are in Burmese jails. Convincing the U.N. Security Council to investigate Burmese war crimes might seem like an uphill struggle. "But that is why we campaign — to change things," says Farmaner. That campaign could galvanize Burma's weary democrats, even as their leader prepares for yet another lengthy spell in the junta's custody.

http://www.time.com/time/printout/0,8816,1915174,00.html

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Appeal to Take Action on Prosecution of Daw Aung San Su Kyi Under the Rome Statute of the International Criminal Court

1. Recently, the president of East Timor and Nobel Peace Prize laureate Jose Ramos-Harto claimed that, if the SPDC does not immediately release Daw Aung San Su Kyi, he will urge the Office of the Prosecutor of the International Criminal Court (ICC) to investigate and prosecute Sen. Gen. Than Shwe and other responsible leaders of the SPDC for the crimes they have committed over the years. The Burma Lawyers’ Council welcomes and fully supports Mr. Ramos-Harto’s statement.

2. The ICC may have jurisdiction to investigate and/or prosecute heinous crimes which have been committed and are being committed if a given state’s judicial system is unable or unwilling to investigate and take legal action to ensure justice. Daw Aung San Su Kyi is being detained under the State Protection Law of 1975. The government is permitted to detain her for five years under that law. Contrary to law, they have already held her in detention for almost six years. Despite that she is being unlawfully detained Burma’s judiciary did not provide any protection. According to Article 9 of that Law, restrictions may be laid down by the Central Board only, not the judiciary. However, judiciary has admitted the complaint of the government to extend her detention by accusing her of violating the conditions of her original detention under the State Protection Law of 1975. This is a blatant disregard of the Burma’s judiciary for the rule of law. It is evident that Burma’s judicial system is unable or unwilling to ensure justice.

3. Illegal detention of Daw Aung San Suu Kyi and other political prisoners causes commission of international crime provided for in the Rome Statute of the ICC, article 7 Crimes Against Humanity, sub-article 1(e) which states that a crime against humanity is imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law. According to Article 14, “a State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed.” Under article 15(1), should a “situation” be referred by a State Party, the Prosecutor may initiate investigations on the basis of information related to crimes within the jurisdiction of the Court.
4. Some Generals in the Army may desire a genuine national reconciliation and hold the belief that the military should not interfere in politics. However, Sen. Gen. Than Shwe and other military officials have been committing heinous crimes repeatedly, to strengthen their political power, with impunity given that judiciary did not take any action, denying the principles of the rule of law. If there is no rule of law, a genuine national reconciliation will never become a reality in Burma. The Burma Lawyers’ Council requests the international community to work together to restore the rule of law in Burma, by seeking the power of the International Criminal Court.

Burma Lawyers' Council
May 16, 2009

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BLC Statement on Depayin Massacre

1. The Depayin Massacre took place in Burma on May 30, 2003. Despite that it has already been six years, the perpetrators have not yet been taken into legal action effectively. As a result, the Rule of Law does not prevail and a genuine national reconciliation has not yet come into existence. Given that the perpetrators enjoy impunity, they have continued committing the heinous crimes repeatedly.

2. Daw Aung San Suu Kyi was a victim of crime at Depayin Massacre. Then, she was detained at the scene of crime arbitrarily, instead of treating her properly, as a victim. To be worse, without committing any crime, she is being tried at the court. As such, it is evident that her physical liberty is severely deprived. The action of the SPDC military regime in Burma causes commission of international crime provided for in the Rome Statute of the International Criminal Court, article 7 Crimes Against Humanity, sub-article 1(e) which states that a crime against humanity is imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law.

3. It can be argued on whether arbitrary detention of Daw Aung San Suu Kyi alone may or may not constitute a Crime against Humanity. However, it should be noteworthy that arbitrary detention of Daw Aung San Suu Kyi took place while civilians were being massacred at Depayin, as part of a widespread or systematic attack which is pursuant to policy of the ruling regime. Imprisonment or severe deprivation of physical liberty occurred not only for Daw Aung San Suu Kyi but also for a number of political prisoners. It constitutes the Crime against Humanity.

4. In spite of the fact that it has already been six years, the heinous crime issue centering on Depayin Massacre should not be fading out. Repeated crimes can be prevented only when the perpetrators who massacred civilians at Depayin can be taken into legal action by the ICC. Only after that, the Rule of Law will be restored; a genuine national reconciliation will be achieved; and, people will enjoy peace, stability and development.

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"The Limits of Permissible Forced Labour"

An Analysis of Article 2(d) of the ILO Convention on Forced Labour, 1930

By: Brendan Morrison, volunteer of BLC

"Forced labour is the antithesis of decent work"
- ILO Director General Juan Somavia.

In the Spring of 2009, a partnership of the Emergency Assistance Team (EAT) and John Hopkins University published a report on the human rights abuses that continue in the Irrawaddy Delta a year after Cyclone Nargis. The report is entitled After the Storm: Voices from the Delta and it principally contends that the military government of Burma has continued to use Cyclone Nargis as an excuse for the perpetuation of human rights abuses.

After the Storm was swiftly responded to with a virulent dismissal by a union of numerous aid organizations working in the Delta region. A group of 21 aid organizations working in the Irrawaddy region publicly issued "Joint Response to After the Storm: Voices from the Delta" on April 8th, 2009. While the different groups disagreed over several issues, one point of contention falls on an important and rarely-discussed question of international law, which merits further examination.

