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

Legal Journal on Burma

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

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Part (A)
Special Feature

(A . 1)

**THE RULE OF LAW AND DEMOCRATIZATION:
AN ANALYSIS OF THE FORTHCOMING 2010 ELECTION IN BURMA
FROM A HUMAN RIGHTS PERSPECTIVE
(EXCERPTS)
NOVEMBER 11, 2009**

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

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

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

The SPDC has proven its unwillingness to relinquish power. The regime repeatedly promises one thing, and then reneges on what it has stated to serve its own purposes. In 2005, the SPDC established Naypyidaw as the new capital of Burma. Located approximately 320 km north of Rangoon, the move attests to the SPDC's intent to maintain political control. In contrast to Rangoon, Naypyidaw is relatively undeveloped and unpopulated (except for by government



officials). The area is void of mobile phone service and private landlines are prohibited for civil servants. The top military generals themselves live hidden from the public eye in mansions 11 km from the main government offices. Naypyidaw represents less of a capital city where a citizen would go to petition a government, and more of what it really is—a military base with pitiful civilian trappings.²

One advantage of the new capital is that it is too removed from the population to be disrupted by events like the 2007 Saffron Revolution, where monks flooded the streets of Rangoon. Business continued as usual in Naypyidaw, while the junta brutally quelled the uprising down south and arbitrarily imprisoned thousands of citizens. In the face of such blatant protest, The bizarre move of capitals and the SPDC's brutal crackdown on peaceful protestors demonstrate the lengths to which the regime will go to cement its rule.

THE IMPOSSIBILITY OF FREE ELECTIONS UNDER EXISTING DRACONIAN LAWS

A. 1962 PRINTERS AND PUBLISHERS REGISTRATION LAW

For example, the 1962 Printers and Publishers Registration Law effectively places a muzzle on free expression. Under this Law, all printed or written material must gain prior approval from the Central Registration Board.³ Additionally, all printers must register with the government,⁴ but registration may be revoked if the printer is found to "[harm] the ideology and views" of the government.⁵ During an election, all campaign materials from all political parties would need to be approved by the regime before being distributed. This process would, at best, unnecessarily slow down campaigning and, at worst, implicate broad political networks as targets for the regime. Using only government-censored material undeniably restricts citizens' access to information and political parties' right to campaign.

B. 1975 STATE PROTECTION LAW

The 1975 State Protection Law allows the military to preemptively arrest and charge people for crimes that that may "endanger the sovereignty and security of the state or public peace and tranquility"—even if they have not yet been committed.⁶ The language is sufficiently vague to allow interpretation befitting the desires of the SPDC. Since the SPDC has historically used a broad interpretation of this law to remove opposition figures from public life, it is can be inferred that political activists will either be discouraged from openly campaigning or punished for doing so. Labeled as "subversive", political parties are routed and, therefore, denied the right to organize freely.



C. 2004 ELECTRONIC TRANSACTION LAW

The 2004 Electronic Transaction Law was promulgated by the SPDC to dictate all use of electronic technology. It is primarily applied as a means to charge and sentence political opponents of the military. Section 33 of this law outlines "Offences and Penalties" for the misuse of electronic transaction. In this current era, the Internet and mobile phones are powerful tools used to disseminate information widely and cheaply. The Internet may also be utilized to inform voters of the election issues and voting process. Unfortunately, the Electronic Transaction Law renders these progressive tools obsolete through the imposition of severe punishments for normal electronic use.

A violation of this section may result in seven to fifteen years of imprisonment.⁷ This punishment was recently used to sentence prominent pro-democracy leader Min Ko Naing, Chairperson of the All Burma Federation of Student Unions and 88 Generation Students group, and nearly forty other dissidents to sixty-five years in prison.⁸ The members of the 88 Generation Students group were charged with violating four counts of the Electronic Transaction Law, with each violation carrying the maximum fifteen-year sentence. This is a highly disproportionate punishment for simply using email communication⁹ and, similar to the State Protection Law, presents a serious risk for political opponents of the SPDC.

D. SECTION 505(B) OF THE PENAL CODE

Under Section 505(b) of the archaic Burmese Penal Code, people can be charged for any statement, rumor, or report made "with intent to cause, or which is likely to cause, fear or alarm to the public or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquility".¹⁰ The junta has used this law to repress and punish those taking part in free expression, peaceful demonstrations, and forming organizations.¹¹ Most notably, Section 505(b) was used in-part to charge U Gambira, leader of the All Burma Monks' Alliance and key activist in the 2007 Saffron Revolution, with a total of 68 years in prison.¹² The Saffron Revolution was an entirely peaceful protest of religious figures that were brutally crushed by the military junta.¹³ With the harsh consequences of this law widely known, political parties are denied their right to organize and campaign. This, in turn, additionally violates citizens' rights to access the political information necessary to make an informed choice during polling.



ARE ALL ELECTIONS STEPPING STONES FOR A GRADUAL DEMOCRATIZATION PROCESS?

RESPONSE TO THE INTERNATIONAL CRISIS GROUP

On August 20, 2009, the International Crisis Group (ICG) released a report describing the 2008 Constitution as the "flawed product of a flawed process".¹⁴ At the same time, the report submitted optimistic hopes for the elections to spur political change. Though the Burma Lawyers' Council would like nothing more than for this election to ignite genuine democratization, it is crucial to remember that the 2008 Constitution, as it stands, will never lead to such a transformation. Though elections were held four times under the 1974 Constitution, none of these could be described as gradual stepping-stones towards democratization. The ICG raised three points as to why the 2010 Elections might lead to democracy:

- the hopeful promise of generational transition;
- provisions in the 2008 Constitution envisioning a multi-party state capable of representing divergent interests;
- the improvement in the domestic and international contexts, including developments in information technology (IT), media, civil society, and political awareness.¹⁵

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

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

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



Third, while IT, civil society, and political awareness in Burma have undoubtedly developed from 35 years ago, instances like the Saffron Revolution reveal that it is still unable to influence the governing powers. Media is so tightly censored that it symbolizes the junta's unquestionable control more than anything else. Regional pressure is unlikely to materialize considering the passivity of ASEAN in dealing with the military. To be noteworthy is that ASEAN itself still adheres to the principle of non-interference in the internal affairs of ASEAN member states¹⁶ despite that promotion and protection of human rights is mentioned as purpose¹⁷. ASEAN leaders did not even reflect the statement made by Mr. Obama, President of the United States, to release Daw Aung San Suu Kyi and political prisoners in their Asia Pacific meeting.¹⁸ With reference to the current status of ASEAN, if an analysis is made such as 'the regional context has also changed',¹⁹ it may be a presupposition. Moreover, the lack of sustained pressure and tangible action on the part of the international community has actually seemed to result in an ever-emboldened regime. Though the international community has expressed the intent to take action, current efforts appear uncoordinated and even contradictory at times.

CHALLENGES ENCOUNTERED BY BURMA'S CIVIL SOCIETY

In Asian countries where democratization has occurred (such as South Korea, Taiwan, and Indonesia) economic liberalization and the loosening of political control have preceded such transitions. In the cases of all three countries, military dictators ruled for several decades. Generational transition, however, did not happen within the framework of the constitutions. Instead, in the case of Indonesia (which presents similar a similar scenario to that of Burma), student demonstrations with the support of civil society organizations facilitated societal change outside of the constitutional framework. Additionally, the authoritarian regimes of all three countries were reasonably susceptible to popular opinion, which paved the way for stabilization into liberal democracy. Thus, civil society can only be effective in propelling democratic change if the ruling authorities are also willing to concede power incrementally. These factors are still not in place in Burma. Particularly, due to the systematic restrictions made by the military regime²⁰, the status of people's organizations currently inside Burma cannot even catch up with that of Indonesia's civil society organizations, existed before the fall of Suharto in 1998.

THE 2008 CONSTITUTION: PROLONGING VIOLENCE AND IMPUNITY IN BURMA

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



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

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

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

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

RECOMMENDATIONS

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

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

Second, all political prisoners including Daw Aung San Suu Kyi must be released. The SPDC must allow political parties and candidates the freedom



to organize and campaign without unreasonable restriction, including equal access to media. Again, this must be done as soon as possible so that citizens have sufficient time to be informed of the various political options and, thus, cast an educated vote.

Third, the election laws and actual election process must meet international standards. The UN Electoral Assistance Division should be requested to participate in helping the SPDC conform to such standards, and long-term international monitors should be invited to observe the election proceedings.

Fourth, where a population is suffering serious harm, as a result of internal war, insurgency, repression or state failure, and the state in question is unwilling or unable to halt or avert it, the principle of non-intervention yields to the international responsibility to protect.²² Attempts by the SPDC, through the Burma's 2008 Constitution or through other domestic laws/measures, to grant immunity for war crimes, crimes against humanity or other crimes falling within the jurisdiction of the ICC, will have no legal bearing on any Security Council process of inquiry or referral.²³ The international community may urge the UN Security Council to form an International Commission of Inquiry to investigate the international crimes taking place in Burma, in order to effectively facilitate our people's efforts for ending impunity in Burma.

(Endnotes)

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

² Nina Martin, 'Living in a ghost town' *Bangkok Post* (18 October 2009) <<http://www.bangkokpost.com/news/investigation/25872/living-in-a-ghost-town>> accessed 21 October 2009.

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

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

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

⁶ State Protection Law (1975), Article 7.

⁷ *Ibid.*

⁸ Phanida, 'Min Ko Naing & "'88 Generation Students" Given 65 Years' *Mizzima* (15 November 2008) <<http://www.mizzima.com/news/inside-burma/1307-min-ko-naing-a-88-generation-students-given-65-years.html>> accessed 10 November 2009.

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

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

¹¹ Human Rights Watch '2100 by 2010: Free Burma's Political Prisoners' *Human Rights Watch* (16 August 2009) <<http://www.hrw.org/en/free-burmas-prisoners/background>> accessed on 2 November 2009.



¹² 'U Gambira to Serve Total of 68 Years in Prison' *Mizzima* (21 November 2008) <<http://www.mizzima.com/news/inside-burma/1343-u-gambira-to-serve-total-of-68-years-in-prison.html>> accessed on 10 November 2009.

¹³ Andrew Buncombe, 'Burma: Inside the Saffron Revolution' *The Independent* (27 September 2007) <<http://www.independent.co.uk/news/world/asia/burma-inside-the-saffron-revolution-403645.html>> accessed on 12 November 2009.

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

¹⁵ *See generally, Ibid.*

¹⁶ Article 2.1 of the ASEAN Charter.

¹⁷ Article 1.1 of the ASEAN Charter.

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

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

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

²¹ UN Security Council Resolution 554 (1984).

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

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

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(A.2)

Constructive Engagement: A Critical Evaluation

*Minn Naing Oo**

Introduction

“Constructive Engagement is a euphemism for doing business with thugs,” so proclaimed former Senator Daniel Patrick Moynihan in referring to the US policy towards China. While this may be the view of its outspoken opponents, the proponents of Constructive Engagement defend it with equal fervor as an enlightened approach, and one that is frequently the only realistic option, in dealing with rouge states in the post-Cold War era of globalization. In essence, Constructive Engagement is a policy which advocates the maintenance of an economic and diplomatic relationship with an authoritarian state as opposed to imposing sanctions and embargoes on it. It has been described as “promoting economic and political ties, while at the same time pressing for democracy, open markets and human rights”.¹ Its advocates believe that in encouraging and participating in the opening up of a country to foreign investments, it will also be facilitating the opening up of the country to more information, as well as foreign liberal influences and views promoting a greater awareness of human rights and democratic values.² By remaining “engaged” with the rouge state, Constructive Engagement advocates also believe that countries are more likely to be able to exert influence over its government and push it along the path to political and social reform. This paper seeks to evaluate Constructive Engagement critically with a focus on its implementation by ASEAN and the United States vis-à-vis Burma and China respectively.

The report card on Constructive Engagement in Burma and China

It has been almost a decade since the ASEAN nations commenced their policy of Constructive Engagement with Burma and 6 years since the Clinton administration did the same with China. It is timely now to examine if it has been successful in achieving better treatment of human rights and democratization in these 2 countries.

Burma

By most accounts, Burma’s human rights record has not improved at all since 1990. The latest reports by the Special Rapporteur of the UN Commission on Human Rights on the situation of human rights in Burma lists a litany of unabated human rights violations including suppression of political activity, torture, non-observance of due process in the judicial system, imprisonment of political opponents, forced relocation, extra-judicial killings and forced labor. Even



on the economic front, the Special Rapporteur reports that it is “in a very weak state, characterized by extreme poverty, lack of food security. . .”³ Burma has also incurred ILO sanctions for its practice of using minorities and the poor to do forced labor. The junta’s delegation simply responded by announcing in Geneva that it would refuse all future collaboration with the ILO.⁴ The only “improvement” to speak of is that the International Red Cross has been permitted to visit select prisons and detention centers.⁵ It is clear that Constructive Engagement has not worked at all in bringing about human rights reform in Burma. On the contrary, the regime, as shown by its attitude towards the ILO sanctions, may have grown even bolder in its repression, strengthened perhaps by the knowledge that it can always turn to its ASEAN neighbors for support and assistance.

China

Despite the Clinton administration’s efforts, Constructive Engagement has not seen much success in bringing about change in China either. The White House’s report on the human rights situation in China admits: “Despite the clear expansion of personal freedom for huge numbers of Chinese citizens associated with economic reform over the past several decades, China continues to curtail freedom of speech, expression, assembly, association and religion. China maintains a one-party state that tolerates no organized opposition. Authorities engage in the extrajudicial arrest and detention of political and religious activists and restrict religious and spiritual practices”.⁶

The latest Country Report on Human Rights Practices on China issued by the State Department in fact states that “the Government’s poor human rights record deteriorated markedly throughout the year, as the Government intensified efforts to suppress dissent, particularly organized dissent.”⁷ The Report goes on to describe the persecution of religious groups and “particularly serious human rights abuses. . . in minority areas, especially in Tibet and Xinjiang, where restrictions on religion and other fundamental freedoms intensified.”⁸

In the midst of this gloomy picture, Constructive Engagement supporters take comfort from the fact that China this year signed the UN Covenant on Civil and Political Rights and the UN Covenant on Economic, Social and Cultural Rights and that the economic well-being of many Chinese citizens continue to improve.⁹ It should be noted though that the signing of the Conventions does not mean anything unless it is backed up by action to safeguard the rights enumerated in them. In this regard, the latest reports by the State Department and NGOs¹⁰ do not give reason for optimism. Economically, there can be little doubt that Chinese citizens now have greater opportunities than they did 10 years ago. That may be cited as an improvement on the record. However, the state continues to retain tight control over communications and information, with restrictions on the Internet and censorship of newspapers.¹¹ The expected information boom that was to accompany economic progress has not yet fully material-



ized. Further, many of the big players in the economy remain state enterprises. Any gains in the economic arena are in any case far outweighed by the “deteriorating” (to paraphrase the State Department’s Report) human rights record. Constructive Engagement must accordingly be judged to have failed to bring about any real tangible improvement in the treatment of human rights.

Of disguises and double standards ASEAN-Burma

The most obvious objective for the ASEAN countries in pursuing Constructive Engagement is economic. Burma is a country rich in natural resources and her population of 50 million provides a potential market for the ASEAN countries’ products and services as well as a source of cheap labor. What was touted was a symbiotic relationship which would not only be good for Burma, but beneficial to the ASEAN members as well. In fact, in economic terms, this was precisely what happened. Singapore and Thailand are now 2 of Burma’s largest trading partners, after China, and with the Asian economies recovering, trade between the other ASEAN members and Burma can be expected to grow to even higher levels. A related consideration was that if ASEAN did not trade with Burma, Chinese business interests would simply take advantage of the situation to establish a monopoly.

A second possible objective of the Constructive Engagement policy is the achievement of political and strategic aims. Burma lies at a strategic location, nestled between China, South East Asia and India. She also has a coastline of some 1,700 miles which China could use to gain access to major waterways. Given her strategic importance, the ASEAN leaders must have been wary that China would cultivate Burma as an ally and try to assume an even greater influence in the region, posing a potential threat to regional stability and security.¹² There was ample reason for the ASEAN leaders to be concerned. Since 1991, the 2 states had been getting ever closer, beginning with the signing of an economic and military cooperation pact in that year. The junta had also bought Chinese arms worth almost US\$ 1 billion.¹³ It is reasonable to conclude from the above that in deciding on Constructive Engagement, economic benefits as well as the potential threat of China to regional stability and security are likely to have been equally important considerations to ASEAN, if not more so, than promoting human rights and democracy.

US-China

In adopting Constructive Engagement as the policy instrument of choice, the Clinton administration touted a free market economy and trade liberalization as the means to achieve political reform in China. However, it was not merely benefits to the people of China that the US was interested in. This is plain from the following extract taken from the State Department’s Report: “The United States seeks constructive relations with a strong, stable, open, and prosperous



China that is integrated into the international community and acts as responsible member of that community. The U.S. needs a constructive working relationship with China because:

- The People's Republic of China (P.R.C.) plays a major role in the post-Cold War world;
- It is the world's most populous nation (about 1.2 billion people) and the third-largest in land mass (after Russia and Canada);
- It has nuclear weapons, is a growing military power, and plays a key role in regional stability;
- As one of the five permanent members of the UN Security Council, China has veto power over Security Council resolutions dealing with key multi-lateral issues, including international peacekeeping and the resolution of regional conflicts; and
- China is undergoing extraordinary economic growth and promises to be a preeminent economic power early in the next century.”¹⁴

It is clear that US economic, political and strategic interests stood to gain from engaging China in a friendly relationship as well. In fact, it can be argued that the de-linking of human rights and trade shows clearly the true intentions of the administration. This argument becomes even more compelling when one considers that the US pursues completely divergent and inconsistent approaches in dealing with other less important regimes.

Double Standards

Although in their records of human rights violations, the Burmese military junta and the Chinese Communist Party in power are equally notorious, the US chose to treat the two countries differently. With respect to Burma, “[t]he United States has responded to the regime's continued failure to end its repression and move towards democratic government with strong measures, including: suspension of economic aid and withdrawal of Burma's eligibility for trade and investment programs; an arms embargo; blocking assistance from international financial institutions; downgrading our diplomatic representation to Charge d'affaires; visa restrictions on senior officials and their families; and a ban on new investment by U.S. persons.”¹⁵

China however has drawn a different response from the US to its notorious human rights record. In place of “strong measures” is Constructive Engagement, a policy that is aimed at more economic and political cooperation and dialogue, not less. This is especially ironic when one considers that with respect to Burma, President Clinton had said that relations between the Burmese government and the US would improve only if there was “a program on democratization and respect for human rights.”¹⁶ Surely, the question is: why not the same for China? China has **no** program for democratization, and the Chinese Communist Party has certainly not given any indication that it has even remotely



considered turning China into a democracy. Further, by the State Department's own reports, China's human rights record remains atrocious. The inconsistency in approaches smacks of hypocrisy and is sufficient to dispel any notion that Constructive Engagement is a policy that is primarily concerned with human rights and democratic reform. In fact, this view is supported by economic data as well as the strategic considerations outlined above. China is clearly much more economically important to the US than Burma. In 1997, the year when the US imposed the latest sanctions on Burma, the US imported US\$12.862 **billion** and exported US\$62.558 **billion** worth of goods to China.¹⁷ In contrast, the US imported US\$114.90 **million** worth of goods and exported US\$19.9 **million** worth of goods to Burma.¹⁸ The contrast could hardly have been more stark. For the year 2000, it was reported that the bilateral trade volume between China and the US was expected to hit US\$73.5 billion, an all-time high figure.¹⁹

The ASEAN nations are no less guilty of hypocrisy. They participated in imposing sanctions on South Africa. It is hard to imagine how the apartheid regime is more repressive than the military junta now running Burma. They also did not speak of "non-interference" in domestic affairs then. If the ASEAN countries were true believers in Constructive Engagement as the engine of change, they would have applied it to South Africa as well. That they did not speaks volumes.

Constructive Engagement as a credible alternative to sanctions

It is convenient to start off this discussion by quoting the Thai Deputy Foreign Minister : "The choice of whether to use sanctions or constructive engagement has implications beyond the issue of persuading a nonconformist regime to adopt the norms of the majority. First, it affects the welfare of the people in the target country. Constructive engagement allows the majority of the population to carry on their lives without undue hardship. Sanctions, on the other hand, hurt the most vulnerable sectors of society first and hit them the hardest. And as long as the target government can suppress the opposition and maintain its grip on power, sanctions are unlikely to persuade the regime to loosen up.