Both parties agree that the SPDC continues to use forced labour schemes to carry out re-construction efforts in the Irrawaddy Delta. As the authors of After the Storm describe: "the junta used civilians’ vulnerabilities to their benefit forcing many communities to provide free labor or donations to the military for ‘reconstruction efforts’, often for prolonged periods of time and with no provisions for food, transportation, equipment, or safety." These findings are similar
to numerous reports by other international media outlets and non-governmental organizations. According to a recent article published by the Democratic Voice of Burma, "(i)n the past two years the International Labour Organisation (ILO) has received 152 complaints of forced labour in Burma."²

The point of conflict between the two parties on this issue was whether these forced labour schemes are a violation of international law, or justified by the emergency exemption articulated in Article 2(d) of the International Labour Organization’s Forced Labour Convention, 1930. The "Joint Response" report issued by the union of organizations operating within Burma asserted bluntly that "(a)ccording to the International Labor Organization (ILO) which monitors forced labor, international law is clear that work exacted during the immediate emergency period is not forced labour."³

Given the widespread agreement and acknowledgement that forced labour schemes are taking place in Burma, it is important to critically analyze Article 2(d) of the Forced Labour Convention, and reflect on whether the provision does in fact contemplate such schemes, thus justifying them under international law.

**Forced Labour Convention, 1930⁴**

Article 1, of the Forced Labour Convention clearly and unequivocally prohibits forced labour under international:

**Article 1**

*For the purposes of this Convention the term forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.*

Article 2, however, provides a list of exemptions to Article 1’s broad prohibition, citing various circumstances when the use of forced labour is justified. It is these provisions that merit further scrutiny and discussion.

**Article 2**

*Nevertheless, for the purposes of this Convention, the term forced or compulsory labour shall not include--*

(a) any work or service exacted in virtue of compulsory military service laws for work of a purely military character;
(b) any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country;

(c) any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations;

(d) any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population;

(e) minor communal services of a kind which, being performed by the members of the community in the direct interest of the said community, can therefore be considered as normal civic obligations incumbent upon the members of the community, provided that the members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services.

Analysis

Very little has been written on this provision and no international court has yet been charged with the task of ruling over its scope. As a result, the provision remains obscured in a plethora of questions that are critical to the debate over post-Nargis labour schemes in Burma.

With particular regard to Article 2(d), we may all agree that certain emergencies constitute a fatal threat to "the existence…of the whole…population", and may necessitate an "any means possible" reaction. For example, if the tiny Pacific Island nation of Tuvalu were facing an imminent tsunami, it is conceivable that the international legal community would accept that the use of forced labour to establish safety, rescue and infrastructure preparations is contemplated by this justificatory provision.
However, Article 2(d) does not leave the legal community with a clear understanding of what might constitute merely a danger to "the well-being...of part of the population". And it is this grey area that one would have to be focusing on when one analyzes an attempt to justify the SPDC’s use of forced labour a full year after Cyclone Nargis.

A further question is whether this provision necessarily contains any inherent time limitations. Can it be said that after a full year it is even possible that a people still face the type of danger to their well-being that was contemplated by this provision? How imminent and severe must the threat be to constitute such an emergency? It is time for the international legal community to raise these questions in court in order to better define the limitations of permissible forced labour. This clarification is essential to the health and safety of Burmese workers.

Moving Forward

Various members of the ILO have in the past considered three legal avenues through which one might raise such allegations of forced labour.

The first option is for any ILO member to bring the question before the International Court of Justice for it to properly rule on whether the SPDC’s labour schemes are in violation or in accordance with the Forced Labour Convention. The ruling of the ICJ in this circumstance would be enforceable by the UN Security Council.

The second option is to request merely an advisory ruling from the ICJ. While this ruling would not be binding on the SPDC, it would provide clarity for the international legal community on these important provisions, and create a further impetus for advocacy and pressure on the SPDC to bring about its own reform.

A final option is to establish an independent tribunal that would inquire into the junta’s various labour policies and report on any violations of international law that may be taking place or have taken place in the past. In the view of this author, this last option is the least likely to levy pressure on the SPDC and thus effect real change should violations be discovered.

Conclusion

At present, the international law of forced labour remains in obscurity. The exemptions listed in Article 2 are ill-defined and await further clarification by international courts. The absence of clear rulings on these legal questions allow
the SPDC to continue to use Cyclone Nargis as a justification for forced labour schemes that have very likely extended beyond the time limitations that were contemplated by the authors of the Forced Labour Convention. The health and safety of the Burmese workers would be greatly benefited by this clarification to international law. This paper has sought to provide a single and narrow question of international law, as well as three avenues through which ILO members may bring the SPDC to an international tribunal. It is hoped that this issue will be resolved.