Second, the choice of policy affects the overall bilateral relations of the countries concerned. Not only do sanctions not work, they also poison the climate and make dialogue more difficult. Where sizable economic stakes are involved, sanctions can hurt both sides deeply, while having none of the effect intended. Tit for tat measures can divert trade to other countries that have no similar compunction to impose sanctions, and may escalate out of proportion into something neither side wants. Engagement, at the very least, keeps the lines of communication open. The interaction and discourse that are a natural part of any relationship allows the exchange of ideas. And ideas that come from friends are more easily accepted than those that come from perceived foes. The choice



between sanctions and constructive engagement also has broader geopolitical ramifications. Where the nonconformist country is a major power or a pivotal player in the regional security equation, its response to the imposition of sanctions can be unpredictable, with disturbing implications for the region. Constructive engagement, meanwhile, allows the countries immediately concerned to maintain a dialogue with the target country and to gradually build confidence, even if only at a rudimentary level.”²⁰ I shall begin my analysis by examining the above arguments critically. I will then go on to examine the merits of other arguments both for and against Constructive Engagement.

Constructive engagement better the lives of the people while sanctions hurt them

One main argument that opponents of sanctions cite is that sanctions hurt the most vulnerable segments of the population while not having any appreciable adverse effect on the ruling class. Iraq and Cuba are frequently mentioned in this connection. In contrast, it is said that Constructive Engagement, because it brings in trade and commerce, provides jobs and better the lives of the ordinary people.

A related argument which is used by advocates of Constructive Engagement is that foreign companies have a positive impact on the local civil society. Foreign companies offer better working conditions, training and technology transfer, higher wages, health and education benefits. Ernest Bower, president of the US-ASEAN Council argues that American foreign investment in Burma "is an extremely effective means of advancing economic and social development, and should not be abandoned in favor of measures which have no chance of success,".²¹

In China's case, NYU professor Doug Guthrie, writing in *Foreign Policy in Focus*, has this to say: "My research on Chinese factories shows that those which have formal relationships with foreign (particularly Western) firms are significantly more likely to have institutionalized formal organizational rules, they are almost 20 times more likely to have formal grievance filing procedures, they are more likely to have worker representative committee meetings, and formal hiring procedures. They pay significantly higher wages (about 50% higher), they are more likely to adopt China's new Company Law, which binds them to the norms of the international community, and they are more likely to respect international legal institutions.".²²

Despite views like the above, many remain convinced that sanctions are the only means to achieve political reform in an authoritarian state. They point to South Africa as a case in point. Archbishop Desmond Tutu has asked the world now to again treat Burma as South Africa and impose tough sanctions on her: "International pressure can change the situation in Burma. Tough sanc-



tions, not constructive engagement, finally brought the release of Nelson Mandela and the dawn of a new era in my country. This is the language that must be spoken with tyrants --for, sadly, it is the only language they understand.”²³

Aung San Su Kyi has also echoed the call for sanctions against Burma. Neither Reverend Tutu nor Aung San Su Kyi dispute that sanctions can hit the general population hard. However, they and many others are convinced that sanctions will ultimately starve the regime of political legitimacy and economic sustenance and force its capitulation. Apart from South Africa however, the verdict on the effectiveness of sanctions is still out. Cuba and Iraq are examples of sanctions having little effect on the regimes there.

Constructive engagement benefits the peoples of both countries economically

It is argued that sanctions, by definition, takes trade away and hurt not only the economy of the target country, but that of the sanctioning country as well. In contrast, Constructive Engagement, which encourages economic exchange and trade, benefits both economies. This argument is not necessarily true because it assumes that engagement opens up the country to a true market economy fueled by the engine of private enterprise. However, in the case of authoritarian states such as Burma, that is often not the case.

In authoritarian or Communist states, the economy is largely state-controlled with limited private enterprise. Most of the major business entities that foreign investors will deal with are likely to be state-owned enterprises or businesses allied to the regime rather than private entrepreneurs, the true engines of commerce in a truly free market economy. This means that real beneficiaries of the business are the government and its cronies. Although it may be argued that there would be a trickle down effect, this is not likely to be substantial as if the country were a true market economy. Indonesia provides a good example in this regard. While the Suharto regime and its cronies got richer and richer from dealing with foreign businesses, the majority of the people did not get to reap the benefits. Unless the market is truly opened up in the authoritarian states and private enterprise is allowed to flourish, the argument that Constructive Engagement and foreign investments bring economic benefits to the people rings hollow. Sanctions may not work too because there would always be other countries that are willing to trade with the rouge regime and circumvent the sanctions. Constructive Engagement advocates therefore argue that trade is the better alternative.

This view has some truth if the sanctioning country imposes the sanctions unilaterally and cannot get the support of the other major trading partners of the rouge country. If the sanctions are multilateral however, like in the case of South Africa, and especially if the rouge state's main trading partners are par-



ticipants, it is arguable that sanctions can work. On the other hand, it is also not true that Constructive Engagement with its emphasis on economic engagement will work better. All that it may ultimately accomplish is to sustain the authoritarian regime without weakening its grip on power, especially if the economic activity in the country is largely controlled by the regime and its cronies.

Constructive engagement keeps communication lines open

If any positive change is to be achieved, advocates of Constructive Engagement argue that a friendly dialogue must be maintained with the regime. Sanctions only provoke the regime unnecessarily and strengthen its resolve to cling on to power at all cost. It is unclear however whether persuasion has in fact worked. There has been only superficial change in the treatment of human right in Burma and China. It appears that even ASEAN is seeing divisions in its ranks over whether Constructive Engagement has worked. Thailand's proposal of "flexible engagement" which called for a tougher stance to be taken with Burma, met with resistance from the other ASEAN members (including Burma) and was dropped.²⁴ Indonesia can be cited once again as an example where dialogue did not work. Nonetheless, complete isolation is also not to be preferred. Instead, keeping communication lines open while not engaging the regime actively may well make it easier to start a real dialogue when the appropriate time arrives.

Economic development leads to political and legal reform

It has been argued that trade liberalization weakens the power of government and that the institutional infrastructure of a market system is supportive of personal freedom and good government. Free markets, based on private property and consent, encourage individual responsibility, social mobility, and tolerance, which are all associated with human rights and democracy. As Michael Novak writes : "The capitalist preference for law and due process leads naturally enough to the ... basic institutions of democracy: the rule of law, limited government, separated powers, and the protection of the rights of individuals and minorities."²⁵

Indonesia however is a case which defies the above theory. A free market for 30 years did nothing to change it from an authoritarian regime into a democracy with respect for human rights and the rule of law. An argument can be made though that Constructive Engagement and the economic development that it brings are more likely to lead to political reform by strengthening the hand of the moderates among the regime. Frequently, it is the moderates and progressives that push for economic liberalization. They are also likely to be more receptive to bringing about political changes which would include a better respect for human rights. If they are successful in bringing development to the



country and better the lives of the citizens as well as the leaders through the door of trade liberalization and a market economy, their influence in the ruling circle is likely to grow rather than diminish. They will then be in a better position to institute systemic political and social reform gradually in the country.

In this regard, I believe that Constructive Engagement is a better alternative to economic sanctions. No threat to the power of a regime can be more naked or direct than sanctions. A threat of sanctions is likely to breed a siege mentality among the leaders which will be fueled even more by the paranoia of the hardliners. There is also a danger that the hardliners will manipulate sanctions to cast the sanctioning country as an enemy of the people and rally the population around the regime. We can see this happening in Cuba and Iraq. States should therefore identify and support or cultivate discretely moderate leaders in the authoritarian regime who are most likely to champion reform if given the opportunity.

Constructive engagement strengthens the private sector

One argument that can be made for Constructive Engagement is that it nurtures the private sector of the authoritarian state, bringing about greater economic freedom and weakening of state control over the economic life of the people. A strong private sector will encourage the fostering of the institutional legal and political framework necessary to protect property, contractual rights and trade. In turn, these will lead to a civil society with greater respect for civil rights. It is also argued that greater private enterprise will lead to the development of a middle class which is more politically aware and willing to participate in the political process.

How true this argument is in reality is difficult to quantify. In China's case, even as the state was liberalizing the economy, its control over political life remains strong, and some would argue, even stronger. For example, the flood of foreign investments and the increasing number of private enterprises have not prevented the CCP from placing restrictions on Internet usage in the country, which belies the prediction of the flood of information that was expected to engulf China.

Culture

One reason that has been cited for ASEAN's adoption of Constructive Engagement with respect to Burma is culture. As one Malaysian foreign ministry official reportedly put it: "We prefer to do things quietly, the ASEAN way, so as to give face to the other side."²⁶ Cultural differences may influence the tack to take with a particular country. However, it can easily become a convenient excuse for carrying out one's own agenda, as is arguably the case with ASEAN's approach to Burma.



Geographic proximity

Another reason is geographic proximity. It is an unalterable fact of life for the ASEAN countries that Burma is part of the region. "We have to live with the problem" is a common refrain among ASEAN officials.²⁷ Geographic proximity means that problems in Burma can and do spill over into her neighbor's borders. Good neighborliness however does not mean that one has to stand by and watch as widespread human rights violations occur, especially since one's interests may be affected by the violations, such as in Thailand's case where refugees from Burma have spilled into the country.

Sanctions not a credible threat

Another reason why Constructive Engagement may be favored over sanctions is that isolation is not a credible threat to the repressive regime in Burma. It must be remembered that Burma had lived under self-imposed isolation for more than 30 years under General Ne Win. Isolation is therefore nothing new to the country. If sanctions were imposed, it is not hard to imagine that she would simply retreat into a shell and cut herself off from the rest of the world as she had done before.²⁸

Doctrine of non-interference

An important reason why the ASEAN countries went the way of Constructive Engagement is the doctrine of "non-interference" which the regional grouping had subscribed to from its very beginning. As Indonesian Foreign Minister Ali Alatas said in 1996 : "Asean has one cardinal rule, and that is not to interfere in the internal affairs of other countries. [The countries of the region] prefer to work quietly on issues of internal matters, and Western countries must realize that this [i.e. ASEAN] is our organization, not theirs."²⁹

ASEAN believes that how a government ruled its country and treated its citizens, even if there were effects on the other neighboring countries, were matters which were strictly "domestic" affairs. Also, none of the ASEAN members wanted their own affairs to be publicly scrutinized. By condemning Burma, it would have set an undesirable precedent for open criticism of one another's treatment of domestic matters. Non-interference is certainly no excuse for standing by and watching people die and suffer under an oppressive regime. Non-action, like an actionable omission, is arguably as culpable as active participation in the abuses.

Fear of reprisal

The ASEAN countries also claim that the junta will not give up power easily because it fears retribution by a vengeful civilian administration. One ASEAN official reportedly said: "The Western position sometimes is almost tantamount to telling Siorc to commit suicide. If you give them the choice that



the Western countries are doing -commit suicide or be isolated -of course they'll be isolated."³⁰ This is a problem that the international community has to deal with together with the people of the country ruled by the regime. Distasteful as it may seem, it may sometimes be better to find a way out for the repressive regime in order to persuade it to give up power rather than to force it to fight to the bitter end at enormous cost to everyone.

Constructive engagement legitimizes the illegitimate regime

One of the main arguments against Constructive Engagement is that it grants an aura of legitimacy to an otherwise illegitimate government. This is certainly the case in Burma where free and fair democratic elections were held and a government elected through that process. The military junta that seized power does not have the mandate of the people of Burma to govern. By engaging with the junta, the countries that do so are recognizing that it possesses the legitimacy to represent the interests of the Burmese people when it has none and perpetuates the myth of its legitimacy.

Gaining friends in the international community also means that the authoritarian regime has others to speak up on its behalf and lend a voice to protect its interests on the world stage. In gaining membership to ASEAN, the military junta in Burma gained the backing of a powerful regional grouping, particularly in its skirmishes with the Western nations. Sanctions may not solve the problem either. As already seen above, isolation may have little effect on a country like Burma. What is required is engagement with specific aims, such as humanitarian assistance, aid and limited economic activity that makes it clear that the regime is being dealt with because it holds the reins of power, not because it has the mandate to govern.

Wither constructive engagement?

The above analysis shows that Constructive Engagement is a seriously flawed approach to take with totalitarian regimes. On the other hand, sanctions are also unlikely in most cases to be effective in bringing about positive changes in a country and better treatment of human rights. What is required is an approach that steers a middle path between the two. With this in mind, I would propose the following. It is evident that isolation is counter-productive. It is necessary to maintain a limited dialogue with the regime. However, it must be made clear to the regime and the world that any dialogue with it is not to be interpreted as legitimizing it. It must be clear that contact is made with it not because it is the legitimate government of the country, but only because it is in power. The kind of indulgence shown to the Burmese regime by ASEAN must be firmly discouraged.

The country that seeks to engage the regime must also make it clear to the regime that it genuinely wishes to help the general population, and that human rights reforms, democracy and the rule of law will be beneficial to the



country. If the engaging country is a Western country, it must be especially careful as too often, well-intentioned Western governments end up lecturing the other country (which is likely to be a poorer, non-Western state) and provoking resentment, instead of trying to persuade and conduct a real dialogue where there is a frank and equal exchange of views. Trade and other economic activity should not be stopped completely as it hurts the people more than the regime. On the other hand, the kind of scramble that developed in the case of China and Burma should not be condoned as well. What is required is a concerted effort by the major trading partners of the rouge state to be selective about the kinds of trade and investments that they encourage.

One way of doing this is to encourage the regime to free up the economy to more private enterprise so that a true market economy develops. At the same time, the foreign companies could be encouraged to do more business with the private sector so that it can be nurtured and the state's economic controls weakened. Either general guidelines or a code of conduct could also be established for companies wishing to do business in the rouge state which encourages fair wages, good working conditions and contribution to the community, e.g. by helping to build schools and hospitals. Local talent should also be nurtured so that a middle class can develop. Participation in certain sectors, such as telecommunications, energy and transportation, is also likely to be more beneficial to the country than being involved in building defense installations.

Historical allies or neighbors of the rouge state can also help by acting as a form of mediator between the regime and those opposing it so that a peaceful transition to democracy and rule of law can take place. The ASEAN countries played such a role in Cambodia and there is no reason to believe why the same cannot be done in Burma.

Humanitarian assistance and development aid should not be stopped, although the granting of aid and its utilization should be more strictly scrutinized to ensure that the regime does not pocket the money. As things stand, it is clear that Constructive Engagement in its present form is unlikely to bring about changes in the near future. Neither are sanctions likely to be successful. If the above suggestions are adopted, I believe that respect for human rights and democracy will be more likely to emerge in the rouge states of the world.

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Part (B) In Review

(B . 1)

BURMA: Many Crises, No Response¹

LEAD: Under the ruling Junta, the Burmese people live with perpetual crises, whether related to the economy, politics, food or the environment. These have combined to create a situation of extreme poverty, lack of basic rights and increasingly deteriorating social conditions. People's organizations, which may constitute a part of civil society in the future, are underdeveloped, banned or persecuted by the Government. Rights are reserved only for the military elite and their cronies, while the most vulnerable citizens are disproportionately affected by crises and disaster.

Burma Lawyers' Council

As a result of 47 years of misguided policies, oppression and corruption by the ruling State Peace and Development Council (SPDC), the current global crises that are affecting financial markets, the availability of basic goods and the environment have hit the Burmese faster and harder than other peoples around the world.

Late in 2006, with the annual per capita income at around USD 300, the cost of basic food commodities rose in Burma between 30 and 40% – a tremendous threat for people who spend 70% of their income on food.² In August 2007, the Government reduced fuel subsidies, leading to gas price increases. Many people could not even travel to work. As the price of basic goods increased another four to five times, widespread peaceful protests led by Buddhist monks and the vestiges of Burmese civil society broke out across the country. In response, the Government brutally cracked down, firing into unarmed crowds and ransacking monasteries at night. Nearly 2,000 civilians were taken as political prisoners.³ Participants were sentenced to long prison terms.

Then, in May 2008, the Government failed to provide warning about the impending landfall of Cyclone Nargis, which struck the Irrawaddy Delta with devastating force. An estimated 140,000 people died in the immediate aftermath, while the disaster directly affected at least 3.4 million. The Government refused aid workers entry into the most devastated regions and closed aid camps for displaced citizens, forcing them to return to flood-stricken areas without



food, water, shelter or medical care.⁴ The SPDC also repackaged foreign aid deliveries to make it seem that the Government was the donor. Amnesty International expressed concern that the Government was using its citizens' suffering in the wake of the cyclone to tighten its grip and expand the reach of its forced labour programmes among a population lacking basic necessities.⁵

In the same month, the Government held a discredited referendum on the new constitution, taking advantage of the displacement of cyclone victims. Many of the victims could not vote either in the originally scheduled 10 May balloting or in the additional voting held on 24 May on the pretext of accommodating displaced voters. Reports also note that government officials exchanged foreign aid packages for votes and labour.⁶

The current global financial, environmental and food crises have intensified the hardships that the Burmese were already suffering. In the face of this dire situation, however, the SPDC has shown no willingness to change its policies or system of governance.

The financial crisis

Burma has long suffered internal domestic financial crises. Inflation in basic commodity prices, including food and fuel, led to widespread protests because individuals could no longer afford these goods and because the price increases translated into job losses. Furthermore, the credit crunch has indirectly affected workers by depressing investment in domestic industries. The market for consumer or small business credit is functionally non-existent. At its heart, the development of a free market economy in the country is a myth, and the right to develop industries is reserved for the ruling Junta, their families and their cronies.⁷

Additionally, the SPDC's misuse of the nation's funds for increased military spending continues to have serious consequences for the poorest and most desperate. While the Government was unable to support its citizens in the aftermath of the cyclone without significant foreign aid, it spends nearly half of its budget on the military.

The global financial crisis has worsened the economic reality of the country. The fishing, mining, garment, food processing and advertising industries, for instance, have all suffered.⁸ Burmese living abroad are also financially distressed and thus unable to send as much money back to their families as they did before. Developed countries' demand for goods from factories where Burmese migrants work has decreased, both lowering the availability of jobs for migrant workers and increasing abuse as employers attempt to maximize profit margins.⁹



The environmental crisis

There is increasing environmental degradation as the SPDC is putting on sale the rights to domestic resources, both mineral and biological. Burma's neighbours, along with a compliant Government, exploit the country's natural resources without attention to the environmental and cultural consequences. In Kachin state, Chinese loggers are currently extracting wood without considering either the short- or long-term impact, without employing Burmese workers and without providing any stimulus to the local economy.¹⁰ Similarly, the SPDC has long sold rights to Burma's rich mineral reserves, including gold and gems, without any regulatory oversight of the effects on the environment.

Over the past two decades, Burma has suffered from one of the highest rates of deforestation, losing close to 20% of its forests.¹¹ This has occurred despite warnings of widespread environmental damage when development ignores the interdependence of ecosystems.¹² A number of large dams that are currently being planned and constructed on Burma's major rivers by Chinese, Indian and Thai corporations and governments threaten the country's biodiversity.¹³ The financial benefit goes to the military leaders, while the harm is suffered by the people.

The food crisis

The global food crisis has directly affected Burma, where for decades people have been suffering a localized, domestic alimentary crisis, including a dramatic reduction in protein.¹⁴ While Burma is technically a "food surplus" country because it produces more food than it consumes, inadequate distribution schemes have left the population severely malnourished, with 32% of children underweight.¹⁵ Much of the population is at high risk of food shortages when natural disasters and environmental incidents are poorly managed, illustrated by the aftermath of Cyclone Nargis. In Chin state, a recent plague of rats placed 100,000 people at risk of starvation, yet the Government provided no aid.¹⁶

Crisis in education

Burmese funding for education, both as a percentage of GDP and in absolute numbers, ranks towards the very bottom globally at a mere 1.2% of GDP (CIA 2009). Nationally, only about one-third of students who enter primary or secondary schools finish the full curriculum.¹⁷

Political crisis

Overarching all the other factors is the broken political system. The SPDC and its predecessor dictators have refused to allow a true transition to



democracy, despite the steep decline of the country since the military seized power. The regime's "Seven-Step Road to Democracy" is widely viewed as a seven-step road to permanent military entrenchment. Among other points, the new constitution reinforces the military's unlimited control over government operations, fails to provide for an independent judiciary and lacks meaningful human rights protections.¹⁸ A number of prominent political groups, such as the National League for Democracy (NLD), the New Mon State Party, the Mon National Democratic Front and the Kachin Independence Organization, refused to participate in the constitutional referendum. Key opposition groups, led by the NLD, plan to boycott the upcoming 2010 election.

In addition, among military ranks a potential crisis is brewing between the SPDC and the United Wa State Army (USWA), which controls part of the Shan State. Although the groups agreed on a ceasefire in 1989, the USWA rejected the order to disarm and become a government-controlled militia. The USWA has been printing official documents as "Government of Wa State, Special Autonomous Region, Union of Myanmar", and have stated that it will neither disarm nor participate in the 2010 elections unless this status is granted.¹⁹

The SPDC's continued arrests and detention of anyone who dares to criticize government policy is a clear indicator of its unwillingness to allow meaningful change in the political sphere. In the past year, the house arrest of Daw Aung San Suu Kyi, Nobel Laureate and democratically elected leader, was extended. Popular Burmese comedian and social commentator Zaganar was sentenced to 45 years in prison for his criticism of the Government's response to Cyclone Nargis. Currently, there are an estimated 2,100 political prisoners.²⁰

People's organizations and the fight for economic, social, cultural and gender rights

In times of crisis, civil society organizations are crucial in providing relief and an alternative voice to help solve a nation's most pressing problems. In Burma, however, such organizations are underdeveloped, banned or persecuted by the SPDC. The prominent groups that are allowed to exist merely help to prop up the military. For example, the Auxiliary Fire Squad primarily serves as an anti-riot force. Likewise, government-sanctioned women's groups promote government policy rather than lobby to change it. While some community-based organizations do exist, they must receive government permission to undertake any activity.²¹ Furthermore, members of organizations found to have done something "unlawful", which often merely means opposing the government, are often punished.²²



Conclusion

Under the ruling Junta, the Burmese people live with perpetual crises, whether economic, political or environmental. In recent years, these crises have frequently served to fuel one another and to perpetuate a harmful status quo. In response, the Government increases its crackdowns and arrests and refuses to provide any form of safety net to its citizens. It has created a country with rights reserved only for its military elite and their cronies, while the most vulnerable citizens are disproportionately affected by crises and disaster.

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(B . 2)



Mr. Tomas Ojea Quintana
Special Rapporteur on the Situation
Of Human Rights in Myanmar

November 18, 2009

Urgent: The Activities of the Special Rapporteur on the Situation in Burma, including Endorsing the 2008 Constitution and the 2010 Election, are Inconsistent with the Obligations Erga Omnes of the United Nations

Dear Mr. Quintana,

The Global Justice Center (GJC) and the Burma Lawyer's Council (BLC)¹ acknowledge the dedicated efforts of the various Special Rapporteurs on the Situation of Human Rights in Myanmar. Central to the mandate of your office is furthering the international human rights and humanitarian precepts under the UN Charter. The human rights initiatives that currently frame your interaction with the military rulers of Burma are based on fully embracing the Constitution of the Republic of the Union of Myanmar (2008) (hereinafter the 2008 constitution).² We are writing this letter as a matter of urgency to alert you to the fact that by supporting the 2008 constitution, which facilitates Burma's serious and continuing breaches of peremptory norms, you are at risk of violating your mandate. Any acceptance of the 2008 constitution violates jus cogens rules³ and the UN's established policy⁴ since the constitution embodies permanent amnesties and other serious breaches in violation of Common Article 3 of the Geneva Conventions.

The GJC and the BLC are deeply concerned that your office, one of the United Nations' key "standard bearers", is compromised by your continuing support of the 2008 constitution and the 2010 elections. Any official contact between your office and the Burmese military leaders should address the serious breaches detailed in this letter. To do otherwise puts the Human Rights Council and your office at risk of perpetuating the government's breaches.⁵

Therefore we respectfully request that you cease any activities, such as an endorsement of the 2008 constitution, which would violate international law. Although we recognize this letter is written close to your November 22, 2009 trip to Burma, we recommend that you use this trip to lay the groundwork for



taking positive action to address impunity in Burma. We urge your office and the Human Rights Council to immediately consult with the Under-Secretary-General for Legal Affairs on how to ensure that your mandate activities are in conformance with jus cogens rules. Such compliance requires, at a minimum, that you retract your endorsement of the 2008 constitution, particularly in light of the Secretary-General finding Burma in violation of SCR 1820, which precludes any amnesties for sexual violence against ethnic women in conflict.⁶

I. The serious legal breaches embodied in the 2008 constitution impose a duty of non-recognition on the Special Rapporteur

The 2008 constitution breaches international humanitarian law and repudiates most, if not all, of Burma's existing treaty obligations.⁷ Your March 11 Report calls for "a review of national legislation in accordance with the new constitution..."⁸ This support of the 2008 constitution violates the duty of nonrecognition, given that the constitution embodies serious breaches of peremptory norms. The Security Council applied this jus cogens rule in 1984, when it called on States and the United Nations not to recognize the apartheid constitution of South Africa and any elections arising out of it declaring them "null and void."⁹

A. Complete amnesties for jus cogens crimes

Chief Justice U Aung Toe, working hand-in-hand with Senior General Than Shwe, drafted the constitution in his own words to ensure that "Tatmadaw (the military) [were given] the leading political role in the future of the state..."¹⁰ The 2008 constitution grants permanent amnesties for the crimes of government military leaders and their agents.¹¹ Civilian and military courts are prohibited from prosecuting those Tatmadaw (military) civilians or officials who are perpetrators of jus cogens crimes including genocide, war crimes and crimes against humanity.¹² Victims, including ethnic women systematically subjected to sexual assault in conflict areas, are forever precluded from seeking any remedies or reparations for their injuries, including civil damages, in violation of international law.¹³

This amnesty provision in the 2008 constitution violates Burma's nontransgressible obligations under the Genocide and Geneva Conventions and customary international law, as well as Security Council Resolutions 1674, 1612, 1325 and 1820.¹⁴

B. The Repudiation of Common Article 3 of the Geneva Conventions

A second serious breach of peremptory norms is that the 2008 constitution is constructed in such a way as to insulate the military and police from any oversight



by the executive, judicial, or legislative branches.¹⁵ All crimes by the military and police, including crimes perpetrated by active military officers serving as parliamentarians or in the civil service, fall outside of all civilian courts. Further, military court defendants, including those brought before military tribunals, are not entitled to any appellate or constitutional review by the Supreme or Constitutional Courts. The 2008 constitution entrenches the power of the non-elected, unaccountable, and perpetually male Commander-in-Chief, including declaring his decisions over all legal matters involving the military "final and conclusive."¹⁶

Common Article 3, supplemented by Additional Protocol II of the Geneva Conventions, mandates Burma to provide courts for protected persons with "essential guarantees of independence and impartiality" that "[afford] all the judicial guarantees which are recognized as indispensable by civilized peoples."¹⁷ The 2008 constitution, which does the opposite, is a formal repudiation of the Geneva Conventions and constitutes a serious breach of peremptory norms.¹⁸

Further, the 2008 constitution turns the very concept of lustration or vetting on its head. For example, the judicial qualifications ensure that the majority of judges who are "qualified" to fill the seats on the Supreme and Constitutional Courts are the same judges who are potentially culpable of the most heinous crimes. Security Council Resolutions 1820, 1888 and the Secretary-General's report on 1820 collectively recognize that without vetting any mandates on judicial reform are meaningless.¹⁹

II. Actions of the Special Rapporteur must be in conformity with existing obligations erga omnes of the United Nations

A. Geneva Conventions

Burma is a country in internal armed conflict and has for over twenty years committed systematic and major violations of the Geneva Conventions. These violations evoke Article 1 obligations on all States and the United Nations to take measures both "to respect and ensure respect" for the Geneva Conventions.²⁰ This duty was called upon by the International Committee of the Red Cross (ICRC) in its "public condemnation" of Burma (a step taken less than four times in its history) on June 29, 2007, reminding "all States party to the Geneva Conventions of their obligation, under Article 1, to respect and to ensure respect for the Conventions."²¹

B. The "obligation of means" to prevent genocide in Burma

The Genocide Convention, which Burma ratified in 1956, obligates State Parties to take measures "to prevent" genocide independent from punishing the actual



crimes of genocide. States' and the United Nations' obligations erga omnes are now triggered due to three factors: Burma is deemed "at risk" of genocide,²² Burma is included as a State being monitored by the UN Special Advisor on the Prevention of Genocide,²³ and the Special Advisor has initiated at least one confidential Security Council briefing regarding the military targeting Burma's ethnic civilian populations.²⁴

III. The United Nations must seek to end the impunity of the top war criminals in Burma including Chief Justice U Aung Toe

The Special Rapporteur's assertion that the 2008 constitution furthers judicial independence is inaccurate given that the constitution consolidates military power and structurally removes judicial independence. Chief Justice U Aung Toe is himself culpable of crimes against humanity and war crimes, including many counts of first degree murder for the deaths in prison of persons wrongfully imprisoned, as well as torture, gross medical neglect, rape and forced labor.²⁵

Additionally, Chief Justice U Aung Toe has perpetrated intentional breaches of international law in his capacity as sitting Chief Justice and in his capacity as Chair of the National Convention Working Committee since 1992, Chair of the Commission for Drafting the State Constitution beginning in 2007, and Chair of the Commission for Holding Referendum for the Approval of the Draft Constitution of the Republic of the Union of Myanmar in 2008.²⁶

Under the firm leadership of Chief Justice U Aung Toe, the judiciary in Burma has become a critical criminal arm of the military.²⁷ The "rule of law" in Burma is one where judges routinely commit heinous crimes, including murder, by "means of court order." The judges in Burma perpetrate heinous crimes exactly as did judges in the regimes of Adolf Hitler,²⁸ Emperor Hirohito,²⁹ and Saddam Hussein³⁰ who were subsequently convicted of war crimes and crimes against humanity. The decisions in those cases rested on sham trials that handed down predetermined guilty findings accompanied by draconian prison sentences. All of the above is equally applicable to Burma.³¹

Notably, it was stated in the Justice Case during the Nuremberg Tribunals that "If the evidence cited supra does not demonstrate the utter destruction of judicial independence and impartiality, then we 'never writ nor no man ever' proved."³² The same can equally be said of Burma.

In the March 11 Report, the Special Rapporteur states that the crime of Daw Pone Na Mee (dae Mya Nyunt), an 84 year old crippled nun, was unknown. We note for the public record that Daw Pone Na Mee was convicted by Judge U Pyein Tun Aung on October 23, 2008 of pornography; a court order designed to both eliminate and humiliate her.³³



IV. The 2008 Constitution embeds permanent gender inequality and repudiates CEDAW

The March 11 Report commends Myanmar as a party to CEDAW³⁴ and encourages the government to implement the Committee's concluding recommendations on gender balance.³⁵ However, the 2008 constitution, embedding what constitutes de jure and de facto gender apartheid,³⁶ is a repudiation of Burma's CEDAW obligations.

Women are not allowed in the military except in honorary positions, and thus are precluded under the constitution from ever holding the top government offices, which are reserved for active military. This includes Commander-in-Chief, several ministries, and 25% of all parliamentary seats. Further this "military experience" qualification effectively makes women ineligible for both the Presidency and/or Vice Presidency.³⁷ No other constitution in modern history explicitly declares women as second-class citizens. This factor has been the focus of protests to the Secretary General by US Congresswomen and others.³⁸

We strongly urge you to use your mandate to address the illegality of the 2008 constitution rather than endorsing it and further legitimizing Burma's ongoing violations of peremptory norms.

Sincerely,

President
Global Justice Center

General Secretary
Burma Lawyers' Council

Cc: H.E. Mr. Alex Van Meeuwen, President of the Human Rights Council; Ms. Patricia O'Brien, Under-Secretary-General for Legal Affairs; Ms. Navanethem Pillay, UN High Commissioner for Human Rights; Mr. Ibrahim Gambari, Special Advisor to the Secretary-General; Sisi Shahidzadeh, Assistant to the Special Rapporteur; Stuart Groves, Senior Security Manager and Security Focal Point; Hannah Wu, Human Rights Officer, OHCHR Regional Office for South-East Asia

(Endnotes)

¹ The Global Justice Center is a human rights organization focused on the enforcement of international humanitarian and human rights law. The Burma Lawyers' Council, the legal arm of the Burma democracy movement, publishes extensively on Burma's military regime and the history of constitutionalism in Burma. Both organizations are internationally recognized for



their expertise on Burma and regularly brief civil society groups, United Nations bodies, and governments on issues involving Burma and international law.

² Special Rapporteur on the Situation of Human Rights in Myanmar, Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Tomas Ojea Quintana, U.N. Doc. A/HRC/10/19 at 2 (Mar. 11, 2009) [hereinafter Special Rapporteur's Report] (Noting that one of the four core human rights elements includes "a review of national legislation in accordance with the new Constitution and international obligations....").

³ See Draft Articles on Responsibility of States for Internationally Wrongful Acts in Report of the International Law Commission on the Work of its Fifty-Third Session, art. 40, 41 U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (Nov. 2001) [hereinafter ILC Draft Articles] ("No State shall recognise as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation."). While the Draft Articles are addressed to states, the obligations of non-recognition outlined in Article 40 and 41 regarding serious breaches of peremptory norms have long been recognized as applying to the UN and other organizations. See S.C. Res.554, ¶ 5, U.N.Doc. S/RES/556 (Aug. 17, 1984) (urging "all Governments and organizations not to accord recognition to the results of the so-called 'elections' and to take appropriate action, in cooperation with the United Nations...to assist the oppressed people of South Africa in their legitimate struggle for a non-racial, democratic society...."). See also Mac Darrow & Louise Arbour, *The Pillar of Glass: Human Rights in the Development Operations of the United Nations*, 103 AM. J. INT'L L. 446, 473 (2009) ("The acceptance of human rights obligations enjoying the status of jus cogens conforms with the views of the International Law Commission that peremptory norms of international law apply to international organizations as well as to states, on the basis that states cannot avoid compliance with such norms by creating international organizations."). Furthermore, under Common Article 1 of the Geneva Conventions, all States undertake to "ensure respect for the present Convention in all circumstances." Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 1, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. This article, which applies to internal conflict, has been found by the International Court of Justice to constitute part of the "intransgressible principles of international customary law." *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 at ¶220 (June 27); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 95 at ¶79 (July 8).

⁴ See Address by Ms. Navanethem Pillay, United Nations High Commissioner for Human Rights at the Annual Conference, FDFA Political Affairs Division IV, Human Security (Oct. 15, 2009) ("The growing acceptance of the compatibility of peace and justice is reflected in current international law and UN policy on amnesties. Amnesties are impermissible if they prevent prosecution of individuals who may be criminally responsible for war crimes, genocide, crimes against humanity, and gross violations of human rights.") See also Opening Statement of Patricia O'Brien, UN Under-Secretary-General for Legal Affairs, at the 36th Meeting of the Committee of Legal Advisers on Public International Law (Oct. 7, 2008) ("The UN does not recognize any amnesty for genocide, crimes against humanity, war crimes and other serious violations of international Humanitarian law.").

⁵ See Mac Darrow & Louise Arbour, *The Pillar of Glass: Human Rights in the Development Operations of the United Nations*, 103 AM. J. INT'L L. 446, 448 (2009). (Noting the human rights issues raised when members of the UNDP were eyewitnesses to government-perpetrated killings of monks in Myanmar in 2007).

⁶ Security Council Resolution 1820 "stresses the need for the exclusion of sexual violence crimes from amnesty provisions in the context of conflict resolution processes, and calls upon Member States to comply with their obligations for prosecuting persons responsible for such acts, to ensure that all victims of sexual violence, particularly women and girls, have equal protection under the law and equal access to justice...." S.C. Res. 1820, ¶ 4, U.N. Doc. S/RES/1820 (June 19, 2008). Nonetheless, the Myanmar constitution provides for such amnesties.



Constitution of the Republic of the Union of Myanmar (2008) art. 445 [hereinafter Myanmar Constitution] ("No proceedings shall be instituted against the said Councils or any member thereof or any member of the Government, in respect of any act done in the execution of their respective duties.").

⁷ Burma ratified the Geneva Conventions on August 25, 1992, the Genocide Conventions on March 14, 1956, the Convention on the Rights of the Child on July 15, 1991, and the Convention on the Elimination of all Discrimination against Women (CEDAW) on July 22, 1997. See United Nations Treaty Collection, <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>.

⁸ Special Rapporteur's Report, *supra* note 2, at 2.

⁹ S.C. Res.554, ¶ 5, U.N.Doc. S/RES/556 (Aug. 17, 1984) (calling for non-recognition of the 1983 constitution in apartheid South Africa due to its serious breaches).

¹⁰ Reuters, New Myanmar Constitution Gives Military Leading Role, Feb. 19, 2008, <http://www.reuters.com/article/worldNews/idUSBK10184120080219?feedType=RSS&feedName=worldNews>.

¹¹ Myanmar Constitution, *supra* note 6, at art. 445.

¹² *Id.*

¹³ See The Secretary-General, Report of the Secretary-General Pursuant to Security Council Resolution 1820 (2008), ¶29, U.N. Doc. S/2009/363 (Aug. 20, 2009); Basic Principles and Guidelines on the Right to A Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, U.N. Doc. A/RES/60/147 (Mar. 21 2006).

¹⁴ See S.C. Res.1325, ¶11, U.N. Doc. S/RES/1325 (Oct. 30, 2000); S.C. Res. 1674, U.N. Doc. S/RES/1674 (Apr. 28, 2006); S.C. Res. 1820, ¶ 4, U.N. Doc. S/RES/1820 (June 19, 2008).

¹⁵ The constitution states that "In the adjudication of Military Justice...the decision of the Commander-in-Chief is final and conclusive." Myanmar Constitution, *supra* note 6, at art. 343. It further provides that "The Commander-in-Chief of the Defense Services to whom the sovereign power has been transferred shall have the right to exercise the powers of legislature, executive and judiciary." *Id.* at art. 419. Note, this is a divergence even from Myanmar's previous constitutions. Under the 1947 constitution the president was the chief executive, there was no parallel military government, and all law-making power was vested in the Parliament, even in times of war. The Constitution of the Union of Burma (1947) art. 59, 90, 94. In direct contrast to the 2008 constitution, the Supreme Court's jurisdiction could not be removed on matters regarding the constitution and decisions of the Supreme Court. *Id.* at art. 138; Myanmar Constitution, *supra* note 6, at art. 343. The 1974 constitution, even though enacted when Burma was under military rule, did not establish separate military power. The Constitution of the Socialist Republic of Burma (1974) art. 65, 66. The president, also Chair of the Council of State, was supreme over the military, the judiciary retained jurisdiction over military matters, and the parliament had the power to declare war. *Id.* at art. 13, 49, 105.

¹⁶ Myanmar Constitution, *supra* note 6, at art. 343.

¹⁷ Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Conventions]; see generally International Committee of the Red Cross Advisory Service on International Humanitarian Law, National Enforcement of International Humanitarian Law: Information Kit, Criminal Procedure, Dec. 31, 2003.

¹⁸ *Id.*

¹⁹ See 1820 Report, *supra* note 15 at ¶26 ("States must ensure that vetting processes exclude persons against whom there are credible allegations, and evidence of crimes, including sexual crimes; such persons should also be excluded from public institutions, including integrated



armed forces."). See also SCR 1820, *supra* note 7 at ¶ 3; S.C. Res. 1888, ¶ 3, U.N. Doc. S/RES/1888 (Sept. 30, 2009);

²⁰ Geneva Conventions, *supra* note 18, at art. 1.

²¹ Jakob Kellenberger of the ICRC urged, "the government of Myanmar to put a stop to all violations of international humanitarian law and to ensure that they do not recur." See Press Release, International Committee of the Red Cross, Myanmar: ICRC denounces major and repeated violations of international humanitarian law (June 29, 2007) (on file with the ICRC), available at http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/myanmarnews290607?OpenDocument&style=custo_print.

²² Global indices on genocide placed Burma as eight on the red alert states at risk of genocide. See Genocide Prevention Project, Mass Atrocity Red Alert, <http://www.preventorprotect.org/overview/watch-list.html> (last visited Oct. 21, 2009). The ICJ has asserted that states have obligations to prevent genocide where such a risk exists. See Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 91, 155 (Feb. 26).