(Endnotes)

1 Emergency Assistance Team (EAT) and John Hopkins University, After the Storm: Voices from the Delta, p.58.
3 "Joint Response to After the Storm: Voices from the Delta," April 8 2009, p.3.
Current Situation of Burmese Migrant Workers and their Children in Thailand

Ana I. Mendy and Nicole, volunteers of Burma Lawyers' Council

Abstract. It is estimated that over 2.2 million people from Myanmar have decided to flee the tyranny of the military government in their home country and cross the porous Thai-Burmese border. Upon doing so, most Burmese migrants find work that most Thais refuse to partake in. These jobs, known to many as "dirty, dangerous, and degrading" or "3-D jobs," include working in garment factories, fisheries, and sweatshops in which beating and modern-day slavery are hardly uncommon. In 2005, Burmese migrant workers comprised 80% of all migrant workers in Thailand. Yet by 2009, Burmese migrant workers earned less than half of Thailand’s legal minimum wage (133 baht per day). Given the dire conditions that Burmese migrant workers face in Thailand one might expect the Thai government to step in and enforce national worker protection standards. Yet while the Thai Royal Government has established a number of registration processes in order to provide a path to legalization and protection under national law for migrant workers, these processes are poorly designed, feebly administered, and rarely implemented. In the aftermath of the 2008 economic downturn and with the appreciation of the kyat in comparison to the baht, Burmese migrant workers may begin to face even harsher working conditions, lower wages, and higher pressures to join the "3-D job market." Burmese migrant workers’ children fare no better than their parents in Thailand, as education continues to remain limited to them.

Burmese Migrant Workers in the Aftermath of the 2008 Economic Depression

There is a growing literature on the abuse and exploitation of Burmese migrant workers in Thailand. Burmese migrant laborers are not only faced with hardships due to workplace conditions, but also as a result of the poorly designed Thai immigration system, police corruption, and pro-business incentives for employing Burmese migrant labor. Although the Royal Thai Government has cautiously experimented with registration programs to regularize and control migration into Thailand from Myanmar since 1992, the registration process is still extremely complex and hardly serves to ameliorate the tenuous status of most Burmese people in Thailand. Problems with this system include odd intervals...
for registration, high fees that render registration financially impossible for many, and employer oversight, which often leads to gross embezzlement. In addition to the complicated immigration system, police forces in towns along the Thai-Burma border profit tremendously from the tenuous legal status of the Burmese in Thailand. Unofficial sources of income for the police in these areas include, but are not limited to, bribes to process and expedite legal documents, involvement in legal business ventures, illegal business ventures such as the smuggling of drugs and sex workers, as well as agreements with employers to only selectively implement certain aspects of the law that are meant to protect workers in Thailand. In addition, the pro-business environment in Thailand that incentivizes the use of Burmese migrant workers does little to improve working conditions. For example, in 1993 the Thai Board of Investment created investment promotion zones to increase the industrialization of the country. Most of these areas lay near (or on) the Thai-Burma border, and investing in them would guarantee its investors exemption from import duties on machinery, corporate tax exemptions, and a 75% tariff exemption on raw materials used and sold domestically, among others. These pro-business incentives coupled with the wide availability of cheap Burmese labor lay the foundations for a system of protracted exploitation. Both Thai and Burmese workers who have a permanent legal status in Thailand are ostensibly protected under the 1997 Constitution of the Kingdom of Thailand, as well as the Labor Protection Act of 1998 (B.E. 2541). Yet whether these protections apply to Burmese migrant workers still remains much in question, especially as police in border towns align with businesses to overlook violations of these statutes.

The economic downturn of 2008 has exacerbated the conditions of Burmese migrant workers in Thailand, especially those in the garment industry. The local chapter in Mae Sot of the Federation of Thai Industries announced in March 2009 that orders were down by 12%, yet many workers confess that production has dropped, and that rumors of lay-offs, unpaid leave, and cancellations of overtime are widespread. Furthermore, the value of remittances has also taken a hit given the appreciation of the Burmese kyat, which has risen by a quarter against the baht over the past year. Not only has the appreciation impacted the value of remittances, but it has also exacerbated the falling demands for imports inside Burma. While migrant workers in the garment industry may continue to feel the pinches of the economic downturn and some may in fact face unemployment, those toiling in the "3-D jobs" will surely continue to face the same abuses, and the demand for employees in these industries will likely remain stable (if not on the rise), even as prices and incomes fall.

The Plight of the Children

If one were to judge Thailand’s commitment to furthering the education of all its children according to national law and its ostensible support for a number of
international conventions it would fare remarkably well. All children in Thailand, regardless of nationality, ethnicity, or registration status, are guaranteed a basic education under the National Education Act of 1999 (B.E. 2542), which explicitly states that "[a]ll individuals shall have equal rights and opportunities to receive basic education provided by the State for the duration of at least 12 years. Such education, provided on a nationwide basis, shall be of quality and free of charge." Furthermore, Thailand has ratified the U.N. Convention on the Rights of the Child, and repeatedly announced its determination to leave no child behind. In August 2005, the government launched an "Education for All" campaign with the aim of giving all children in Thailand equal access to schooling. Most recently, speaking on the World Day Against Child Labor in June 2009, Chaiwut Bannawat, Thailand’s Deputy Education Minister stated that the Thai government would introduce a new policy of providing equal educational opportunities to all children in the Kingdom including over 100,000 stateless and migrant children.