²³ See UN Report from the Special Advisor on Genocide Prevention, Feb. 16, 2006, <http://www.ushmm.org/genocide/analysis/details.php?content=2006-02-16> ("I can say that I am following the situations in various countries and in some cases, I have already written notes to the Secretary-General, and through him to the Security Council. Those are Darfur, Ivory Coast and the Democratic Republic of the Congo, but in other cases short of going to the Security Council, we have made our concerns known via the Secretariat, and they include, as I said, Colombia, but also Burma, with the situation of indigenous populations that have been in armed conflict with the government of Burma—there have been intrusions also—but recently, the government has acted militarily against them, and apparently affected the civilian population....").

²⁴ In the briefing on December 16, 2005, the Council was informed that the allegations of core crimes in Burma appeared to "[affect] particular ethnic and national groups...and that under the prevailing circumstances in Myanmar, civilian populations may be identified as enemies or as sympathetic to enemies, solely on the basis of their ethnicity." See Jared Genser, Op-Ed, The question of genocide in Burma, *Burma Digest*, Mar. 20, 2006, <http://burmadigest.info/2006/03/20/the-question-of-genocide-in-burma-2/> (quoting U.N. Under-Secretary Ibrahim Gambari's private briefing to the Security Council on December 16, 2005).

²⁵ See Assistance Association for Political Prisoners, *Eight Seconds of Silence: The Death of Democracy Activists Behind Bars*, May 2006.

²⁶ See, Union of Myanmar Convening Commission for National Convention Letter No.3/Convention/1-Sa ma of December 1, 1992 on Formation of the Working Committee, *Working People Daily*, Dec 1, 1992; See also State Peace and Development Council of the Union of Myanmar, announcement No. 2/2007 issued as Commission for Drafting State Constitution formed, Oct 18, 2007, *Working People Daily*, Oct 18, 2007.

²⁷ See report by Asia Watch stating that sixty-two judges were reportedly deprived of office in 1989 after failing to comply with SLORC instructions to sentence political dissidents to prison terms longer than those permissible than in the prescribed laws. Asia Watch, *Human Rights in Burma* 12 (1990).

²⁸ See *The Justice Case*, 3 Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10, at 1024 (1951) [hereinafter *The Justice Case*].

²⁹ Japanese judges were convicted of war crimes for using false trials to convict and execute American Prisoners of War. See *Isayama trials*, *supra* note 3; *Hisakasu Trials*, *supra* note 3.

³⁰ The Iraqi High Tribunal found Judge Awad Hamed al-Bandar jointly criminally liable for crimes against humanity committed with Saddam Hussein because he used the pretense of judicial "authority and law" to try and then execute civilians. Under the leadership of Awad



Hamad Al Bandar, the court had issued an execution verdict against defendants after a period of only 17 days during a single session. See *al-Dujail Opinion*, *supra* note 3.

³¹ See Assistance Association for Political Prisoners, *The Darkness We See: Torture in Burma's Interrogation Centers and Prisons*, Dec. 2005.

³² *The Justice Case*, *supra* note 29, at 1024 ("In view of the conclusive proof of the sinister influences, which were in constant interplay between Hitler, his Ministers, the Ministry of Justice, the Party, the Gestapo, and the courts, we see no merit in the suggestion that Nazi judges are entitled to the benefit of the Anglo-American doctrine of judicial immunity. The doctrine that judges are not personally liable for their judicial actions is based on the concept of an independent judiciary administering impartial justice. Furthermore, it has never prevented the prosecution of a judge for malfeasance in office.") (emphasis added).

³³ See attachment 1

³⁴ Special Rapporteur's Report, *supra* note 2, at ¶14.

³⁵ *Id.*, at ¶15.

³⁶ Committee on the Elimination of Discrimination against Women (CEDAW Committee), *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Myanmar*, U.N. Doc. CEDAW/C/MMR/CO/3 (Nov. 7, 2008).

³⁷ Myanmar Constitution, *supra* note 6, at art. 190.

³⁸ See Letter from the Senate Women's Caucus on Burma to Secretary-General Ban Ki-moon, Apr. 9, 2009, available at http://feinstein.senate.gov/public/index.cfm?FuseAction=NewsRoom.PressReleases&ContentRecord_id=a5d1f98e-5056-8059-7692-63bda7b74dac&Region_id=&Issue_id=; Letter from the Global Justice Center and SALT to Secretary-General Ban Ki-moon (on file with the author), Mar. 4, 2009, available at <http://www.globaljusticecenter.net/projects/burma/petition.html>; Letter from the Women's League of Burma to Secretary-General Ban Ki-moon, Aug. 7, 2009.

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(B . 3)

ASEAN Snubs Civil Society Groups, Dashes Hopes for Effective Human Rights Mechanism

By Andrea Gittleman, BLC Volunteer

All eyes were on Cha-Am, Thailand on October 23, 2009, when Association of Southeast Asian Nations (ASEAN) leaders met to inaugurate the ASEAN Intergovernmental Commission on Human Rights (AICHR). The Commission is fraught with serious problems such as a lack of independence from member states – Burma’s representative to the AICHR, for example, staunchly defends the military regime and its dismal human rights record. The AICHR also adheres to a non-interference policy, promotes “promotion” as opposed to protection of human rights, and has no enforcement powers. Despite these obstacles, human rights groups in the region were hopeful that input from civil society would help to give teeth to the fledgling AICHR.

Civil society groups from ASEAN member states met on October 18-20 at the 2nd ASEAN Peoples’ Forum (APF) to advocate for a more people-centered regional body and to generate recommendations for human rights protection in the region. Representatives from human rights, environmental protection, and political security organizations throughout Southeast Asia compiled recommendations to ASEAN regarding its human rights body, and submitted a formal statement to regional leaders. The advocates called for the AICHR to include a mechanism that would conduct country visits, handle complaints of human rights violations, and provide recourse for violations in the region. Specifically, human rights leaders called for an end to ASEAN’s “culture of non-interference,” which keeps regional actors from protecting human rights in member states.

Participants at the APF chose one civil society delegate from each member country to have a formal meeting with ASEAN leaders. The last time such an interface was arranged between civil society groups and government officials, the leaders from Burma and Cambodia refused to meet with their country’s civil society delegates. While that meeting went ahead without the participation of civil society from those two countries, ASEAN leaders were even more emboldened during last week’s interface. Leaders from Burma, Cambodia, Laos, Philippines, and Singapore each rejected the civil society delegates chosen for the interface, and Burma and Singapore both substituted hand-picked delegates to attend the meeting instead. Representatives from other countries were admitted but were not allowed to speak during the supposed



“dialogue.” The civil society delegates from Thailand, Indonesia, and Malaysia walked out of the meeting in protest.

These five governments’ rejection of civil society representatives demonstrates the regional body’s indifference to substantive dialogue with human rights advocates. The refusal to meet with human rights leaders is a shocking repudiation of ASEAN’s supposed commitment to promoting and protecting human rights in Southeast Asia. Perhaps more infuriating, although not entirely surprising, is the Burmese government’s submission of its own loyal members to the APF with the sole purpose of derailing human rights discussion before it even reached the level of the ASEAN leaders. These junta-backed individuals falsely represented themselves as Burmese civil society groups, and urged APF attendees to remove all discussion of Burma from ASEAN’s agenda. They claimed that abuses in Burma were internal matters that did not impact regional security, an argument that was soundly refuted by human rights leaders from the Thai/Burma border. Because the APF generates its statements to ASEAN leaders on the basis of consensus of all attendees, the mere presence of government-backed individuals threatened to keep Burmese issues off the table. Human rights activists in Southeast Asia face serious obstacles when states not only ignore their concerns, but also actively attempt to suppress discussion of governmental abuses.

ASEAN’s dismissal of the concerns of human rights groups in Southeast Asia does not bode well for the formation of an effective, powerful human rights mechanism in the region. Without the input from advocates working on myriad human rights issues, the resulting AICHR will not end serious violations of human rights nor bring any perpetrators to justice. Victims of human rights abuses deserve meaningful redress. For their sake, ASEAN leaders should heed the advice of civil society groups and establish a commission that will not hesitate to tackle the serious human rights abuses in the region.

(This article was also published on Human Rights Brief Blog, available at <http://hrbrief.org/perspectives-in-practice/c1>.)

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**Part (C)
Ethnic Issue**

(C . 1)

**Burma and National Reconciliation: Ethnic
Conflict and State-Society Dysfunction**

*Chao-Tzang Yawnghwe**

It is maintained that Burma's 'ethnic conflict' is not per se ethnic, nor that of the kind faced by indigenous peoples of, for example, North America, but a conflict rooted in politics. Following the collapse of Burma's General Ne Win's military-socialist regime in 1988, the issue of ethnic conflict has attracted the attention from both observers and protagonists. This attention became heightened following the unraveling of the socialist bloc and the emergence of ethnic wars in those hitherto (presumed) stable socialist nation-states.

Introduction: The Problem of State-Society Dysfunction

The ethnic resistance movements in Burma were previously perceived by most observers as insurgencies by disgruntled tribal isolates fighting against the modernizing and unifying state. Especially following the emergence of new nation-states in the 1950s, political scientists cheered for the new leaders of these countries and their attempts to 'modernize' their 'backward' societies. Resistance of societal segments, especially ethnic groups, to the state was frowned upon as obstructing the laudable nation and state-building efforts of the modern state and its leaders. The ethnic conflict problem was not seen as integral to the larger, more basic problem of disjunction. This was especially the case after 1962, between the military-monopolized state and the society at large. That there was dysfunction in state-society relations in Burma is now recognized, but the ethnic dimension of state-society dysfunction has never been fully appreciated. This insight is critical for those seeking to gain a clear understanding of Burma's current crisis. The conflict in Burma is deep-rooted. Solutions can only be found if the real issues of conflict are examined, such as territory, resources and nationality, rather than the previously accepted but superficial explanations.

When resistance of societal segments is considered obstructive, especially when these segments are ethnic-based, it constitutes an important dimension of state-society dysfunction. The need for national integration in Burma



is inarguable. The problem is how it is to be defined and achieved. Integration has both vertical and horizontal dimensions, i.e. between state and society, and between the different elements of a society. Attempts at national integration ignoring these dimensions are likely to divide rather than unite. Ethnic resistance was condemned by leaders and governments of postcolonial states, and likewise by their respective former foreign patrons, as reactionary tribal holdouts.

Often, ethnic resistance was portrayed by ruling regimes as instruments of external, 'imperialist' powers or agents. Contributing to the confusion was a situation where cold-war protagonists were encouraging ethnic discontent and rebellion in order to destabilize the state of the rival power.

Ethnic Conflict in Burma: Some Basic Definitions

Even today, when it is recognized that the various 'ethnic rebellions' form a part of Burma's state-society dysfunction, there remains some confusion regarding the nature of ethnic conflict. One current perspective sees the ethnic conflict in Burma in terms of ethnic minorities fighting for democratic rights or cultural-identity rights, or equal opportunity, like the African-American and other minorities in the United States. Even Burma's ethnic non-Burman¹ groups and leaders, at least some of them, have been drawn into the "minority rights, equal opportunity" paradigm. Some ethnic leaders and activists have even defined themselves as 'indigenous people', although this term refers to native people or aboriginals marginalized and displaced by white settlers. The use of the term 'indigenous people' in the Burma context is odd because all ethnic segments, including the Burmans or ethnic Burmese, are indigenous in the sense that they are all native to Burma.

The ethnic non-Burman segments of Burma, especially the Shan, Kachin, Karenni, Chin, and Rakhine, are neither ethnic minorities nor indigenous peoples. As will be clarified below, they (like the Burmans) are peoples or nations. They moreover have had the experience of administering themselves, albeit under British supervision, for about five decades.² They also have, like the Burmans, their own history, or rather, a sense of history. In their own states or home territories the ethnic non-Burmans, in fact, comprise collectively the majority, and the Burmans the minority. Because of their role as cofounders of the Union of Burma, by virtue of the 1947 Panglong Accord, the ethnic non-Burman nationalities consider themselves the founding nations of the country. They have used the term 'ethnic nationalities' rather than 'ethnic minorities' to refer to themselves collectively. Burma's 'ethnic conflict' is not per se ethnic but political, in a very fundamental way. The conflict is political because it is both about ethnic identity and rights, about democracy and equal opportunity, and about building nation and state. It involves political fundamentals as to how a nation is



to be built, defined or identified, by whom, and in what direction. It has much to do with problems arising from the application of nation-building formulae by the state or by a set of power-holders.

With regard to nation-building in independent Burma, it is important to recognize that the first foundation stones were laid in 1947 when the Panglong Accord was signed in the Shan State. This politically defining document was signed between U Aung San, the Shan *Sawbwa* princes and representatives of the Shan, Kachin, and Chin peoples. The Panglong Conference reached unanimous agreement that the political freedom of all peoples there represented would be hastened by immediate cooperation with the interim government. It was further agreed at Panglong that cooperation should be implemented by the governor's appointment of an additional councilor, to be nominated by the newly formed supreme council of United Hill Peoples. The councilor would assume executive responsibility for the Frontier Areas. Other agreements at Panglong provided for the enjoyment of democratic rights by all citizens, for continued interim financial aid by the center to the Frontier Areas, for local autonomy, and for immediate consultations looking toward the demarcation of a Kachin State.³ The Panglong Accord defined the political and geographical boundaries of present-day Burma: its peoples would join together in an alliance to obtain independence from Britain and to establish a union of equal and self-determining states—the Union of Burma or *Pyidaungzu*.

The Burmese word *Pyidaungzu* means a union of nation-states, implying a federation of states. Federalism is embedded in the Burmese term for the post-1948 Union of Burma. Since Panglong was a historically defining moment and the genesis of present-day Burma, the Pang-long Accord and its underlying spirit are politically hegemonic. Even the successive ruling generals (who have done much violence to the ideals of Panglong) have to pay lipservice to the Panglong Spirit, to the notion of equality between what they call 'national races'.⁴

British Colonial Rule and the Making of Burma

Like all nation-states that emerged after the withdrawal of colonial powers, such as India, Pakistan, Malaysia and Indonesia, Burma is basically the child of the colonial order. The colonial powers re-arranged the territories that came into their hands and made them into 'modern' entities that later became post-colonial nation-states. Prior to the advent of colonial powers, Burma in its present form did not exist. There were what modern historians describe as Burmese (or Burman) kingdoms that existed side by side with the Mon, Shan, Rakhine, Manipuri, Thai, Lao, and Khmer kingdoms, and which were often in conflict with each other. Wars, both intra-kingdom dynastic fighting and inter-kingdom conflicts, were endemic. The kingdoms were however neither solely



territorial nor based on ethnic sentiments or solidarity. That is, they were not national kingdoms but dynastic or personal systems of power and domination.

In the final British annexation of Burma in 1885, the Burmese king and court had hardly any control over the areas north of the capital city of Mandalay. Moreover, an alliance of Shan princes, called the Limbin Confederacy, was poised to march on to the capital to overthrow King Thibaw (whose mother was Shan, the Hsipaw Princess). The Shan princes wanted to install their candidate, the Limbin Prince, on the throne. There was at that time no Burmese kingdom to speak of. A year after the fall of Mandalay, the British met with the Shan princes at Mong Yai and negotiated the inclusion of their principedoms in British India as protectorates under the Viceroy. The British then proceeded to reorganize the areas beyond India ('farther India' or 'British Indochina') that had come under their control. By the 1930s, British Burma was separated from India and organized into two distinct parts, namely Ministerial Burma (the homeland of the majority ethnic Burmese) and the Frontier Areas. The latter included the present-day Shan, Kachin, and Chin States, and parts of the current Karen and Arakan/Rakhine State. The present Karenni State was treated more or less as a protectorate, and the Wa area was classified as un-administered territory.

Under the British, there was still no Burma in its current form. It has been held by a number of Burman nationalists that the British deliberately divided Burma in accordance with their 'divide-and-rule' policy. What can be said about the divide-and-rule thesis, however, is that it assumes that the population of Burma was homogenous or had already been unified as a nation in the current sense of the word. In this context the term 'divide-and-rule' is untenable and fails to take account of practices that were common to all colonial powers. Rather than being moved by the 'divide-and-rule' imperative, which anti-colonial nationalists often attribute to colonial powers, the widely practiced system of direct and indirect rule was based on administrative convenience, informed by the economic-commercial viability of the real estate in question. That is to say, areas that were accessible from the sea, fertile, productive, and where an infrastructure could be built at low cost, were usually placed under direct rule, whereas the hinterland with hardly any infrastructure, controlled by traditional rulers, was loosely supervised by colonial officers.

In Burma, the Irrawaddy basin constituting the Burman homeland, i.e. Burma Proper, was ruled directly and thus became developed and reached some degree of modernization. The Frontier Areas were left to their own respective rulers and became less developed. British Burma was, like French Indochina, a mix of expedient bureaucratic-administrative arrangements, and it was this patchwork of differently administered and differently developed territories that would form the Union of Burma after the Panglong Accord.



Nation-Building Formulas and the Rise of the Military

Three major schools of thought can be distinguished with regard to Burma's post-independence (mainly Burman) leaders on nation-building. One school of thought, associated with U Aung San, the architect of independence, held that Burma was to be a union of States based on equality of all national groups. The principles of 'unity in diversity' and self-determination, implying the widest of autonomy for the States, would underpin the Union. This was the vision that led to the signing of the Panglong Accord in 1947, a year before independence.

The second school of thought was adopted by the post-Aung San AFPFL6 leaders. This vision was embodied structurally in the 1947 Union Constitution. It provided for a unitary form of state, decentralized to some degree but not federal. This formula gained ascendancy and was in force for almost twelve years, from 1948 to 1962, but was certainly not in keeping with the Panglong Spirit or with the vision of U Aung San. Nevertheless, it worked after a fashion but Burma's ethnic nationalities seethed with discontent and civil war raged. The relationship between the members was asymmetrical: there was the Mother country (*Pyi-Ma*, the Burma State) and around it revolved a set of subordinate constituent states. The relation of, say, the Shan State to the Burma State was similar to that between Scotland and England. In concept it can be said that there were seven Scotlands in Burma, all revolving around Rangoon.

The third school of thought was fascistic and narrowly ethno-nationalistic. It held that the Burmans had built an empire through defeating and conquering the lesser 'races' such as the Mon, Rakhine, Shan, and Karen. In this formula, Burma had been unified by 'Burman conquest' since the 11th century, by great kings such as Anawratha, Bayinnaung, Alaungpaya and Bodawpaya. According to this nationhood vision, the British had forcibly dismembered this unified kingdom and through their divide-and-rule policy further alienated the hitherto unified 'races' of Burma from each other. From this perspective, held by the military and successive ruling generals, nationhood and nation-building would be no problem: all national 'races' would be kept together by a strong state, and nationhood or unity would be achieved by obliterating all differences through forced assimilation or 'Burmanization'. The military looked forward to everyone becoming Burmans as in the good old days. From this point of view, cultural and ethnic diversity was deemed to be undesirable and dangerous because diversity was divisive. It was therefore imperative that the solidarity of the Union had to be maintained and safeguarded by the armed forces, otherwise the country would fall apart or become a chaotic arena of warring 'races' as in Bosnia.⁷



Although the Shan, Kachin, and other ethnic nationalities' leaders found the 1947 Constitution unsatisfactory, they went along with it until the coup in 1962, because they had been assured that it could be amended at any time in the future. Also, the fact that independent Burma immediately became a battleground between the AFPFL government and its erstwhile allies (the Red and White Flag communists, the People's Volunteers Organization, Burman army mutineers, and later, Karen army mutineers and Pa-O rebels in the Shan State) gave the non-Burman leaders very little option but to stand with the AFPFL, or rather behind U Nu. The alternative was revolution and communist victory.

In many ways, the armed struggle led by the communists and their allies strengthened ties between the leaders of the ethnic nationalities and the AFPFL. However, at the same time, the insurgents (Burman communists, and the Karen with their ethnic allies among the Pa-O and Mon) bolstered the importance of the military to the extent that during the 1950s it had become very powerful and gained much autonomy. The incursions of U.S.-backed Chinese nationalist Kuomintang irregulars in the eastern Shan State further reinforced the power and autonomy of the military. In fighting the insurgents and the Kuomintang, the military also took on administrative functions in areas where martial law was imposed. Moreover, the 1957 split in the ruling AFPFL party into two camps and many sub-factions again strengthened the position and autonomy of the military. The split created a power vacuum at the very top, and it was only a matter of time before the military ventured onto the political stage, which it did in 1958. The then Prime Minister, U Nu, was requested by Brigadiers Aung Gyi and Tin Pe to hand over power to the army, albeit temporarily, so that the political confusion stemming from the AFPFL split could be sorted out. U Nu agreed and, with the sanction of parliament, the military ruled as a caretaker government for two years. In 1960, as promised, the military held an election which U Nu won overwhelmingly on an anti-military platform. In addition, U Nu promised to make Buddhism the official state religion. In 1962, however, the military marched back to power, and has been ruling Burma ever since.

Nation-Building by Ne Win and the Military

The military's nation-building formula dovetailed nicely with its top-down idea of state-society relations, still with a command-and-control orientation. The military's fascistic view of nationhood and tight control may be owing to Japanese influence, since the army was trained by the Japanese during the Second World War. Under General Ne Win's rule, from 1962 to 1988, the fascistic, chauvinistic vision of nationhood became entrenched within the military. As a result of the outbreak of insurgencies at the onset of independence, the military was at once brought to the forefront as the defender of the new (AFPFL) state. That role garnered substantial power for the army, because the AFPFL



leaders were not only the military's political masters but also dependent on the army to fend off dangers—particularly dangers caused by the communists. The eventual effect was that the military became a power unto itself. The military took on the task of nation-building according to its notion of nationhood.

This formula has not only been destructive but also a failure in terms of creating a viable multi-ethnic nation-state. It can be said that what was of utmost concern to the military (as self-acclaimed 'nation-builders') was Chapter 10 of the 1947 Constitution, which granted the Shan State the option of secession after 10 years of union. The military, however, set out to preempt the Shan from exercising that option, whether or not they actually planned to do so. The military intimidated the population by sowing terror, and it fomented opposition in the Shan State towards the *Sawbwa* princes, whom the military accused of hatching plots to dismember the Union.

Everywhere the military went in the Shan State, they unleashed on the population their brutal power with apparent immunity. It was only after the 1988 people's uprising that atrocities in the non-Burman areas came to light. Previously, because Cold War strategies had dwarfed all other issues, and because the ethnic non-Burmese resistance was regarded as tribal rebellion, stories of widespread atrocities perpetrated by the military were dismissed as rebel propaganda. As 1958 drew nearer, the military resorted to beating and torturing village headmen, accusing them of hiding arms in preparation for an armed uprising. The military also set out to terrorize the local populace in other non-Burman areas as a display of power. Thus, the military's nationbuilding efforts created a situation where the non-Burman segments of the population were alienated by military actions carried out by and for the state. The state came to be perceived by the ethnic non-Burmans as alien to society and harmful to their welfare. The situation of 'lack of fit' between the state and the ethnic non-Burman segments, and the policy of terror by systematic atrocities, naturally provided ethno-nationalist resistance in the non-Burman States.

The military's nation-building formula, and their brutal methods, did not promote any sense of nationhood among the ethnic groups but instead created a situation of vertical dysfunction between the state and the significant non-Burman segment of the broader society. When the military seized power in 1962, they hoped to win the support of the Burman populace. The generals claimed that drastic action was necessary because the Union was threatened by the 'secessionist plots' of Shan princes. However, the cruel massacre of university students in Rangoon on 7 July 1962, four months after the coup, alienated the Burman population from the new military regime. Moreover, further imposition of repressive control in all spheres of society turned the Burman populace against the military and against the 'socialist state' which it monopolized.



The problem of state-society dysfunction was further exacerbated in 1988 when the military staged a bloody comeback following the collapse of Ne Win's military dictatorship, the military-socialist BSPP (Burmese Socialist Program Party) regime.

The Politics of National Reconciliation

Especially since 1962, state-society relations in Burma have become increasingly dysfunctional. The state generally remains unresponsive to the needs and problems of Burmese society. However, it is quick to respond to the priorities of the armed, uniformed elements within the state. A situation has developed in which the state is separated, politically insulated and isolated from its citizens. The consequence of state-society dysfunction is, as the past decades have shown, economic decay, atrophy of political institutions, corruption of the military, paralysis of the state and its problem-solving capacity, breakdown of infrastructure, and greater impoverishment of the people. The military's resistance to societal demands for political participation has resulted in political deadlock. The pressing need in Burma today is to resolve this problem of state-society dysfunction.

The ethnic dimension of state-society dysfunction in Burma has two interrelated facets. One is political, and the other has to do with the restoration of ethnic harmony. The political facet concerns the constitutional problem of how the relationship between the ethnic and territorial constituent components of the Union is to be arranged. Or, in other words, whether Burma should be a unitary or federal state. Ethnic hatred such as in former Yugoslavia, that makes it difficult to achieve national reconciliation after years of brutal military rule and widespread atrocities, does not exist in Burma. There is still an understanding among political leaders that the problem of 'ethnic conflict' is political and constitutional rather than ethnic. The leaders of the various ethnic nationalities in Burma have participated in the struggle for democracy together with ethnic Burmese on the basis of the principle of equality, national self-determination, and the shared goals of democracy and federalism. The years of shared struggle for democracy, especially after 1988, have induced closer interaction between the ethnic Burmese and the other ethnic nationalities.

As a result, a number of building blocks and even consensus have been put into place for building a peaceful, democratic, federal Burma, and for the resolution of the country's multi-faceted problems through a dialogue process. The unity achieved among the opposition may be owed to a great extent to the emergence of Daw Aung San Suu Kyi on to the political stage in 1988. She has over time projected an image of a leader who is staunchly democratic, intelligent, humane and fair-minded, and who empathizes with the plight of the ethnic



nationalities and their aspiration for equality, selfdetermination, human dignity and human rights.

However, other things are seldom equal. Intervening variables over which political actors in Burma have no control,⁸ always have the potential to put an end to any sort of dialogue in Burma, thus putting any national reconciliation efforts or hopes on the shelf for an indefinite time.⁹ Even if dialogue continues, the military's opposition to federalism (notwithstanding the generals' lipservice to the Panglong Spirit, equality, and brotherhood) remains a big hurdle. The main reason for the military's objection to federalism may be that federalism would bring decentralization of both power and power structures. In a federal union, power would no longer be concentrated in the centre, nor can it be monopolized by one element of the state. Power would rest in different levels of government and be made accessible to democratically empowered local communities. Thus, in a democratic federation, the state (or rather, governments at both federal, state, and local level) would necessarily have to be responsive to the priorities, needs, and problems of citizens within the broader society, and most importantly, be committed to the Rule of Law. In this way, the problem of state-society dysfunction in Burma, the main root of the country's problems, will be solved and national reconciliation achieved.

Nevertheless, given the military regime's staunch opposition to democratic federalism, there may have to be a paradigm shift in looking at how the military can be persuaded to give up its monopolistic grip on the state in Burma and its (failed) fascistic nation-building vision. The politics of transition and national reconciliation are complex and require an equal measure of firmness and flexibility.

Endnotes

* Professor Chao-Tzang Yawngwe from Vancouver, Canada, is a participant in the struggle for a federal and democratic Burma. His father, Soo Thanke, was Burma's first independent President.

1. The term 'ethnic non-Burman' is here used to denote the Mon, Kachin, Rakhine, Shan, etc. segments of the population in Burma, and to differentiate them from the Burmans (i.e. the speakers of Burmese) or ethnic Burmese. This practice is however not in common usage because many scholars use the term 'Burmese' to denote all citizens of Burma, and 'Burman' to refer to the Burmese-speaking ethnic segment—like 'British' and 'English'. This is however problematic because the term 'Burmese' refers to the language of the Burman and denote things Burman, such as Burmese food, Burmese dress, and so on. The term 'Burmese' does not come anywhere near the term 'British'.

2. Regarding self-administration, the pre-colonial period is problematic. The people as a collectivity had no say however (and whatsoever) in the management of affairs that affected their lives. At least under colonial rule, the administrators were held accountable for their actions.

3. "Report of the Frontier Areas Committee of Enquiry, 1947". Rangoon, 1947. Part I, pp. 16-18.

4. Curiously, the term 'race' is commonly used in Burma when speaking of ethnic or national groups. There is no specific Burmese word for race, nation, or ethnic group. All are *Lu Myo* or



humankind. In Burmese, *Tarok Lu Myo* means Chinese, or ethnic Chinese. Why *Lu Myo* has been translated as 'race' is something that needs looking into. It is probably the result of the wide use of the term 'race' by the British in colonial times, when scholarship on ethnicity and race was not yet developed. In those days, even up to the early 20th century, no distinction was yet made between races, ethnic groups, tribes, etc.

5. The British annexation of Burma was undertaken in three stages. During the First Anglo-Burmese War of 1824-1826, the British annexed Arakan and lower Tenasserim. Lower Burma was annexed during the Second Anglo-Burmese War (1852-1853). In the Third Anglo-Burmese War (1885-1886), the capital city of Mandalay was captured and King Thibaw sent into exile in India.

6. AFPFL stands for Anti-Fascist People's Freedom League, the vanguard of the Burmese nationalist movement, formed during the Second World War by U Aung San and U Than Tun.

7. This is the 'national unity' mantra of the military in Burma, employed to justify military dictatorship, military monopoly on power, as well as military terror tactics in the non-Burman ethnic areas: arbitrary killing, rape, forcible relocation of villages, pillage, plunder, extortion, and so on.

8. Such as, for example, the current increased Thai concern with the Wa and their methamphetamine production on the Thai-Shan State border, combined with renewed interest at least of the U.S. military in the Thai war on drugs. The renewed fighting on the border between the Shan army and the Burmese junta's troops has the potential of escalating into a larger Thai-Burmese border war.

9. The border dispute with Thailand has probably strengthened the hands of the junta's Secretary No. 1, General Khin Nyunt, vis-à-vis other military factions and his rivals, such as General Maung Aye and his followers. There is no external enemy, either real, imagined, or manufactured, to rally the troops. Having firmed up his position within the military, the possibility that Khin Nyunt might terminate the talks with Daw Aung San Suu Kyi cannot be ruled out.

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**Part (D)
The Rule of Law**

(D . 1)

**Appeal to Take Action on the SPDC Military Regime in Burma
In Regard to Its Recent Oppression of Reporters and Journalists
who Exercise Freedom of Expression**

1. The 2nd Southeast Asia Media Legal Defense Network Conference was held in Cebu City, the Philippines, on Oct 27-27, 2009. The representatives from the international organizations, which are fighting for freedom of expression, and media related associations from Southeast Asia, and legal academicians, including those from the Burma Lawyers' Council, numbering over 90, participated there.

2. In addition to the fact that freedom of expression is basic human rights of individuals, it is also foundation for all democratic states. Oppression of media enterprises, reporters and journalists, who exercise freedom of expression systematically, means commission of human rights violations. As a negative result, people's right to know is denied and element for the emergence of a democratic state is ruined.

3. The SPDC military regime in Burma enacts draconian laws which prohibit freedom of expressions; inhumanely render harsh penalties on the democracy activists pursuant to those abusive laws; awfully restrict formation, establishment and operation of media enterprises, and excessively oppress reporters, journalists and publishers. It is time now for the people to take effective action on the regime, joining hands each other. To facilitate this, cooperation with the Southeast Asia Media Legal Defense Network should be made.

4. The ASEAN Intergovernmental Commission on Human Rights (AICHR) has come into existence formally for the first time in history of Asian countries. It is known that its meeting will be held soon. Despite that Term of Reference of the AICHR has a number of flaws, the CEBU Conference reached an agreement that it is a reasonable venue to raise the issues on freedom of expression there. Oppression of freedom of expression in Burma should be documented consistently and reports based on those documentations should be submitted at the forthcoming meeting of the AICHR. Civil society organizations and democracy activists struggling for promotion of human rights in Burma



should be a part of a broader movement arising in Southeast Asian countries to pressure their own governments in order to select human rights defenders, who sacrificed their lives for human rights, and send them to AICHR for being members of the said commission.

Burma Lawyers' Council

November 3, 2009

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(D.2)



The Honorable Paul de Jersey AC
Chief Justice of Queensland
Chief Justice's Chambers
George Street
Brisbane QLD 4000 AUSTRALIA

November 10, 2009

Re: Existing obligations erga omnes require the Conference of Chief Justices of the Asia Pacific region to publicly exclude Chief Justice U Aung Toe of Myanmar as a Conference participant.

Dear Chief Justice de Jersey,

We are writing you in your capacity as Chair of the Judicial Section of LAWASIA regarding the Conference of Supreme Court Chief Justices from the Asia Pacific region (the Conference), which, we believe, is meeting in Ho Chi Minh, Vietnam this week of November 9, 2009.

We want to preface this letter by expressing our admiration and respect for the powerful initiatives taken by the Chief Justices of the Asia Pacific region (Chief Justices). The Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (Beijing Statement), publicly affirming constitutionalism, judicial independence, and the universality of international humanitarian and human rights law, is a singular example of how Chief Justices can act together to advance respect for the rule of law.¹

It is with this spirit of deep respect that we call your attention to a matter of utmost importance: the fundamental incompatibility of the Conference of Chief Justices associating with Chief Justice U Aung Toe of the Supreme Court of the Union of Myanmar (Chief Justice U Aung Toe), with States' existing obligations erga omnes to take certain actions in regards to Burma.

The serious breaches detailed in this letter are relevant to this Conference due to the legitimizing effects of Chief Justice U Aung Toe's status as a member in good standing. Collective and individual responsibilities of Chief Justices devolve



from States' responsibilities under Articles 40, 41 and 58 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts.ⁱⁱ Additional jus cogens rules apply given Chief Justice U Aung Toe's personal criminal culpability for systematically perpetrating crimes of concern to the global community.ⁱⁱⁱ International law requires, at a minimum, that Chief Justice U Aung Toe be expelled from both the Conference of Chief Justices of the Asia Pacific region and from the Judicial Section of LAWASIA.^{iv} Chief Justice U Aung Toe has perpetrated intentional breaches of international law in his capacity as sitting Chief Justice and in his capacity as Chair of the National Convention Working Committee since 1992, Chair of the Commission for Drafting the State Constitution beginning in 2007, and Chair of the Commission for Holding Referendum for the Approval of the Draft Constitution of the Republic of the Union of Myanmar in 2008.^v

We understand that the seriousness of this situation calls for considered Conference deliberation and we have outlined the applicable doctrines of international law to help expedite this process. Therefore, we respectfully request that you forward this letter to the Chief Justices listed below, immediately agenda this item for future consideration, and consider convening a special meeting of the Conference. Given the serious and continuing criminal transgressions of Chief Justice U Aung Toe, waiting for the next Biennial Conference before considering this matter will serve only to foster a norm of judicial illegitimacy in the region.

LEGAL OVERVIEW

1. States' obligations erga omnes in regards to Burma

Burma is a country in internal armed conflict governed by international humanitarian law (IHL). Third-party States' obligations to ensure respect for the Geneva Conventions^{vi} in face of serious breaches of IHL include taking all possible measures to ensure that high-level criminal perpetrators such as Chief Justice U Aung Toe are prosecuted and punished.^{vii}

Recent developments in international law heighten States' affirmative obligations to end impunity. Most notably, to date, there are 110 State Parties to the Rome Statute of the International Criminal Court; in fact, nearly half of the thirty-two countries whose Chief Justices signed the Beijing Statement have either ratified or signed the Rome Statute.^{viii} Further, States are increasingly enacting national legislation providing for prosecution of perpetrators of jus cogens crimes under universal jurisdiction principles.^{ix} While this is not yet the established practice, the legal community has a special duty to respect the integrity of such laws, including the penal code in Vietnam providing for prosecution of foreign visitors for treaty related jus cogens crimes.^x



2. The 2008 constitution embodies serious breaches of peremptory norms: the granting of permanent amnesties for the Tatmadaw's jus cogens crimes. Since 1993, Chief Justice U Aung Toe has worked hand-in-hand with Senior General Than Shwe to draft a constitution which is primarily aimed – in his own words – to ensure that “Tatmadaw (the military) [were given] the leading political role in the future of the state....”^{**xi**}

To accomplish this aim, Chief Justice U Aung Toe in February 2008 granted all Tatmadaw military officers a permanent amnesty for all crimes as their constitutional right.^{**xii**} This amnesty provision precludes civilian or military courts from ever being able to prosecute Tatmadaw perpetrators of jus cogens crimes including genocide, war crimes, and crimes against humanity. Victims, including women sexually assaulted during conflict, are also precluded from ever suing for civil damages.

This intentional and aggressive act by Chief Justice U Aung Toe to enshrine impunity is a serious breach of peremptory norms striking at the heart of Burma's nontransgressible obligations under the Genocide and Geneva Conventions and customary international law.^{**xiii**} Additionally, by constructing a constitution which deliberately and permanently excludes women from the highest government offices, Chief Justice U Aung Toe precluded Burma from ever being in compliance with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which it ratified in July 1997.^{**xiv**}

Further, by awarding amnesties to the government side of a situation in armed conflict, the constitution flouts Security Council mandates including SCR 1674, 1325 and 1820.^{**xv**} Notably, on July 15, 2009, the Secretary-General's report on SCR 1820 to the Security Council cites Burma as a violator country for affording impunity for the ongoing military crimes of sexual violence against ethnic women in conflict areas.^{**xvi**}

3. The 2008 constitution embodies serious breaches of peremptory norms: the repudiation of the Geneva Conventions. Under Chief Justice U Aung Toe's specific directives, the 2008 Burma constitution removes all power over the military from the executive, judicial, and legislative branches.^{**xvii**} This entrenches the current structure whereby the non-elected Commander-in-Chief is the most powerful person in Burma and clarifies that his power over all legal matters involving the military are deemed “final and conclusive.”^{**xviii**}

What this means is that under the 2008 constitution, offenses committed by the military, including by active military serving as parliamentarians or in the civil service, cannot be tried in any civilian court nor are defendants entitled to appellate review or constitutional oversight by the Supreme or Constitutional Courts.^{**xix**}



Excluding all military legal matters from any civilian review, covering Courts-Martial and military tribunals alike, is a formal repudiation of Common Article 3 of the Geneva Conventions. The 2008 constitution makes it impossible for Burma to comply with Common Article 3, now part of customary international law, requiring that States provide protected persons with courts that ensure “essential guarantees of independence and impartiality,” and which “[afford] all the judicial guarantees which are recognized as indispensable by civilized peoples.”^{xx}

4. The individual criminal culpability of Chief Justice U Aung Toe, States’ nontransgressible obligations erga omnes, and the resulting implications for the Conference and individual Chief Justices It is beyond dispute that Chief Justices have neither a duty nor a right to advocate for the prosecution of any particular criminal perpetrator, much less when that perpetrator is a sitting Chief Justice in another State. That being said, the fact that Chief Justice U Aung Toe, solely by virtue of his office, is considered a member of this Conference in good standing, raises serious issues of international law.

Membership in this conference serves as a source of legitimacy, which he should not be conferred, given the ongoing impunity of Chief Justice U Aung Toe for crimes of the most serious nature and given his role as the chief architect of a constitution designed to “ensure disrespect” for the rule of law. This conference “membership” triggers an “obligation of means” requiring Chief Justices take positive action and, in turn, expel Chief Justice U Aung Toe from the conference.

Working since 1988, Chief Justice U Aung Toe transformed the judiciary in Burma into a criminal arm of the military regime.^{xxi} A cadre of judges in Burma provide critical support for Senior General Than Shwe by disposing of political dissidents. Under direction of Chief Justice U Aung Toe, judges in Burma routinely commit crimes by “means of court order,” exactly as did the judges in the regimes of Adolf Hitler^{xxii}, Emperor Hirohito^{xxiii}, and Saddam Hussein.^{xxiv} These judges were convicted of war crimes and crimes against humanity for the same acts as those committed daily in Burma; holding fake trials based on sham criminal charges before announcing predetermined guilty findings accompanied by the most draconian prison sentences.^{xxv} Chief Justice U Aung Toe and other judges are guilty of crimes against humanity and war crimes, underlying crimes include first degree murder for the wrongful premeditated imprisoning of those persons who later died in prison from torture, killing, inadequate food, gross medical neglect and forced labor.^{xxvi}

The documentary evidence used to convict Hitler’s former Chief Judge, Schlegeberger, in the Altstoetter trial at Nuremberg is the same type of evidence now publicly available to prosecute and convict Chief Justice U Aung Toe. As stated in Altstoetter, and equally applicable to Burma: “If the evidence cited



supra does not demonstrate the utter destruction of judicial independence and impartiality, then we 'never writ nor no man ever' proved."xxvii

As Chief Justices, you stand as representatives of the core values underlying the rule of law: an independent judiciary. The integrity of the judiciary is threatened by the transformation of the judiciary in Burma into an instrument of crime. We request you take action on the matter of Chief Justice U Aung Toe in the interest of advancing global justice.