Yet the reality of the situation of Thailand’s children is very different to the one it ought to be if laws and speeches directly translated into action, as there remain a large number of children who have failed to receive an education—especially migrant and stateless children from Burma. Despite Thailand’s ratification of the Convention on the Rights of the Child, and the constitutional responsibility of its Ministry of Interior and Ministry of Education to uphold responsibilities that allegedly guarantee access to education to all children, the state has yet to enact these obligations, especially with regard to the children of Burmese migrant workers who live in the periphery of Thai society. According to the Ministry of Education, of the 93,000 children under the age of fifteen registered with the Ministry of Interior in July 2004, there were only 13,459 students (a mere 14%) from Cambodia, Laos, and Myanmar attending Thai schools. While Thai law states that all children in the country shall receive birth certificates and education, its authorities continue to define children of non-Thai parents as glaring exceptions to the rule. Consequently, they are continuously denied basic human rights, such as access to education. According to a recent report by the International Organization for Migration (IOM), an estimated 200,000 migrant children younger than 17 are in the country. Some NGOs, however, estimate there could be as many as 500,000 children born to Burmese parents in Thailand. Even though Thailand announced a policy in 1996 that would permit the registration of certain illegal migrant workers for employment, no children registered. The plight of the children of Burma may in part be explained by the following factors:

(a) On-the-surface factors (lack of awareness, costs of schooling, lack of resources, language barriers). Although the Thai law guarantees access to education to all children aged 7 to 16, many Thais and Burmese seem unaware
of these statutes. As a result, schools, immigration officers, and governmental agencies routinely refuse to teach migrant children deeming it illegal to do so. 20 Similarly, migrant parents are not aware of the right they possess to enroll their children in Thai schools nor are they aware that a basic education is free of charge. 21 The inherent costs of schooling and transportation have also prevented many from attaining a bare-minimum education. While costs of education remain high for the children of Burmese migrant workers, schools are sparsely stocked and lacking in good teachers. Amanda Bissex, chief of the child protection section with the UN Children’s Fund (UNICEF) Thailand, noted that many teachers in Thai schools refuse to educate Burmese children and are often unwilling to make an extra effort to dedicate more time to these children who are not native Thai-speakers and still struggle with communication. Children of Burmese migrant workers thus often have difficulties adapting to their new schools as they have not yet developed their communication skills and do not speak Thai. 22

(b) Child labor. Tattiya Likitwong, a project coordinator of the Child Development Foundation, noted that the child labor situation in Thailand has not improved because children from Burma, Laos, and Cambodia are found working in several businesses, particularly in big cities and in the cities along the border. She declared that many children "are found working in fishing industries, selling flowers on the roads or begging" and criticized the numerous Thai employers who currently employ more than 200,000 migrant children between the ages of 15 and 18. 23

(c) Fear of trafficking. Not only is the cost of education beyond the grasp of most Burmese migrant workers who consistently earn a daily wages well below the minimum salary, but they also face the challenge of having to send their children to schools that are considerably far from their houses. Jackie Pollock, director of the Migrant Assistance Program (MAP) Foundation, remarked that Burmese parents, who have heard countless stories about the trafficking of children, often worry about sending their children off in busses to school for fear that their children will fall into the hands of sex traffickers. 24

(d) Transient lifestyle of parents. Given the nature of the jobs many Burmese parents engage in, children of migrant workers are often victims of a transient lifestyle. Reflecting upon this, Pollock, noted that "[s]ome migrant communities are very mobile; construction site workers don’t stay in one place, they work on a construction site for three months and then move to another area, so it is difficult for the families to put the children to school." 25

(e) NGO-run schools. Parents who refuse to send their children to schools far from their residences, and those who cannot afford state-run schools often send
their children to schools run by local NGOs. Yet while these schools enable Burmese children to learn English, and teach them basic vocational skills, the Thai Ministry of Education does not recognize these educational certificates as legitimate. As a result, children that go through these in NGO-run schools often find themselves hard-pressed to prove their credentials to potential employers and higher education schools as they lack the Thai certificate of education, which is essential for further study.

While working conditions for Burmese migrant workers only seem to worsen in light of the 2008 economic downturn, access to education for their children remains a challenge.

**Conclusion**

As a member of several international organizations and an ostensible exponent of international human rights, the Royal Thai Government has a long way to go with regard to the current status of its migrant workers from Burma and their children. Many of the factors that contribute to the influx of migration from neighboring countries, such as Myanmar, are not within the Thai government’s control. However, as a member of the United Nations, the Thai government is not only culpable under numerous international agreements, such as the Responsibility to Protect, but furthermore, as a magnet for migrant workers it must immediately recognize that it has the responsibility to ameliorate the conditions of its very own inhabitants, especially the stateless Burmese. The following solutions ought to be prioritized and addressed in the near future.

(1) The Royal Thai Government must revisit and revise the registration process for migrants and other cumbersome laws that currently force migrant workers to remain illegal in status. A comprehensive awareness campaign led by the Ministries of Education, Health, Labor, and Interior should be implemented with the goals of clarifying existing law and creating uniformity in how immigration officers, school principals, and employers understand and implement Thai laws. As discussed above, one area that causes widespread confusion is the registration process, which, if successfully utilized, would enable migrant workers to lawfully work in Thailand and thus enjoy benefits such as access to health care and education.

(2) The Royal Thai Government, as well as local NGOs, must seek to spread awareness of migrants’ rights, among them the right to quality education. Burmese migrant workers cannot hope to improve their situation or reap the benefits of their legal rights if they remain unaware of what these rights are or confused regarding bureaucratic processes. Although this responsibility would ideally rest on the slothful shoulders of the government, NGOs are realistically
more capable of raising awareness within marginalized groups due to their non-governmental character. Given the number of schools already being run by NGOs in Thailand and their vast connections to migrant communities, they are also better suited to raise awareness more immediately and perhaps with more efficiency.

(3) The Royal Thai Government ought to recognize diplomas issues by NGO-run schools. Doing so would enable thousands of Burmese young graduates to pursue a university education, and thus rescue themselves and their families from poverty. While ideally the government would recognize these diplomas without external pressures, such an action seems highly unlikely. NGO pressure is thus crucial to draw attention to the present injustices that many children suffer upon graduating from these NGO-run schools.

(4) The Royal Thai Government ought to better enforce present laws that regulate its schools. While ignorance among the citizenry of the law may be understandable, the indifference of the government to these violations is not. It ought to be the government’s responsibility to ensure that schools provide children not only with the right to enroll, but also with free lunches and textbooks, as decreed by the law.

Aside from these recommendations, this article calls for pragmatic solutions to deal with the glaring human rights violations in Burma. As the Harvard report "Crimes in Burma" declares, the Burmese have been subjected to "epidemic levels of forced labor in the 1990s, the recruitment of tens of thousands of child soldiers, widespread sexual violence, extrajudicial killings and torture, and more than a million displaced persons." Immediate international attention ought to be drawn toward Myanmar—especially in light of the trial of pro-democracy leader Aung San Suu Kyi. As dire as the situation in Burma may seem, gradual action must be taken in order to promote democracy in Burma—doing so will not only improve the quality of life of millions of Burmese, but will also help Thailand to better deal with the thousands of Burmese that cross the Thai-Burma border every year. Indeed, if less Burmese cross the border every year, the Thai government and its agencies would be better able to deal with registering them, and enabling them to become legal workers under the law.

Moreover, international pressure ought to also be applied to the Royal Thai Government—for it to recognize its importance as a necessary haven for many within the region, and the needs of its inhabitants regardless of their nationality. While the abovementioned solutions would ideally happen overnight, the reality of the situation is that incentives are currently not aligned with reform, as businesses profit from cheap labor, the police count on bribes for their income, and the Thai population benefits from the lack of Burmese competition for higher paying jobs. International pressure will thus prove crucial in encouraging the
government to meet the human rights standards upheld by the international community—especially those dealing with the rights of migrant workers and their children.

(Endnotes)

1 Note that estimates vary from 1 million to 6 million. Most reliable sources, however, agree that 80% of all of the immigrants to Thailand are Burmese.
2 "Burmese Migrant Workers in Thailand: Myanmar’s Overflow," The Economist, 19 March 2009.
4 Ibid. It must be noted, however, that the garment industries in Mae Sot are seen as the best alternative among a few bad choices.
5 While there are many international worker protection statutes, as well as laws that declare the access to education for all children—many of which have been ratified by the Thai government—this article will focus solely on national law.
9 Erick Gjerdingen’s "Human Smuggling vs. Human Trafficking: The Impact of the ‘Exploitation’ Standard on Burmese Migrant Workers in Thailand," identifies these three issues as central to the poor working conditions faced by migrant workers in Thailand.
11 The intervals in which the government enables people to register are irregular, leaving many confused regarding when they can or cannot register, and rendering those eligible to register illegal in status. Furthermore, the 3,800 baht fee leaves most Burmese unable to pay such an impossibly high fee. In addition should workers decide to change their employer, they must re-register and thus incur a new wave of fees. Some migrant workers pay the 3,800 baht fee through their employers—the employers pay the fee and later discount it from their employees’ salary. While this pragmatic solution occasionally works, frequently unscrupulous employers charge their employees with fees higher than the original 3,800 baht
Labor Protection Act defines employee as follows: "a person who is employed by an employer for remuneration, regardless of the title that he is given." It is therefore safe to assume that this act applies to ALL workers in the kingdom of Thailand—regardless of their nationality, gender, or race.

15 National Education Act B.E. 2542 (1999), Ch. 2 §10 (Thail.), http://www.moe.go.th/English/edu-act.htm.


21 Ibid


27 For an example of such NGO-run schools see: http://www.globalgiving.com/projects/thailand-education-to-children-at-risk/. Note that this is one of countless such organizations.


BURMA LAWYERS’ COUNCIL PROGRESS REPORT
ON
PEACE LAW ACADEMY

Reporting Period: February 2009 to May 2009

The Advanced Internship Program in Human Rights and Law of Peace Law Academy was officially opened on 12 February 2009. The Program is a two year diploma course; after completion of the course, the successful interns will be awarded a “Diploma in Law” certificate.

The opening ceremony of the Peace Law Academy was attended by 25 interns of different ethnic nationalities who passed the written and the oral examinations conducted by the Executive Board members of BLC.

Guardians of the selected interns and their organization’s heads participated in the opening ceremony. Invited guests included the representatives of the Ministry of Education, Tak Area II, school heads of migrant schools and heads of different organizations. The Vice Chairperson, General Secretary of NCUB and associates of NCUB, elected Members of Parliament Union and the Executive Board members of BLC formed the panel during the opening ceremony. The Chairperson, General Secretary and two members of Executive Board of BLC gave an account of the Peace Law Academy.