Sincerely,

Janet Benshoof
President
Global Justice Center

U Aung Htoo
General Secretary
Burma Lawyers' Council

CC: The Hon. Justice John Muir, Judge of Appeal Supreme Court of Queensland
Chief Justices of Asian Pacific Region
Hon Chief Justice Paul de Jersey of Australia
Hon Chief Justice Xiao Yang of the People's Republic of China,
Hon Chief Justice Andrew Li of the Hong Kong Special Administrative Region of the
People's Republic of China,
Hon President Sam Hou Fai of the Macao Special Administrative Region of the
People's Republic of China,
Hon Chief Justice Murray Gleeson of Australia,
Hon Chief Justice Muhammed Ruhul Amin of Bangladesh,
Hon Justice Steven Chong of Brunei,
Hon Chief Justice Beverley McLachlin of Canada, Premier President Olivier Aimot of
French Polynesia,
Hon Chief Justice Philip Carbullido of Guam,
Hon Chief Justice Konakupakattil G. Balakrishnan of India,
Hon Chief Justice Professor Dr Bagir Manan of Indonesia,
Hon Chief Justice Niro Shimada of Japan,
Hon Chief Justice Robin Millhouse of Kiribati,
Hon Chief Justice Lee Yong-hoon of Korea,
Hon Chief Justice Tun Dato' Sri Ahmad Fairuz Dato' Sheikh Abdul Halim of Malaysia,
Hon Chief Justice Carl B. Ingram of Marshall Islands,
Hon Chief Justice Batdelger Sodnomdarjaa of Mongolia,
Hon Chief Justice Dilip Kumar Paudel of Nepal,
Hon Monsieur Le Premier President Gerard Fey of New Caledonia,
Hon Chief Justice Dame Sian Elias of New Zealand,
Hon Chief Justice Miguel Demapan of Northern Mariana Islands,
Hon Chief Justice Arthur Ngiraklsong of Palau,
Hon Chief Justice Reynato Puno of the Philippines,
President of the Supreme Court Professor Vyacheslav Lebedev of Russia,



Hon Chief Justice Patu Falefatu Sapolu of Samoa,
 Hon Chief Justice Chan Sek Keong of Singapore,
 Hon Chief Justice Sir Albert Rocky Palmer of Solomon Islands,
 Hon Justice Viruch Limvichai of Thailand,
 Hon Chief Justice Tony Ford of Tonga,
 Hon Chief Justice Gordon Ward of Tuvalu,

Endnotes

i LAWASIA: The Law Association for Asia and the Pacific, Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (Aug. 19, 1995) [hereinafter Beijing Statement].

ii See Draft Articles on Responsibility of States for Internationally Wrongful Acts in Report of the International Law Commission on the Work of its Fifty-Third Session, art. 40, 41, 58 U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (Nov. 2001) [hereinafter ILC Draft Articles].

iii For precedents on the conviction judges for war crimes, see *The Justice Case*, 3 Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10 (1951) [hereinafter *The Justice Case*] (finding Nazi judges guilty of crimes against humanity, and war crimes). See also *Trial of Lieutenant General Harukei Isayama and Seven Others*, 5 Law Reports of Trials of War Criminals (1948); *Trial of General Tanaka Hisakasu and Five Others*, 5 Law Reports of Trials of War Criminals (1948) (finding the Japanese military tribunal judges guilty using fraudulent evidence and denying prisoners of war fair hearings); *Cassation Panel, Iraqi High Tribunal, Al-Dujail Final Opinion*, available at <http://www.iraq-iht.org/ar/doc/ihctco.pdf> and <http://law.case.edu/saddamtrial/content.asp?t=1&id=88> (unofficial English translation) [hereinafter *Al-Dujail Opinion*]. See also Statute of the International Criminal Tribunal for Rwanda arts. 4, 6, Nov. 8, 1994, S/RES/955 (1994).

iv See ILC Draft Articles, *supra* note 2, at arts. 40, 41 (“No State shall recognise as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation.”). See also S.C. Res.554, ¶ 5 (Security Council Resolution in 1983 calling for non-recognition of the 1983 constitution in apartheid South Africa due to its serious breaches).

v See, Union of Myanmar Convening Commission for National Convention Letter No.3/ Convention/1-Sa ma of December 1, 1992 on Formation of the Working Committee, *Working People Daily*, Dec 1, 1992; See also State Peace and Development Council of the Union of Myanmar, announcement No. 2/2007 issued as Commission for Drafting State Constitution formed, Oct 18, 2007, *Working People Daily*, Oct 18, 2007.

vi See Press Release, International Committee of the Red Cross, Myanmar: ICRC denounces major and repeated violations of international humanitarian law (June 29, 2007) (on file with the ICRC), available at <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/myanmar-news-290607> (noting ongoing serious crimes by Burma’s military, the ICRC reminds all State Parties to the Geneva Conventions of “their obligation, under Article 1, to respect and to ensure respect for the Conventions.”).

vii See generally Press Release, International Committee of the Red Cross, Protection of Civilians in Armed Conflict (Nov. 20, 2007), available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/unitednations-statement-201107> (“By means of Article 89 of Protocol I additional to the Geneva Conventions, the High Contracting Parties have also committed themselves ‘to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter’ in the event of serious violations of international humanitarian law. States must employ all appropriate means, including political, legal, economic and security measures, to honour this commitment.”). See also Yasmin Naqvi, *International Review of the Red Cross: Amnesty for War Crimes: Defining the Limits of International Recognition*, 613-614, Vol. 85, No. 851, Sept. 2003 (discussing the possibility of criminal prosecutions by third-party states for war crimes).



viii Chief Justices representing 32 States have signed the Beijing Statement: Australia, Bangladesh, People's Republic of China, Hong Kong, India, Indonesia, Mongolia, Myanmar, Nepal, New Caledonia, New Zealand, Pakistan, Papua New Guinea, the Philippines, Singapore, Sri Lanka, Vanuatu, Vietnam, Samoa, Fiji, Korea, Malaysia, Republic of the Seychelles, Solomon Islands, Tonga, Republic of Kiribati, Marshall Islands, Chief Justice of Tuvalu, Russian Federation, Japan, and Thailand. See Beijing Statement, *supra* note 1. Nine of these countries have ratified the Rome Statute of the International Criminal Court: Australia, New Zealand, Republic of Korea, Mongolia, Japan, Samoa, Fiji, Marshall Island and Nauru. See The International Criminal Court, The States Parties to the Rome Statute, available at <http://www.icc-cpi.int/Menus/ASP/states+parties/>. Furthermore, six additional countries have signed the Rome Statute: Bangladesh, Philippine, Seychelles, the Solomon Islands, Thailand and Russia Federation. *Id.*

ix At least 54 states have criminalized war crimes in their domestic legislation. EVE LA HAYE, *WAR CRIMES IN INTERNAL ARMED CONFLICTS* 170 (Cambridge University Press 2008). At least 32 of these states have incorporated domestic legislation allowing their courts to exercise universal jurisdiction over war crimes committed in foreign internal conflicts where both the perpetrator and victim are non-nationals. LA HAYE, at 254. Moreover, at least three ASEAN countries have incorporated and/or recognized universal jurisdiction principles. The Vietnam criminal code allows for prosecution of foreigners in accordance with international instruments that Vietnam has ratified. See LA HAYE, at 287, n. 124; Vietnam Penal Code, Art. 6(2), Dec. 1999 ("Foreigners who commit offenses outside the territory of the Socialist Republic of Vietnam may be examined for penal liability according to the Penal Code of Vietnam in circumstances provided for in the international treaties which the Socialist Republic of Vietnam has signed or acceded to."). In Indonesia, the Ad Hoc Human Rights Tribunal has found that "Punishment of the perpetrators of [serious human rights violations] is recognized as an obligation to the entire international community (erga omnes obligation)." Abilio Soares, Ad Hoc Human Rights Tribunal at the Human Rights Court of Justice of Central Jakarta, 65, Aug. 14, 2002. Cambodia, has ratified the Rome Statute of the International Criminal Court.

x See *id.*

xi Reuters, New Myanmar Constitution Gives Military Leading Role, Feb. 19, 2008, <http://www.reuters.com/article/worldNews/idUSBKK10184120080219?feedType=RSS&feedName=worldNews>.

xii Constitution of the Republic of the Union of Myanmar (2008) art. 445 [hereinafter Myanmar Constitution] ("No proceedings shall be instituted against the said Councils or any member thereof or any member of the Government, in respect of any act done in the execution of their respective duties.").

xiii Burma ratified the Geneva Convention on August 25, 1992, the Genocide Conventions on March 14, 1956, the Convention on the Rights of the Child on July 15, 1991, and the Convention on the Elimination of all Discrimination against Women (CEDAW) on July 22, 1997. See United Nations Treaty Collection, <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>.

xiv Convention on the Elimination of All Forms of Discrimination against Women, Dec. 19, 1979, 1249 U.N.T.S. 13. See also the findings of the CEDAW Committee in Committee on the Elimination of Discrimination against Women (CEDAW Committee), Concluding Observations of the Committee on the Elimination of Discrimination against Women: Myanmar, U.N. Doc. CEDAW/C/MMR/CO/3 (Nov. 7, 2008).

xv See S.C. Res.1325, ¶11, U.N. Doc. S/RES/1325 (Oct. 30, 2000); S.C, Res. 1674, U.N. Doc. S/RES/1674 (Apr. 28, 2006); S.C. Res. 1820, ¶ 4, U.N. Doc. S/RES/1820 (June 19, 2008) (Noting that "rape and other forms of sexual violence can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide, stresses the need for the exclusion of sexual violence crimes from amnesty provisions in the context of conflict resolution processes, and calls upon Member States to comply with their obligations for prosecuting persons responsible for such acts, to ensure that all victims of sexual violence, particularly women and girls, have equal protection under the law and equal access to justice, and stresses the importance



of ending impunity for such acts as part of a comprehensive approach to seeking sustainable peace, justice, truth, and national reconciliation....”).

xvi The Secretary-General, Report of the Secretary-General Pursuant to Security Council Resolution 1820 (2008), ¶¶15, 19, 23, 26, U.N. Doc. S/2009/363 (Aug. 20, 2009).

xvii The constitution states that “In the adjudication of Military Justice...the decision of the Commander-in-Chief is final and conclusive.” Myanmar Constitution, *supra* note 12, at art. 343. It further provides that “The Commander-in-Chief of the Defense Services to whom the sovereign power has been transferred shall have the right to exercise the powers of legislature, executive and judiciary.” *Id.* at art. 419. Note, this is a divergence even from Myanmar’s previous constitutions. Under the 1947 constitution the president was the chief executive, there was no parallel military government, and all law-making power was vested in the Parliament, even in times of war. The Constitution of the Union of Burma (1947) art. 59, 90, 94. In direct contrast to the 2008 constitution, the Supreme Court’s jurisdiction could not be removed on matters regarding the constitution and decisions of the Supreme Court. *Id.* at art. 138; Myanmar Constitution, *supra* note 12, at art. 343. The 1974 constitution, even though enacted when Burma was under military rule, did not establish separate military power. The Constitution of the Socialist Republic of Burma (1974) art. 65, 66. The president, also Chair of the Council of State, was supreme over the military, the judiciary retained jurisdiction over military matters, and the parliament had the power to declare war. *Id.* at art. 13, 49, 105.

xviii Myanmar Constitution, *supra* note 12, at art. 343.

xix *Id.*

xx Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. See also Prosecutor v. Dusko Tadic (Jurisdiction), Case No. IT-94-I-AR72, para. 134, Oct. 2 1995 (“customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict.”).

xxi See report by Asia Watch stating that sixty-two judges were reportedly deprived of office in 1989 after failing to comply with SLORC instructions to sentence political dissidents to prison terms longer than those permissible than in the prescribed laws. Asia Watch, Human Rights in Burma 12(1990).

xxii See The Justice Case, *supra* note 3.

xxiii Japanese judges were convicted of war crimes for using false trials to convict and execute American Prisoners of War. See Isayama trials, *supra* note 3; Hisakasu Trials, *supra* note 3.

xxiv The Iraqi High Tribunal found Judge Awad Hamed al-Bandar jointly criminally liable for crimes against humanity committed with Saddam Hussein because he used the pretense of judicial “authority and law” to try and then execute civilians. Under the leadership of Awad Hamad Al Bandar, the court had issued and execution verdict against defendants after a period of only 17 days during a single session. See al-Dujail Opinion, *supra* note 3.

xxv See Open Society Institute, The Darkness We See: Torture in Burma’s Interrogation Centers and Prisons, Dec. 2005.

xxvi See Open Society Institute, Eight Seconds of Silence: The Death of Democracy Activists Behind Bars, May 2006.

xxvii The Justice Case, *supra* note 22, at 1024 (“In view of the conclusive proof of the sinister influences, which were in constant interplay between Hitler, his Ministers, the Ministry of Justice, the Party, the Gestapo, and the courts, we see no merit in the suggestion that Nazi judges are entitled to the benefit of the Anglo-American doctrine of judicial immunity. The doctrine that judges are not personally liable for their judicial actions is based on the concept of an independent judiciary administering impartial justice. Furthermore, it has never prevented the prosecution of a judge for malfeasance in office.”) (emphasis added).

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(D.3)

The Landmark Trial of Daw Aung San Suu Kyi

B.K.Sen

In legal history we see many trials that are both historical and political. The recent trial of Daw Aung San Suu Kyi was one such trial. From a legal standpoint, the trial has surpassed expectations of dishonesty and unfairness. Never had the judiciary in any country been so under the control of its military rulers. Never had there been such a sham trial where a representative of the military government entered a courtroom to reverse the court's verdict. Although it is known throughout the world that the military in Burma is manipulating the judiciary and undermining its independence, Suu Kyi's trial pushes these issues to the forefront. The long story of Suu Kyi's non-violent struggle for democracy has become more complicated and more important after this landmark trial. Both Suu Kyi and the democracy movement are now facing new challenges in the future.

On August 11, 2009, the trial court passed a verdict of guilty and gave Suu Kyi a sentence of 3 years, a sentence of rigorous imprisonment considering the offense of accepting an uninvited intruder. By executive fiat, the sentence was reduced to 1 year and 6 months of house detention. This sentence reduction is not a gift to the democracy movement; the sentence assures that Suu Kyi will remain immobile through the parliamentary election that is scheduled for 2010.

Perhaps the most incredible part of the sentencing was that the Home Minister himself stepped forward in the court in order to deliver the sentence "reduction." The Minister read out an order from junta's leader Sr. Gen. Than Swe that her sentence was to be reduced to 18 months and that she would be sent home from prison to be under



house arrest. Of course, 18 months from now will be in 2011, by which time the much labored general election will be over and the junta will be well saddled in power through the sham election. For argument's sake, if the junta loses the election, the situation of 1990 May election may well repeat itself. The junta may refuse to transfer power and suppress all movements and even prepare for a coup. During that period Suu Kyi will still be immobilized while serving her



house arrest. The junta's game plan to hold on to power by any means necessary may succeed.

On October 2, 2009, Suu Kyi's appeal was turned down by the Divisional Court. Dismissing the appeal, the court ruled that the 1974 constitution - which the defense had cited as the over-reaching frame for her trial - is legally invalid. However, the court upheld the validity of the State Protection Law which was invoked to set the terms of her previous house arrest. The NLD lawyers representing Suu Kyi saw this as a very controversial ruling that could be challenged. Their reasoning was that the invalidation of the 1974 constitution, which the government demanded during hearings, would imply a constitutional vacuum. This would then strengthen the case against any state protection law, however enacted or promulgated. The hope of the NLD lawyers was that a successful appeal in the form of a revised petition before the apex court would not only exonerate Suu Kyi of any wrongdoing but also undermine the basis of the executive order on her current detention.

Fundamental confusion has been created as to the legal position of Suu Kyi. The question is whether Suu Kyi is now detained under the State Protection Law or whether she is now serving the un-commuted part of the verdict. The Home Minister's notification of the sentence reduction included notice that the regime would also "suspend" the remaining half of her sentence. This statement



could mean that the Minister was declaring that Suu Kyi was free, but that a new order had been clamped down to fill the legal vacuum. The new 18-month house arrest sentence would then be under the State Protection Law. The Minister also emphasized that the SPDC would be willing to consider an amnesty or a pardon to Suu Kyi for her "good conduct" during her house arrest sentence. The junta engaged in such

roundabout moves regarding her sentence in order to create this bizarre alternative punishment. The reading of the sentence was framed as a conciliatory gesture of modest proportions to Suu Kyi, yet the junta was allowed a wide opportunity to enact its mischief.

Through these legal moves, the sham legal process against Suu Kyi was made to appear legitimate. Regarding her initial "transgression," the security forces did not prevent an intruder from barging into her house despite closely guarding it all time. These guards had not been punished, and the intruder - after standing trial and being convicted - was allowed to be deported to the United States. The peculiar circumstances surrounding Suu Kyi's arrest, trial,



and sentence cannot hide the overall plan of the junta to continue to detain the democracy leader. This landmark trial has demonstrated that the judiciary in Burma is under the thumb of the junta and that democratic checks and balances were completely ineffective in maintaining the independence of the judiciary.

There has been an important development since the trial. Suu Kyi sent a letter to Than Shwe declaring that she would work to reduce international sanctions on Myanmar. She also asked in the letter to meet the representatives of the United States, European Union, and Australia, which was granted. In this context, a minister designated by the junta to "liaise" with Sue Kyi met her twice in quick succession after her judicial appeal was denied on October 2. This turn has given rise to speculation about a change in major policy from sanctions to engagement. Now the international community is aware of the possibility of three-way engagement between the junta, Suu Kyi, and the United States. Democracy advocates are still unsure whether this dialogue will result in true regime change and improvements for the people of Burma.

The Obama Administration has decided to engage with Myanmar's generals in a recent shift of its policy toward the regime. The Assistant Secretary of State for East Asian and Pacific Affairs, Kurt Campbell, held the administration's first meeting with a Burmese minister in New York. Campbell announced that he would work closely with India and China regarding Myanmar, and stopped in New Delhi on his way to Yangon for a meeting with Suu Kyi. The U.S. visit to Burma happened at a politically significant time, following the 15th ASEAN summit where ASEAN leaders noted that "general elections to be held in Myanmar in 2010 must be conducted in a fair, free, inclusive, and transparent manner in order to be credible to the international community." Some say that Myanmar has given indications that it is ready to open up the 2010 elections, showing that the upcoming elections will become central in the discussion of sanctions versus engagement. In this sense, the Suu Kyi trial is a catalyst for the emergence of significant events. The trial has brought the democracy icon again into the limelight. The suffering of the Burmese people shown through the trial will only be mitigated if international dialogue is opened in a credible and transparent manner.

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(D.4)



Ms. Louise Arbour
 October 28, 2009
 President and CEO
 International Crisis Group
 149 Avenue Louise Levels 24
 B-1050 Brussels, Belgium
 Via mail and facsimile

**Urgent: The ICG Recommendations Urging Support for the 2010
 Elections in Burma Conflict with States' Erga Omnes
 Obligations Under International Law**

Dear President Arbour,

The International Crisis Group plays a unique and critical role in resolving and preventing conflict globally. Central to the ICG mission is its commitment to ensuring respect for the principles of international humanitarian law. We are writing this letter to call your attention to ICG's radical departure from those principles in its August 2009 Report (the Report), "Myanmar: Towards the Elections." The Report urges that States and the United Nations endorse the military drafted Constitution of the Republic of the Union of Myanmar (2008) (hereinafter 2008 constitution), assist Senior General Than Shwe with the 2010 elections, and engage as fully as possible with any "new" government in Burma.¹ These recommendations are fundamentally incompatible with jus cogens rules requiring States to take all possible measures to stop the ongoing violations of the Geneva Conventions and other serious breaches of peremptory norms in Burma.