Two interns from the previous internship program who are serving as chamber interns at BLC shared their experiences of the previous two year internship program.
The interns were selected based on the following principles:
(1) Candidates must be ethnic nationals from Burma;
(2) At a minimum, they must have passed the high school final examination (higher education is desirable);
(3) They must have completed BLC’s three-month intensive training course or the one-year intensive English language course provided by the Open Society Institute in Chiang Mai or the one-year Foreign Affairs Training Course provided by the Foreign Affairs Committee of the NCUB;
(4) Out of total number of candidates, at least one third should be females;
(5) Out of total number of candidates, at least three-fourths should be non-Burman ethnic nationalities; and
(6) Priority will be given to the intern candidates who contributed to the democratic movement of Burma for over three years.

There are a men's hostel for eleven male interns and a women's hostel for fourteen female interns. There is a warden in each hostel. The regular teaching time is from 09:15 am to 16:15 pm from Monday to Friday with recess of 15 minutes in the morning and in the evening.

During the reporting period, the topics taught in the Peace Law Academy were:
1. Rule of Law and Jurisprudence by Mr. Thein Oo, Chairperson of BLC
2. International Criminal Law by Mr. Stewart Manley, staff attorney of BLC
3. Criminal Procedure of Burma by Mr. Chit Tin, a lawyer, a Member of Parliament-elect and a member of BLC
4. Special Laws of Burma by Mr. Myint Thein, an Executive Board member of BLC
5. Introduction on Working Research by Mr. Nai Lawe Aung, warden of the men's hostel and a graduate of Peace Law Academy
6. Constitution and Federalism by Mr. Hkun Okker, an Executive Board member of BLC

Lectures of Visiting Professors

From 1 May 2009 to 6 May 2009, Associate Professor and Director of the LL.M program in Human Rights from Hong Kong University, Ms. Suzannah Linton, taught:
- Introduction to International Law and

With respect to the rules of the International Criminal Court (ICC) and combined with a mutual and open discussion with the interns, the President of Global Justice Center (GJC), Professor Janet Benshoof, taught about:
- rapes during armed conflict
- sexual violations
- torture

Other lectures

In the first and second weeks of May, U Tun and Ma Maythazin from Federation Trade Union of Burma (FTUB) and Ma Win Win from National Council of the Union of Burma (NCUB) taught Database Systems.

To promote the English skills of the interns, Mr. Nicholas Altstadt., a volunteer at BLC, taught Advanced, Middle and Basic levels of English in the morning and evening apart from the regular teaching periods.

Socio-Political Workshops

Dr. Kyaw Nyunt, Secretary of Democratic Alliance of Burma (DAB), was invited to the Peace Law Academy on 27 February 2009 to explain the political background of Burma and the democratic movement of opposition organizations. He conducted discussions on the opposition's aims and objectives for future Burma with the interns.

The interest of the interns in the political situation of Burma was very heartening when, on 2 March 2009, Mr. Aung Din, Director from US Campaign for Burma, discussed the attitude of US foreign policy on Burma, particularly President Obama's foreign policy and potential changes. Mr. Aung Din responded to the questions raised by the interns, which included topics such as US sanctions against Burma and their effectiveness.

On 6 March 2009, Mr. Moe Chan, who works on UN affairs for the Burmese
opposition alliance NCUB, discussed the connection between the System of the United Nations and the role of the UN Security with the current political situation of Burma. A very hot debate was held on the Credentials Challenge submitted by Members of Parliament Union (MPU) to the United Nations in September 2008.

Mr. Tun Aung Kyaw, former Chairperson of All Burma Students Democratic Front (ABSDF), was invited to Peace Law Academy on 10 March 2009 to explain the students' popular movements of 8888, students' revolutionary history, the existing Burmese political situation around the world and the status of revolutionary organizations, particularly in connection with the topic of "Unity and Capacity of Leaders". A discussion with the interns was held after the presentation.

A forum on Law and Politics was held at Peace Law Academy on 20 March 2009, led by Mr. Kyaw Htwee of All Arakan Student Youth Congress (AASYC) on behalf of Nationalities Youth-Forum (NY-Forum). The discussion at the forum included:

- Consideration on the 2008 Constitution of the State Peace and Development Council (SPDC)
- Main principles of the SPDC constitution
- Political attitude on the upcoming 2010 election

The forum was conducted in a workshop format of four discussion groups.

Mr Kyaw Htwee was the main questioner, while the Chairperson of BLC and two wardens of Peace Law Academy presided over the forum. The students held serious discussions on the future political matters of Burma.

Mr. Myo Win, a Joint Secretary of NCUB, gave a lecture at the Peace Law Academy on 9 April 2009 in which he explained:

- the political background of Burma
- the background of the formation of NCUB
- the aims and objectives of NCUB
- the structure and activities of NCUB
- the differences between Constituent Assembly and Parliament
- the common opposition strategy for the upcoming 2010 elections in Burma.
Visitors

Ms. Htusan Maran and Mr. Zaw Zaw from Open Society Institute (OSI) visited the Peace Law Academy on 21 February 2009 to explain about OSI and its activities. They had a frank discussion with the interns on various issues. The BLC Executive Board Members, Financial Committee Members and Administration members explained the establishment, objectives and teaching subjects of Peace Law Academy.

Dr. Alicia, a coordinator of the Thai Ministry of Education, and her assistant visited Peace Law Academy on 27 February 2009. She explained her deep interest in Peace Law Academy and promised to help in coordinating the cooperation between the Peace Law Academy and Thai authorities. She also encouraged the interns to try their best on the lessons taught by experienced lawyers for a better future Burma.

Activities

(1) In March, the interns were divided into groups to give presentations on ICTY Trial, ICTR Trial, Nuremburg Trial and IMTFE (Tokyo Trial).

(2) On 20 March, a SKYPE meeting/discussion was held between the AIP students and Human Rights Now (an NGO based in Japan). During the presentation the interns had an opportunity to introduce themselves and their ideas.

One of the Executive Board Member, Mr. Myint Thein, divided the interns into nine groups and instructed them to collect information, news and data on the topics are Land Issues in Burma, Judiciary Issues in Burma, Rule of Law in Burma, Ethnic Issues in Burma, The Role of the Army in Civilian Administration, Migrant Workers and Refugee Issues, Issues on Burma Elections and Political Parties, Media Issues and media law and Economic Issues, and economic law.
New Era for the Rule of Law:

Economic Development and the Rule of Law in Burma (Myanmar)

By- Thein Oo, Chairperson of Burma Lawyers' Council

Introduction

Burma, my country, has proved that political stability is essential for economic development as well as that the lack of the rule of law will also create political instability. For genuine democracy and sustainable economic development to exist in Burma once there has been a successful transition of power from the military regime to the democratic opposition, an understanding and respect for judicial independence will be the corner stone for a new democratic society governed by the rule of law. Unfortunately, the rule of law is in dire straits in Burma today.

The current political and legal framework stunts Burma's economic development, leaving millions of its people languishing in poverty despite the country's abundant natural resources. Wealth is concentrated in the hands of a few, while the opportunity for economic advancement and a decent standard of living is denied to the majority of Burma's population.
The Role of Country: Burma

Burma is blessed with a host of natural resources like gas, oil, copper, tin, gold, precious stones, timber and millions of hectares of arable land. The country was known as the rice bowl of Asia. However, following the military coup in 1962, because of the lack of the rule of law, mismanagement of the economy, rampant corruption and cronyism, the country is now the poorest in the region. Burma under the junta is ranked third as the most economically repressed and second as the most corrupt country in the world by Transparency International in 2007.

I hope that through this POLA conference I shall be able to contribute towards a better understanding of the sorry state of the rule of law, judicial independence and human rights in Burma today. The people of Burma are by nature law abiding, peace loving and gentle. However, under the present military government, known as the State Peace and Development Council (formerly the State Law and Order Restoration Council), they have been subjected to deplorable treatment as a result of the complete lack of any rule of law.

Unlike some other authoritarian regimes, the Burmese generals do not care one bit about the economic well being of its citizens. While the top generals and their families and cronies are becoming millionaires and billionaires, ninety percent of the population lives on less than US $1 per-day. Millions of people in Burma cannot even afford two regular meals a day. Only about 10 percent of the national expenditure is allocated to the education and health sectors combined, compared to forty or fifty percent for the military.

The economic hardship at home has forced millions of people in Burma to leave the country and seek jobs in neighboring countries where they are vulnerable to all forms of exploitation. Thailand alone hosts more than 2 million migrant workers, the majority of whom are undocumented. The same is true in Malaysia. The Burmese junta's restriction on freedom of movement is forcing those wishing to seek jobs abroad to rely on human smugglers and traffickers, and are often forcibly assigned to unsafe work, including prostitution. The people of Burma deserve a better fate.

The Role of Military Government and Election

The Burmese military came to power in 1962 and continues to rule the country with an iron fist. Indeed, the present political situation is in fact worse than ever before. Without respecting the rule of law, political oppression and human rights abuses take place unabated nationwide despite condemnation from the international community. There are currently more than 2,100 political prisoners among whom 16 are MPs-elect. Daw Aung San Suu Kyi, the national icon and Nobel laureate has been placed under house arrest incommunicado for more than 13 years.
Although members of the National League for Democracy (NLD) party, the winner of the 1990 General Elections, bear the brunt of the oppression, many other democratic activists are also victims of the rampant and systematic human rights abuses by the military. Draconian security laws and sham legal proceedings are used to arrest, charge and imprison dissidents and democratic opposition members. Many of those arrested on trumped-up charges were given ridiculously long prison terms like 65 to 90 or more years and sent to isolated prisons hundreds of miles away from their families. Since 1990, 120 political prisoners have died in the junta’s prisons.

The National League for Democracy is the political party that received the unequivocal mandate of the people in the only democratic elections held in Burma within forty-seven years. The NLD party won an overwhelming eighty-two per cent of the parliamentary seats contested. Today, the results of the elections remain unacknowledged by the military government which continues to rule the country through arbitrary and draconian ordinances and laws.

The Role of Independent Judiciary

Although the SPDC, the military regime, effected judicial law 2/88, which contained formal guarantees of the independence of the courts, in practice courts in Burma are subjected to rigid control by the authorities at all times. Judges do not enjoy tenure and are under clear instructions to take their cues from the military authorities in the discharges of their functions. The independent administration of justice at present has become a casualty of the military regime.

Not only are democratic activists charged unjustly under various laws and military decrees, and denied fair trials and due process of law, the judicial system has been strangled over the years. Court proceedings are not open to the public and defendants are very seldom allowed access to counsel.

Moreover, accused are presumed guilty in advance and not given a fair chance to prove their innocence. Trials are a mere mockery of justice and punishments are far in excess of the so-called crimes. Moreover, most of the legal action taken against political prisoners falls into the *ultra vires* category. Legitimate democratic activities are deemed to be against the law.