The Global Justice Center (GJC) and the Burma Lawyers' Council (BLC) are deeply concerned about the impact of the ICG Report on the rule of law in Burma and globally.²

States' existing non-derogable obligations in regard to Burma

Burma is a country in armed conflict governed by Article 3 of the Geneva Conventions, international rules of customary law and other precepts of international humanitarian law.³ The longstanding nature of the hostilities is



such that United Nations officials, carrying out Security Council mandates, independently engage with Generals from ethnic armies around issues of compliance with the laws of war.⁴

The developments in international law governing internal armed conflict, including the seminal Tadic decision by the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Rome Statute for the International Criminal Court, make clear that Senior General Than Shwe and other top military officers in Burma are individually criminally responsible for the commission of war crimes.⁵

The military government in Burma has systematically committed serious violations of the Geneva Conventions for over twenty years. Tatmadaw Kyi officers and soldiers (government armed forces) routinely perpetrate heinous crimes against ethnic civilian populations including using rape as a weapon of war, all which have been extensively documented by the United Nations.⁶

Most recently, on August 20, 2009, the Secretary-General's Report to the Security Council on Security Council Resolution 1820 (SCR 1820) cited Burma as a violator country, noting both the ongoing sexual violence perpetrated against ethnic women in conflict and the longstanding impunity afforded military perpetrators.⁷ SCR 1820 prohibits any amnesty for rape and other crimes targeting women in conflict, requiring that all such perpetrators, whether the country is in conflict or post-conflict, be prosecuted and punished.⁸

The ICG Report fails to grapple with the fundamental incompatibility of certain of its recommendations with States' current non-derogable obligations, including those recalled by the International Committee of the Red Cross (ICRC) in regards to Burma. The ICRC, the global monitor of international humanitarian law, can issue what is termed a "public condemnation" when all subsidiary measures undertaken to protect victims of armed conflict have failed and the violations are "major and repeated or likely to be repeated."⁹

On June 29, 2007, in reaction to the heinous crimes being committed against ethnic civilian populations in Eastern Burma, the ICRC issued a "public condemnation" of Burma, a step taken less than four times in its history, reminding "all States party to the Geneva Conventions of their obligation, under Article 1, to respect and to ensure respect for the Conventions".¹⁰

The ICG recommendations further abut States' nontransgressible obligations to take all possible measures "to prevent" genocide, a distinct and segregable obligation from the duty "to punish" under the Genocide Convention.¹¹ In February 2007, the International Court of Justice for the first time determined that, under the Genocide Convention, all States have positive erga omnes obligations to act once a serious risk of genocide is made known.¹² States'



obligations to take all possible measures “to prevent” genocide are triggered even prior to any official court or UN finding.¹³ These obligations exist with regard to Burma given authoritative global indices listing Burma as one of eight “red alert” States at risk of genocide,¹⁴ the inclusion of Burma as a State monitored by the UN Special Advisor on the Prevention of Genocide,¹⁵ and the fact that the Special Advisor has initiated at least one confidential briefing on Burma to the Security Council. In the briefing on December 16, 2005, the Council was informed that the allegations of core crimes in Burma appeared to “[affect] particular ethnic and national groups...and that under the prevailing circumstances in Myanmar, civilian populations may be identified as enemies or as sympathetic to enemies, solely on the basis of their ethnicity.”¹⁶

To date, States have not complied with their *erga omnes* obligations to act collectively to ensure that the crimes in Burma cease and military perpetrators are prosecuted and punished. Nor have States complied with their nonderogable obligations under the Genocide Convention, detailed by the ICJ and expanded under the Stockholm Declarations, to take every possible legal measure to avert what has been found to be a serious risk of genocide in Burma.

The 2008 constitution embodies serious breaches of peremptory norms

The 2008 constitution in Burma seriously breaches peremptory norms by providing general amnesties and permanently removing all military from any civilian oversight including by the President or Supreme Court.¹⁷ The same *jus cogens* rules apply to the 2008 Burma constitution as were applied to the 1983 constitution of apartheid South Africa.¹⁸ The amnesty provision ensures permanent disrespect for international humanitarian law. Neither civilian nor military courts can ever prosecute the perpetrators of *jus cogens* crimes including genocide, war crimes, and crimes against humanity, nor can victims, including women sexually assaulted during conflict, ever sue for civil damages.¹⁹

This aggressive and deliberate act by Senior General Than Shwe to enshrine impunity as a “right” is a serious breach of peremptory norms striking at the heart of Burma’s nontransgressible obligations under the Genocide and Geneva Conventions, customary international law, and such accountability mandates as in SCR 1325 and SCR 1820.²⁰ Further, the United Nations is clearly prohibited from recognizing the legitimacy of the constitution in any way given its amnesty provisions.²¹ In a clear departure from earlier constitutions, the 2008 Burma constitution removes power over the military from the President, entrenching the current structure whereby the non-elected Commander-in-Chief remains the most powerful person in Burma.²² Jurisdiction over police and military matters is removed from all civilian courts, with the Commander-in-Chief’s decisions in legal cases deemed “final and conclusive.”²³



The mandates in Common Article 3 and Additional Protocol II of the Geneva Conventions require that States Parties provide courts with “essential guarantees of independence and impartiality” that “[afford] all the judicial guarantees which are recognized as indispensable by civilized peoples.”²⁴ The permanent removal of all military crimes from any civilian judicial review or constitutional oversight constitutes a formal repudiation of the Geneva Conventions and, as such, is a serious breach of peremptory norms.²⁵

International law prohibits States and the United Nations from assisting with the 2010 elections and from supporting any government or officials resulting from that election

Burma, as the responsible State, is required under international law to immediately cease all conduct leading to serious breaches of peremptory norms and, as an independent obligation, provide full reparations.²⁶ The legal consequences on third-party States include a duty of non-recognition and in addition, States are prohibited from providing any aid or assistance which would serve to maintain situations arising from the breaches.²⁷

The ICG urges that States support the elections and that the UN Secretary-General and relevant UN agencies consider providing assistance with the 2010 elections. Further, ICG urges the UN, in particular the United Nations Development Programme, to undertake activities to strengthen “the capacity of civilian institutions of governance...”²⁸ ASEAN States are urged to “[c]onsider offering, as and when appropriate, parliamentary exchanges with the newly elected government, assistance in setting up parliamentary committees and other steps...”²⁹ Western Governments should “send clear messages before the post-election government is in place that a process of normalising relations is possible...” and that such governments should “[s]uspend restrictions on high-level bilateral contacts with the new government...”³⁰

These ICG recommendations are oppositional to the United Nations International Law Commission’s “Draft Articles on the Responsibility of States for Internationally Wrongful Acts,” which codify States’ legal duties towards the State responsible for committing serious breaches of peremptory norms.³¹ The global community can neither support the 2010 elections, nor any new government elected on the basis of the 2008 constitution without abridging the most fundamental precepts of international law.³²

The ICG recommendations, if adopted by the United Nations, could serve to undermine the integrity of UN leaders as “chief standard bearers” for the principles of human rights in the UN Charter. Further, given that the government of Burma engages in active victimization, UN activities could be seen as complicit, rendering the UN itself legally responsible. See Mac Darrow & Louise Arbour,



The Pillar of Glass: Human Rights in the Development Operations of the United Nations, 103 AM. J. INT'L L. 446, (2009). (Noting the human rights issues raised when members of the UNDP were eyewitnesses to government-perpetrated killings of monks in Myanmar in 2007. id. 448).

The Security Council enforced these legal precepts in 1984 when it declared as “null and void [South Africa’s] so-called ‘new constitution’,” noting it was contrary to the principles of the UN Charter, and called for States not to assist or recognize the elections or any resulting government.³³ The ICG recommendations directed to Western Governments fail to take account of the position of the European Parliament in its Resolution of May 22, 2008, condemning the junta’s referendum on the constitution, calling for members to reject the “the sham constitution, and... the implausible outcome” and calling for EU members to press for a Security Council referral of Burma to the International Criminal Court.³⁴

The ICG recommendations, which include lifting all existing travel restrictions, would undermine the integrity of States’ national legislation implementing international humanitarian law. Measures of lustration and vetting, which are not only central to any democratic transition, but now mandated by the Security Council under resolutions 1820 and 1888, are totally absent in Burma.³⁵ In fact, the constitution reverses the very concept of lustration by ensuring that key positions in any new government, including on the Supreme Court, will be occupied by men potentially criminally culpable for perpetrating crimes of concern to the global community.³⁶ The prospect of war criminals occupying major positions in any post-2010 government in Burma presents a serious problem for those States with laws requiring prosecution or extradition for prosecution of perpetrators of jus cogens crimes should they be present in the jurisdiction.³⁷ Other States’ penal codes provide for discretionary prosecutions of perpetrators of certain core crimes under universal jurisdiction principles. In either case the integrity of national legal systems would be severely tested by States fostering “bilateral contacts” with individuals they are under a legal and moral duty to prosecute and punish.³⁸

Women

The 2008 constitution is sui generis in modern history for its formal guarantees enforcing women’s inequality, amounting to de jure and de facto gender apartheid.³⁹ Women are not allowed in the military except in honorary positions, and are thus precluded from holding the top offices reserved for active military including Commander-in-Chief, several ministries, and 25% of all parliamentary seats. The qualification of “military experience” effectively renders women ineligible for the Presidency or Vice Presidency.⁴⁰ This singular form of gender apartheid has been the focus of protests to the Secretary-General, including by U.S. Congresswomen (“[the] constitution...violates international



law and entrenches gender discrimination...”), the Global Justice Center, the Society for American Law Teachers (SALT), and the Women’s League of Burma, along with other civil society groups.⁴¹

The historic measures taken by the Security Council to address the endemic sexual violence against women in conflict, including SCRs 1325 and 1820, are premised on gender equality as key to maintaining international peace and security. By formalizing inequality and providing for amnesty for sexual crimes, the 2008 Burma constitution flouts the Security Council resolutions and precludes Burma from ever complying with its obligations under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).⁴² Moreover, supporting the 2010 elections sends a message to women globally that their rights are fragile; even in the face of formal evisceration of the rights of over twenty-five million women in Burma the global community feels free to choose to legitimate this moral wrong.

The ICG acknowledges that the military can “ignore or override constitutional provisions...or even abrogate the constitution...”⁴³ premising its support for the 2010 elections solely on the speculation that it might “inadvertently” open up political space.⁴⁴ This rationale, absent any considerations of either peace or justice, can never provide the basis for abandoning the legal principles foundational to our world order. We call on you, as President of the ICG, to rescind the organization’s recommendations regarding Burma, to withdraw the flawed constitutional analysis, and to articulate States’ legal obligations with regard to Burma, including taking all possible steps, individually and collectively, to end impunity for the ongoing criminal breaches of international humanitarian law. Burma presents the global community with the opportunity to demonstrate that the global rule of law is a reality and not an illusion. We call on the International Crisis Group to lead the effort to make this happen.

Sincerely,

Janet Benshoof
President
Global Justice Center

U Thein Oo
Chairman
Burma Lawyers’ Council

CC: ICG’s Board of Directors and Executive Committee.

(Endnotes)

1 International Crisis Group, Asia Report N° 174, and Myanmar: Towards the Elections, Aug 20, 2009, ii-iii, 25-26 {hereinafter ICG Report}.



2 The Global Justice Center is a human rights organization focused on the enforcement of international humanitarian and human rights law. The Burma Lawyers' Council, the legal arm of the Burma democracy movement, publishes extensively on Burma's military regime and the history of constitutionalism in Burma, including comparative analyses of the 2008 constitution. Both organizations are internationally recognized for their expertise on Burma and regularly brief civil society groups, United Nations bodies, and governments on issues involving Burma and international law.

3 See generally International Committee of the Red Cross, *How is the Term 'Armed Conflict' Defined in International Humanitarian Law?*, Mar. 2008; International Committee of the Red Cross, *International Review of the Red Cross: Customary Law*, 189, Vol. 87, No.857, March 2005. Burma ratified the Geneva Convention on August 25, 1992, the Genocide Conventions on March 14, 1956, the Convention on the Rights of the Child on July 15, 1991, and the Convention on the Elimination of all Discrimination against Women (CEDAW) on July 22, 1997. See United Nations Treaty Collection, <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>.

4 The March 2009 Report by the Secretary-General to the Security Council on children in armed conflict noted that the Government of Myanmar prevented the United Nations from concluding the action plans it had negotiated and which were agreed upon by the Karen National Liberation Army (KNLA) and Karenni Army (KA) in line with Security Council Resolutions 1539 (2004) and 1612 (2005). The Secretary-General, Report of the Secretary-General on Children and Armed Conflict, 33-34, U.N. Doc. A/63/785-S/2009/158 (Mar. 26, 2009). The Report further noted that the Karen National Union (KNU)/KNLA and the Karenni National Progressive Party (KNPP)/KA signed deeds of commitment on 6 April and 13 April 2007 respectively. *Id.* In regards to the military government violations, the Secretary-General reported that no perpetrators had ever been criminally prosecuted, that the Tatmadaw Kyi was a persistent violator from the date such UN reporting started, that the government denied all UN humanitarian access to children during the reporting period, and that the action plan on the use of child soldiers proposed by the government had to be Rejected as not meeting international standards. *Id.* at 34.

5 See *Prosecutor v. Dusko Tadic (Jurisdiction)*, Case No. IT-94-1-AR72, Oct. 2 1995; Rome Statute of the International Criminal Court, Part 2, U.N. Doc. A/CONF.183/9 (July 17, 1998). See generally International Committee of the Red Cross Advisory Service on International Humanitarian Law, *National Enforcement of International Humanitarian Law: Information Kit, Command Responsibility and Failure to Act*, Dec. 31, 2003; William Fenrick, *The development of the law of armed conflict through the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 3 J. ARMED CONFLICT L., 200, 200-210 (Dec. 1998). The International Criminal Court or the creation of an ad hoc tribunal are currently the only channels to prosecute Senior General Than Shwe and other military leaders in Burma as States are generally precluded from prosecuting sitting heads of state and foreign ministers. *Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)* 2002 I.C.J. 3, 8 (Feb. 14).

6 For an overview of the U.N. documentation on Burma, see THE INTERNATIONAL HUMAN RIGHTS CLINIC AT HARVARD LAW SCHOOL, *CRIMES IN BURMA* (May 2009) [hereinafter Harvard Report]. See also International Federation for Human Rights (FIDH), *ALT-ASEAN and Burma Lawyers' Council Report, Burma/Myanmar International Crimes Committed in Burma: the Urgent Need for a Commission of Inquiry*, Aug. 2009; and International Center for Transitional Justice, *Impunity Prolonged: Burma and its 2008 Constitution*, Sept. 2009.

7 The Secretary-General, Report of the Secretary-General Pursuant to Security Council Resolution 1820 (2008), ¶¶15, 19, 23, 26, U.N. Doc. S/2009/363 (Aug. 20, 2009) [hereinafter 1820 Report]. Criminal violations in Burma are noted in four places in the report: 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. *Id.* at ¶15. In Myanmar, 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. *Id.* at ¶19. 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. *Id.* at ¶23. [I]n Myanmar, 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. *Id.* at ¶26. 8 S.C. Res. 1820, ¶ 4, U.N. Doc. S/RES/1820 (June 19, 2008) [hereinafter SCR 1820]. Prior to its adoption, the International Crisis Group argued to the Security Council that including a provision prohibiting all amnesties for sexual crimes was “non-negotiable”. See also International Crisis Group, Statement on Gender Violence ahead of UNSC 19 June Debate, June 18, 2008. See also Donald Steinberg, Deputy President, International Crisis Group, *Beyond Victimhood: Protection and Participation of Women in the Pursuit of Peace*, Testimony to the U.S Senate Foreign Relations Committee (Oct. 1, 2009)

9 For a detailed explanation of the ICRC protocol for addressing States’ violations see International Committee for the Red Cross, *Action by the International Committee of the Red Cross in the Event of violations of International Humanitarian Law or of Other Fundamental Rules Protecting Persons in Situations of Violence*, 397-98, Vol. 7, No. 858, June 2005.

10 See Press Release, International Committee of the Red Cross, Myanmar: ICRC denounces major and repeated violations of international humanitarian law (June 29, 2007) (on file with the ICRC), available at http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/myanmarnews290607?OpenDocument&style=custo_print.

11 Article V of the Genocide Convention requires “The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article 3.” Convention on Prevention and Punishment of the Crime of Genocide art. V, Dec. 9 1948, 78 U.N.T.S. 277. Additionally, under Article VI, “Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction” *Id.* at art. VI.

12 See Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Mont.*), 2007 I.C.J. 91, 155 (Feb. 26).

13 See Juan E. Mendez, Special Adviser to the Secretary-General on the Prevention of Genocide, *Prosecution and prevention of genocide: current developments and historical experience*, Address Before the Nuremberg Human Rights Center (Oct. 6, 2006), at 2 (transcript available at http://www.responsibilitytoprotect.org/files/60_Nuremberg.pdf) (“Governments are obliged to take all measures within their power to prevent the commission of the crime of genocide, even before a competent court determines that the Convention actually applies to the case at hand.”); See generally Stockholm Declaration on Genocide Prevention (Jan. 28, 2004), available at http://www.aegitrust.org/index2.php?option=com_content&do_pdf=1&id=94 (“We are committed to shouldering our responsibility to protect groups identified as potential victims of genocide, mass murder or ethnic cleansing [...]”)(issued by fifty-five governments at the Stockholm International Forum on Preventing Genocide; Threats and Responsibilities).



14 See Genocide Prevention Project, Mass Atrocity Red Alert, <http://www.preventorprotect.org/overview/watch-list.html> (last visited Oct. 21, 2009).

15 See UN Report from the Special Advisor on Genocide Prevention, Feb. 16, 2006, <http://www.ushmm.org/genocide/analysis/details.php?content=2006-02-16> (“I can say that I am following the situations in various countries and in some cases, I have already written notes to the Secretary-General, and through him to the Security Council. Those are Darfur, Ivory Coast and the Democratic Republic of the Congo, but in other cases short of going to the Security Council, we have made our concerns known via the Secretariat, and they include, as I said, Colombia, but also Burma, with the situation of indigenous populations that have been in armed conflict with the government of Burma—there have been intrusions also—but recently, the government has acted militarily against them, and apparently affected the civilian population...”).

16 Jared Genser, Op-Ed, The question of genocide in Burma, *Burma Digest*, Mar. 20, 2006, <http://burmadigest.info/2006/03/20/the-question-of-genocide-in-burma-2/> (quoting U.N. Under-Secretary Ibrahim Gambari’s private briefing to the Security Council on December 16, 2005).

17 Constitution of the Republic of the Union of Myanmar (2008) art. 445 [hereinafter Myanmar Constitution] (“No proceedings shall be instituted against the said Councils or any member thereof or any member of the Government, in respect of any act done in the execution of their respective duties.”). The constitution states that “In the adjudication of Military Justice...the decision of the Commander-in-Chief is final and conclusive.” *Id.* at art. 343. It further provides that “The Commander-in-Chief of the Defense Services to whom the sovereign power has been transferred shall have the right to exercise the powers of legislature, executive and judiciary.” *Id.* at art. 419.

18 S.C. Res.554, ¶ 5, U.N.Doc. S/RES/556 (Aug. 17, 1984) [hereinafter SCR 554]. See also Draft Articles on Responsibility of States for Internationally Wrongful Acts in Report of the International Law Commission on the Work of its Fifty-Third Session, art. 40, 41, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (Nov. 2001) [hereinafter ILC Draft Articles] (“No State shall recognise as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation.”).

19 See Myanmar Constitution, *supra* note xvii.

20 See S.C. Res.1325, ¶11, U.N. Doc. S/RES/1325 (Oct. 30, 2000); SCR 1820, *supra* note viii.

21 See Opening Statement of Patricia O’Brien, UN Under-Secretary-General for Legal Affairs, at the 36th Meeting of the Committee of Legal Advisers on Public International Law (Oct. 7, 2008) (“The UN does not recognize any amnesty for genocide, crimes against humanity, war crimes and other serious violations of international Humanitarian law.”). See also Statement by the President of the Security Council. U.N. Doc. S/PRST/2009/1* (Jan.14, 2009) (“Stress the need for the exclusion of, and reject any form of, or endorsement of, amnesty for genocide, crimes against humanity, war crimes or other serious violations of human rights in conflict resolution processes and ensure that no such amnesty previously granted is a bar to prosecution before any United Nations-created or assisted court.”).

22 military government, and all law-making power was vested in the Parliament, even in times of war. The Constitution of the Union of Burma (1947) art. 59, 90, 94. In direct contrast to the 2008 constitution, the Supreme Court’s jurisdiction could not be removed on matters regarding the constitution and decisions of the Supreme Court. *Id.* at art. 138; Myanmar Constitution, *supra* note xviii, at art. 343. The 1974 constitution, even though enacted when Burma was under military rule, did not establish separate military power. The Constitution of the Socialist Republic of Burma (1974) art. 65, 66. The president, also Chair of the Council of State, was supreme over the military, the judiciary retained jurisdiction over military matters, and the parliament had the power to declare war. *Id.* at art. 13, 49, 105.