Democracy and Human Rights cannot prevail in Burma without institutional, legal and practical safeguards for ensuring proper procedures for the appointments and removal of judges and for the exercise of their functions without undue external influence so that judges remain impartial and independent of the executive and legislative branches of government.

The military government of Burma has not abided by its own domestic laws nor
by the international norms of justice. As it is neither an elected government accountable to the people nor a popular government ruling under a constitution accepted by the people but a government that has usurped power by military force, there can be no rule of law and the independence of the judiciary is a mere scrap of paper, a mockery of the system.

Recently, the United Nations has acknowledged the regime’s violation of its own domestic laws, in addition to its continued flaunting of international ones. This Spring, the UN Working Group on Arbitrary Detention ruled that the renewal of another one more year in 2008 of Daw Aung San Suu Kyi’s house arrest “not only violates international law but also domestic laws,” since the 1975 State Protection Law only permits renewal for a maximum of five years. Daw Suu Kyi has now spent almost 14 of the past 20 years under house arrest. This declaration by the United Nations is almost unprecedented, accusing a member country of violating its own laws. Sadly, however, this is just a simple illustration of the flagrant regard that the SPDC has for the rule of law.

The Role of Human Rights

Human rights abuses are particularly widespread in border States in Eastern and Western Burma. Villages are burnt down, crops destroyed, people arrested, tortured and many killed. The political repression and rampant human rights abuses in ethnic areas have resulted in the displacement and exodus of more than 150,000 refugees to Thailand alone. Thousands of Burmese citizens are taking refuge in India, Bangladesh and Malaysia as well. Apart from these externally displaced refugees, there are also about 500,000 internally displaced people along the Thai-Burma border.

Burma is more than just a human rights and refugees problem. It is, according to the International Narcotics Control Strategy Report (March 2008), still the largest source of illicit drugs in South East Asia. In September 2008, the US for the 7th straight year said, Burma had "failed demonstrably" in its effort to combat illicit drugs.

Despite the fact that there is no internal or external threat to the security of the country, the Burmese generals maintain a huge army. The strength of the Burmese armed forces is currently estimated to be around 400,000 strong, and the generals plan to expand it to 500,000. There are 70,000 child soldiers in the junta's army, the highest number in the world.

The political, social and economic problems plaguing Burma can be resolved only through political talks under the light of the rule of law and mutual respect. The NLD party and ethnic political leaders have, therefore, been calling on the military junta to engage in political dialogue. The call has been echoed by the international community including the UN, EU and ASEAN.
The Role of New Constitution

Instead of listening to the domestic and international calls for dialogue, the military continues to embark on political repression, and, having gone through with its sham and undemocratic national convention to produce a constitution tailored to its needs, are planning an election for 2010. The election held under the new constitution adopted in a farcical referendum in the middle of Cyclone Nargis which killed more than 140,000 people in May 2008, will allow the military to entrench itself in power for many years to come.

The Nargis Constitution obviously seeks to maintain a centralized administrative state, with the military tightly in control of all sectors of the government. The constitution in its present form cannot lead to democracy. It had been one-sidedly written to protect and keep the military in power. There is no room for free and fair elections. The military gets 25 percent of the Parliamentary seats, from national down to township levels, without the need to contest the elections. All key portfolios in the different levels of government are allocated to the military.

Written in such a way, there is no possibility for amendments. Articles and clauses guaranteeing ethnic rights and equality are conspicuously absent. Separation of powers is sought "to the extent possible". Article 11(a) provides that "The three branches of sovereign power namely, legislative power, executive power and judicial power are separated, to the extent possible, ---" This reservation is legally ambiguous and makes room for the executive branch—dominated by the military—to supersede and subjugate the judicial branch.

The protection of fundamental human rights and of democratic processes requires a judiciary that is not only independent from legislative and executive controls but also neutral, objective, competent and free of all external influences. Constitutional safeguards can go only so far in ensuring those qualities in a country's judiciary.

The Burmese democratic opposition deem it extremely important for the international community not to endorse the undemocratic constitution that has been adopted through a sham referendum, and the election that will be a product of an undemocratic, military-drawn constitution. Endorsing the constitution and the election held under that 2008 constitution is tantamount to lending legitimacy to the military regime and their continued stay in power without the rule of law.

Conclusion

To sum up, the rule of law is in dire straits in Burma today. Good governance, good public administration practicing fiscal prudence and an independent judi-
ciary are needed for there to be sustainable and sustained development, but, unfortunately, Burma is so far away from these bare fundamentals of development. Burma is in crisis—both political and economic.

The political system, lack of rule of law, constructed by the State Peace and Development Council (SPDC) is designed to continue the military's dominance over Burma. In its efforts to maintain power, the SPDC represses and silences its critics and it is clear that they are above the law. The continuing political crisis ensures both national and regional instability.

Constitutional guarantees that protect and promote human rights of individual citizens, the rule of law, and political freedom for political parties must be in place to ensure the participation of Burmese citizens in current and future political process and economic development.

Thank you.
EVERYONE IS EQUAL BEFORE THE LAW.

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

MISSION STATEMENT

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

THE STATUS OF ORGANIZATION

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

OBJECTIVES OF THE BLC

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

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