23 Id.

24 Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; see generally International Committee of the Red Cross Advisory Service on International Humanitarian Law, National Enforcement of International Humanitarian Law: Information Kit, Criminal Procedure, Dec. 31, 2003.

25 Id.

26 ILC Draft Articles, *supra* note xviii, at art. 31 (“The responsible State is under obligation to make full reparation for the injury caused by the internationally wrongful act.”)

27 ILC Draft Articles, *supra* note xviii, at art. 41.

28 ICG Report, *supra* note i, at ii-iii.

29 Id.

30 Id.

31 ILC Draft Articles, *supra* note ,viii.

32 Id. at art. 41 (“No state shall recognise as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation.”).

33 SCR 554, *supra* note xviii.

34 Paragraph 11 of the EU resolution contains two separate calls for an ICC referral directed at the denial of humanitarian aid access after Cyclone Nargis. The paragraph reads: “if the Burmese authorities continue to prevent aid from reaching those in danger, they should be held accountable for crimes against humanity before the ICC; calls on the EU Member States to press for a UN Security Council resolution referring the case to the Prosecutor of the ICC for investigation and prosecution....” Resolution on the Tragic Situation in Burma, EUR. PARL. DOC. P6_TA (2008) 0231 (2008). See also the conclusions of the team of experts led by Johns Hopkins in September 2008 documenting the junta’s deliberate indifference to human life related to denial of aid after Cyclone Nargis. The report notes that the junta’s conduct may rise to the level of crimes against humanity, which would require a Security Council referral to the ICC. EMERGENCY ASSISTANCE TEAM (BURMA) & JOHNS HOPKINS UNIVERSITY CENTER FOR PUBLIC HEALTH AND HUMAN RIGHTS, AFTER THE STORM: VOICES FROM THE DELTA, March 2009. See also Gareth Evans, former President of the ICG, stating that the Burmese generals’ denial of relief after the cyclone, placing thousands of people at risk of immediate death, presents “at least a prima facie case” for crimes against humanity, which if established, would mean that “the responsibility to protect principle does indeed kick in.” Gareth Evans, Facing Up to Our Responsibilities, GUARDIAN.CO.UK, May 12, 2008, <http://www.guardian.co.uk/commentisfree/2008/may/12/facinguptoourresponsibilities>.

35 SCR 1820, *supra* note viii, at ¶ 3; S.C. Res. 1888, ¶ 3, U.N. Doc. S/RES/1888 (Sept. 30, 2009); 1820 Report, *supra* note vii, at ¶26 (“States must ensure that vetting processes exclude persons against whom there are credible allegations, and evidence of crimes, including sexual crimes; such persons should also be excluded from public institutions, including integrated armed forces.”).

36 The four military generals listed in the ICG Report as most likely to be the new President and Commander-in-Chief in 2010 are General Thura Shwe Mahn, Major General Htay Oo, Lt. General Myint Swe and ex-General Aung Thaung. ICG Report, *supra* note i, at 21 n.109. The Council of the European Union has imposed an offshore asset freeze, visa restrictions and restrictions on all diplomatic contact on all four of the candidates. Council Common Position (EC) No. 2009/351/CFSP of 27 April 2009, 2009 O.J. (L 108) 54.

37 States are increasingly enacting national legislation providing for prosecution of perpetrators of jus cogens crimes. In fact at least 54 states have criminalized war crimes in their domestic legislation. EVE LA HAYE, WAR CRIMES IN INTERNAL ARMED CONFLICTS 170 (Cambridge University Press 2008). In the U.S., for example, Charles Taylor’s son was prosecuted for torture under a U.S. law providing prosecution of perpetrators of torture who are U.S. citizens or on U.S. soil. See 18 U.S.C. §2340A. At least



32 of these states have incorporated domestic legislation allowing their courts to exercise universal jurisdiction over war crimes committed in foreign internal conflicts where both the perpetrator and victim are non-nationals. LA HAYE, at 254. Moreover, at least three ASEAN countries have incorporated and/or recognized universal jurisdiction principles. The Vietnam criminal code allows for prosecution of foreigners in accordance with international instruments that Vietnam has ratified. See LA HAYE, at 287, n. 124; Vietnam Penal Code, Art. 6(2), Dec. 1999 (“Foreigners who commit offenses outside the territory of the Socialist Republic of Vietnam may be examined for penal liability....”). In Indonesia, the Ad Hoc Human Rights Tribunal has found that “Punishment of the perpetrators of [serious human rights violations] is recognized as an obligation to the entire international community (erga omnes obligation).” Abilio Soares, Ad Hoc Human Rights Tribunal at the Human Rights Court of Justice of Central Jakarta, 65, Aug. 14, 2002. Cambodia, has ratified the Rome Statute of the International Criminal Court.

38 Internal States are generally precluded from prosecuting sitting heads of state and foreign ministers. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.) 2002 I.C.J. 3, 8 (Feb.14).

39 Committee on the Elimination of Discrimination against Women (CEDAW Committee), Concluding Observations of the Committee on the Elimination of Discrimination against Women: Myanmar, U.N. Doc. CEDAW/C/MMR/CO/3 (Nov. 7, 2008).

40 Myanmar Constitution, supra note xvii, art. 190.

41 See Letter from the Senate Women’s Caucus on Burma to Secretary-General Ban Kimoon, Apr. 9, 2009, available at http://feinstein.senate.gov/public/index.cfm?FuseAction=NewsRoom.PressReleases&Content_Record_id=a5d1f98e-5056-8059-7692-63bda7b74dac&Region_id=&Issue_id=; Letter from the Global Justice Center and SALT to Secretary-General Ban Ki-moon (on file with the author), Mar. 4, 2009, available at <http://www.globaljusticecenter.net/projects/burma/petition.html>; Letter from the Women's League of Burma to Secretary-General Ban Ki-moon, Aug. 7, 2009.

42 See Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee), Conclusion Observation, Principle Area of Concern and Recommendation, Myanmar, 22nd Session , para 133, U.N.Doc. CEDAW/C/SR.450,451 and 457 (2000).

43 ICG Report, supra note i, at 12.

44 Id. at i.

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(D.5)

fidh

Fédération internationale des ligues des droits de l'Homme

ORGANISATION INTERNATIONALE NON GOUVERNEMENTALE AYANT STATUT CONSULTATIF AUPRES DES NATIONS UNIES, DE L'UNESCO,
DU CONSEIL DE L'EUROPE ET D'OBSERVATEUR AUPRES DE LA COMMISSION AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

International Federation
for Human Rights

Federación Internacional
de los Derechos Humanos

الفيدالية الدولية لحقوق الإنسان

Member States of the
United Nations Security Council

Paris - New York, November 11th 2009

Re: The Security Council should address the situation in Burma and the protection of civilians in armed conflict.

Excellencies,

The International Federation for Human Rights (FIDH) is writing to you to urge the United Nations Security Council to address the gravity of the situation in Myanmar/Burma. As you may recall, Tomás Ojea Quintana, the Special Rapporteur on the situation of human rights in Myanmar, in addressing the 64th session of the United Nations General Assembly expressed his concerns that the widespread and systematic violations of civilians' rights continue in Myanmar/Burma. Moreover, Mr. Quintana urged the General Assembly to act against impunity in the country by putting in place measures to establish responsibility for these violations.

The human rights violations, potentially amounting to crimes against humanity and war crimes¹, perpetrated by the State Peace and Development Council (SPDC) are escalating in number and taking place in a context where the junta enjoys complete impunity and is gaining legitimacy in the eyes of the international community merely for undertaking superficial, cosmetic reforms. At the same time, the new constitution of Burma will only further entrench the power of the SPDC while it refuses to undertake any actions in favor of national reconciliation.²

The United Nations Human Rights special procedures, including the UN Special Rapporteur, have cited the destruction of over 3,000 ethnic minority villages, the conscription of tens of thousands of child soldiers, the forced displacement of over one million refugees and internally displaced persons, and the widespread



and systematic rape of women in the ethnic minority regions of the country. The Security Council has made numerous condemnations of these same crimes: The Resolutions 1265, 1296 and 1674 for Protection of Civilians in Armed Conflict, Resolutions 1325, 1820, 1888 and 1889 on women and peace and security and against sexual violence in conflict, and Resolutions 1612 and 1882 on Children and Armed Conflict, all of them provide an international legal framework to address those crimes allegedly perpetrated in Burma.

Abuses are taking place in the country in total impunity while the United Nations Security Council has passed resolutions against these crimes. On November 11, 2009 the Security Council will revisit the issue of protection of civilians during armed conflict. FIDH requests the member States of the Security Council to take urgent and proper action in response to the violations occurring in Burma in the context of the armed conflict taking place in the ethnic minority areas on the occasion of this meeting. FIDH firmly believes that it is the responsibility of the Security Council to address the specific instances of these crimes occurring in countries such as Burma, and to move beyond discussing them in a merely thematic manner.

We sincerely hope that you will take into consideration these concerns, and we remain

Sincerely yours,

Souhayr Belhassen
President

(Endnotes)

1 See FIDH - BLC- ALTSEAN-Burma report entitled “Burma: An International Commission of Inquiry more urgent than ever”, can be downloaded at <http://www.fidh.org/IMG/pdf/bu08.pdf>

2 See ALTSEAN - Burma report on 2010 Elections : a recipe for continued conflict on : <http://www.altsean.org/Reports/2010Electionsbis.php>

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**Part (E)
BLC Activities**

(E . 1)

**Interface Burma:
TO PROMOTE AWARENESS ON THE INTERNATIONAL
CRIMINAL COURT**

by BLC's Working Team for ICC

I. INTRODUCTION

For decades, the people in Burma have suffered extreme oppression under the ruling military regime, the State Peace and Development Council (SPDC). The acts of the military regime in Burma have been widespread and systematically committed, such as murder, rape, torture, forcible displacements, deprivation of physical liberty of individuals and land confiscations without consent or compensation. Furthermore, the regime has forced the judges to jail persons who are active in politics, lacking of fair trial and ignoring due process of law. The acts of the authority are not only human rights violations. These acts are international crimes. These crimes should be subject to the international justice mechanisms, particularly through referral to the International Criminal Court. Therefore, we need to increase cooperation among Burmese Human Rights Organizations, Non-governmental organizations and individuals. We should promote awareness of the International Criminal Court (ICC). This article will highlight the BLC's trip to The Hague in order to promote knowledge of the ICC.

II. SUMMARY OF THE HAGUE TRIP

The purpose of this trip is focused on trainings such as international criminal justice system and international criminal court, upon invitation by the International Federation for Human Rights (FIDH). The FIDH has created training sessions focusing on representatives of national human rights non-governmental organizations (NGOs). The training sessions are presented about the functioning and activities of the ICC. The FIDH also aims to improve capacity building of Burmese (Myanmar) groups on international criminal justice mechanisms.



Furthermore, the FIDH has addressed the fight against impunity for crimes committed in Burma, according to decisions from a seminar in Bangkok which was organized by the FIDH and the Burma Lawyers' Council (BLC) on 4-6 May 2009. Recently, the FIDH, the Alternative Asean Network on Burma (ALTSEAN) and the BLC published a joint report, **Myanmar/Burma: International Crimes committed in Burma – The Urgent Need for a Commission of Inquiry**.

III. TRIP PURPOSES AND MAIN TOPICS OF TRAINING SESSIONS

The objectives on this trip were objectively focused on **Myanmar/Burma: International Crimes committed in Burma – The Urgent Need for a Commission of Inquiry**. Furthermore, this trip confirmed a decision to advocate for a resolution from the United Nations Security Council, send a Commission of Inquiry to Burma, and also seek a referral to the ICC based on the ground information from Burma.

The training sessions were targeted on such concepts as the jurisdiction and functioning of the ICC, the possible establishment of an International Commission of Inquiry, the documentation of crimes, the complexities of dealing with mass atrocities, the rights of victims, and the role of other international justice mechanisms – for example, universal jurisdiction and Truth and Reconciliation Commissions.

IV. PARTICIPANTS

Participants included many representatives from Burmese Human Rights and Legal Organizations. Particularly, three representatives of BLC participated in this trip to The Hague, The Netherlands: U Thein Oo, Chairperson of the BLC; U Aung Htoo, General Secretary of the BLC; and Nai Lawe Aung, a BLC staff member. Lway Aye Nang, General Secretary of the Women's League of Burma (WLB), also participated in this trip. Two other representatives joined this trip on behalf of the Network for Human Rights Documentation-Burma (ND-Burma) – namely, Ko Khin Maung Shwe and Ko Aung Myo Thein.

Many experts from the International Criminal Court (ICC) gave presentations. Mr. Claus Molitor is an Analyst Office of the Prosecutor. Two presenters were from the sections of Registry (Public Information and Documentation and Representative of Victims' Participation and Reparations) of the ICC. There were also two representatives from the section of the Office of Public Counsel for Victims and section of the Office for Public Counsel for the Defense of the ICC. Ms. Kristin Kalla, a Senior Program Officer of the Secretariat of the Trust Fund for Victims of the ICC, also presented.

Three experts presented about the Commission for Reception, Truth and Reconciliation in East Timor; the Coalition for the International Criminal Court (CICC); and the Project Coordinator of Universal Jurisdiction from the



perspective of the international justice system. The International Federation of Human Rights (FIDH) contributed three delegations. They included Emmanouil Athanasiou, an Asia Desk Officer; Mariana Pena, a permanent representative to the ICC; and Camille de Rugy, a staff of the Research Assistant of the FIDH.

V. STUDY OF THE ICC AND INTERNATIONAL JUSTICE SYSTEM FROM EXPERTS

1. Documentary on Milosevic's Case

The FIDH delegation introduced the system of international criminal justice, based on the documentary on Milosevic's Case. The crimes committed by Milosevic, have occurred in internal territory.

2. Universal Jurisdiction: An Introduction

Asa Rydberg van der Sluis is a Swedish lawyer who worked in the International Criminal Tribunal for the former Yugoslavia (ICTY). She presented about universal jurisdiction, such as the background of universal jurisdiction, international conventions providing for universal jurisdiction over serious international crimes, rationale for an exercise of universal jurisdiction, filing complaints based on universal jurisdiction and practical considerations, and also comparing issues in Burma.

3. Current Cases in progress in the Court

The next delegation from the ICC presented current cases which are in progress in the ICC. For instance, the Democratic Republic of Congo (DRC), Central African Republic (CAR), and Northern Uganda, are state parties to the Rome Statute and therefore have been referred to the ICC directly. Similarly, because Sudan is not a member of the Rome Statute, the Darfur case was not directly referred to the ICC. The crimes which happened in Darfur, Sudan reached the ICC through a referral by the UN Security Council. Of these four countries targeted by the ICC, only five perpetrators are currently standing trial in the ICC.

4. Coalition of the ICC: An Introduction

Isabelle Olma spoke about the work of the Coalition of the International Criminal Court, commonly known as CICC, an international non-governmental organization (NGOs) with a membership of over 2,500 organizations worldwide, advocating for a fair, effective and independent ICC. The CICC's members work as a partnership to strengthen international cooperation with the ICC; ensure that the court is fair, effective and independent; make justice both visible and universal; and advance stronger national laws that deliver justice to victims of war crimes, crimes against humanity, and genocide. She also introduced 110 states which are members of the ICC.



5. Role of the ICC Office of the Prosecutor (OTP)

Claus Molitor presented about the structure of the Office of the Prosecutor. The Office of the Prosecutor is formed by three organs which are headed by the Prosecutor. It is an independent office, not influenced by the Court. The mandate of the Office of the Prosecutor is to receive and analyze referrals and communications; to determine whether there is a reasonable basis to investigate; to conduct investigations on crimes such as genocide, crimes against humanity, and war crimes; and to conduct prosecution before the Court.

The three organs of the Office of the Prosecutor are: 1) The Investigation Division; 2) The Prosecution Division; 3) The Jurisdiction, Complementarity and Cooperation Division. The Prosecutor may initiate an investigation in three ways: 1) referral by State Party; 2) referral by UN Security Council; and 3) Communicated from any source.

Moreover, the Prosecutor can open an investigation under the first two ways out of three - referral by State Party or by Security Council. If the case is communicated from a different source, he may request the authority from the Pre-Trial Chamber. Then, the Prosecutor can determine whether there is reasonable basis to proceed in three ways: 1) jurisdiction over crimes; 2) admissibility; and 3) interest of justice.

6. The Role of Victims and Witnesses in the ICC

The Rome Statute has laid down the role of victims and witnesses participating in the Court. The principles of the role of victims and witnesses provided by the Statute are: 1) participation; 2) protection; 3) protection mechanisms; 4) support; 5) reparations; 6) Trust Fund for victims; 7) evidence in sexual violence cases; and 8) special measures.

VI. ADVOCACY AWARENESS OF THE ICC CONCERNING CRIMES IN BURMA

All participants had meetings with the officers of different embassies, such as the Dutch Ministry of Foreign Affairs, the French Embassy, the Swedish Embassy, and the Finland Embassy, and also met many sections of the ICC, such as the Public Information and Documentation Section, Victims' Participation and Reparations Section, The Office of Public Counsel for Victims Section, Section of the Trust Fund for Victims, the Office of Public Counsel for the Defense: Fair Trial. Participants also studied the case of Charles Ghankay Taylor.

The General Secretary of the BLC, Mr. U Aung Htoo, made a short presentation on issues of crimes in eastern Burma committed by the soldiers of the State Peace and Development Council (SPDC). The SPDC has claimed absolute impunity and provided a provision in the 2008 Constitution to ensure impunity on crimes committed in past. Lway Aye Nang, the delegate from WLB, discussed women's issues in Burma. The BLC Chairperson, Mr. U Thein Oo,



shortly presented about the real conditions in Burma and the SPDC oppression of elected preventatives in the 1990 General Election in Burma, including long term imprisonment, detention lacking due process of law, and torture in jail.

The FIDH, BLC, WLB, and ND-Burma requested the officers of embassies to discuss crimes in Burma in the Parliament of the European Union and to encourage the UN Security Council to make a resolution to send a Commission of Inquiry to Burma.

VII. CONCLUSION

This article highlights different points. It aims to increase awareness of the International Criminal Court in the international community, at regional, national, and international levels. It also connects crimes which have been committed by the military regime in Burma. These crimes are international crimes which should be brought to justice under international criminal justice mechanisms, particularly under the ICC. The perpetrators should not be given impunity for these crimes.

Finally, the FIDH, the BLC, and ALTSEAN Burma have produced a report: **The Urgent Need for a Commission of Inquiry in Burma**. It intends to bring the perpetrators to justice because the people have suffered many atrocities in Burma. It is time for the international community to act, to end impunity in Burma in a way that may also facilitate the efforts of people in Burma for peaceful democratic transition, with a true national reconciliation on the basis of the rule of law.

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 Burma Lawyers' Council

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Press Release: BLC's Participation in the Assembly of State Parties to the International Criminal Court

(Nov 13, 2009)

With the invitation from the Coalition for the International Criminal Court (CICC), a net work of over 2,500 non- government organizations working for the International Criminal Court (ICC) across the world, U Aung Htoo, General Secretary of the Burma Lawyers' Council is to attend the upcoming meetings at the Assembly of States Parties to the ICC, to be held in the Hague, the Netherlands, on Nov 17-25, 2009, as an NGO delegate from Burma.

Despite that effort of Burma democratic movement for seeking criminal accountability and ending impunity in order to establish a genuine national reconciliation in Burma still encounters a number of challenges, it has commenced to gain momentum, said U Aung Htoo. Professor David Fisher, Professor of International Law, Stockholm University, Sweden, made the following comment in regard to the ploy of the SPDC to seek impunity in accordance with 2008 Constitution:

The establishment by the Security Council of a Commission of inquiry is key to securing a referral of the Burma situation to the ICC. The referral of the situation in Darfur provides a good illustration of this. Attempts by the SPDC, through the Burmese constitution or through other domestic laws/measures, to grant immunity for war crimes, crimes against humanity or other crimes falling within the jurisdiction of the ICC, will have no legal bearing on any Security Council process of inquiry or referral. In fact, such national attempts to provide immunity are counterproductive since they render the national authorities "unable or unwilling" to prosecute, thus opening for exercise of the complementary jurisdiction of the ICC.

For more detailed information:

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Burma Lawyers' Council

EVERYONE IS EQUAL BEFORE THE LAW.

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

MISSION STATEMENT

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

THE STATUS OF ORGANIZATION

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

OBJECTIVES OF THE BLC

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

BURMA LAWYERS' COUNCIL
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