



# Lawka Pala

Legal Journal on Burma



ISSN 1513-9174

No.37. December, 2010



*Burma Lawyers' Council*

**LawKa PaLa**  
**Legal Journal on Burma**

**BURMA LAWYERS' COUNCIL**

Published by the *Burma Lawyers' Council*

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Cover design & layout: *Than Nai Htwe*

Funded by: **Friedrich Naumann Stiftung (FNS)**

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## **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.

Suggestions, or contribution of articles, for Legal Journal on Burma are most welcome. Any enquiries regarding content or subscription should be directed to the Bangkok Office of the Burma Lawyers' Council.

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## **Part (A): Special Features**

### **Part (1)**

#### **Freedom address calls for cooperation and democracy**

*(Burmese opposition leader Daw Aung San Suu Kyi gave a public address at NLD headquarters in Rangoon on Sunday following her release from house arrest. The following is from a translated transcript distributed by the UNDP in Rangoon.)*

*(The Nation, Thailand, Thursday, November 16, 2010)*

I have to begin by thanking you for your support. We haven't seen each other for a long time, but I am happy to see that our mutual faith remains strong; it fortifies me. In order to do our work, we must know what the people want - you do know what you want, don't you? Well, it's fine to know what you want, but you must also know how you are going to achieve what you want. I believe that politics must be learned. I have often said, in my talks with the youth, I don't believe there is such a thing as good people or bad people, or smart or stupid people. I only believe that there are people who can learn and people who can't. I believe that we, the people, can learn very well. It's not enough to know what you want, but also to know how to achieve it with integrity. I say this not to patronise, I say from experience that no matter what the goal, if the path is without integrity, it will lose its way and be destroyed. This is why we must achieve what we want with integrity.



I know you have lots of questions to ask me, and I want to hear the voices of the people. I believe that I will now have the chance to listen to the voices of the people. While under restriction, I listened to foreign radio broadcasts to hear what the people are saying. Its very tiresome to listen to the radio for five to six hours a day, but I do this out of regard for the people. So I believe that I am, to a degree, aware of the wishes of the people.

I don't believe I know everything. This is not possible. So the people must make their voices heard by us. This will help us help the people. I believe that the people now realise that nothing can be accomplished without the participation of the people. Because nothing can be accomplished without the people's participation, we would like to create a democracy network across the world, of the people and by the people. It is only when we strive with this mentality, can we serenely achieve our democratic goals. In short, it means we have a lot of work to do. You will not get anything without working for it.

We Burmese blame it all on luck. But do you know what luck means? Luck means you reap what you sow. So if there is anything you want, you have to work to achieve it. We cannot simply bribe the people and promise them the impossible. We will try hard and pave the road that the people want. We will pave it together and we will take that road together. It's not right that one person paves the road while the other stands idly by.

Speaking of paving roads, maybe I picked an inappropriate analogy. It was a slip of the tongue. What I mean is that we will walk the road that leads to the democratic goals. We will walk on it together, we will pave it together. It is only this way, can we reach our goals. Don't wait for others to do it for you. We will not "force" you to do it (alluding to forced labour). If you do not put your mind and soul into achieving it, who knows whether it will end up with the tar being stolen (alluding to the shoddy quality of roads being built because of corruption). I know that your show of support is not without expectation. The burden of these expectations is great and the responsibilities are immense. But I am not one to shy away from responsibility. But I am afraid of not being able to live up to my responsibilities. I will do my utmost to live up to these responsibilities, and call on the people to help us, to advise us, to point out our shortcomings. Pointing



out shortcomings, if done in sincere goodwill, is very helpful. It will help us help the people achieve their aspirations.

I would like to ask the people to please communicate with us openly and courageously. Please don't have any qualms about talking to us. We won't do anything to you. If we are not in agreement, we will let you know. This is the basis of democracy - that of freedom of speech. But freedom to speak is not the same as freedom to be abusive. Well, there may be a bit of admonition. It is very important to be able to achieve mutual understanding. To be able to exchange views. We have to practice this and improve on this.

Upon my release, the main change that I have seen is that there is a proliferation of camera-phones. I see camera-phones all over the place. This shows the development of communication. This development must be used for the good of the majority. Communication brings understanding. Please use communication to foster mutual understanding and unity. I used a phone like this for the first time yesterday. Six years ago these did not exist here. I did not even know where to talk into.

But it is not enough just to say you love me, you have to work. So I thought what love means. Love means the desire for mutual happiness and the implementation of that desire. It is not enough to keep repeating "I love you".

I want to ask the people, to tell us what's on your mind. You can deliver the letter here, if you don't trust the postal service. I want to know what's on your mind. What has been in your mind over the past six years? What has changed? I can't know all of this at once. I have to study it. It's not feasible to speak to all of you individually. If possible, I'd like to hand over the mike to you and listen to what each of you has to say. It's so boring to be the only one to speak. If there is an exchange of dialogue, it creates harmony and is more beneficial. I feel that it is not democratic if one person does all the talking.

Please have discipline. Don't be impatient. There will be other opportunities for us to talk. This will not be the only occasion. There will be many others. Let's be patient. I thank you for your patience.



As I said just now, there is so much to do, so you must save your strength. Well, it's been twenty years of having a hard life, so you must be used to it. I don't want you to continue to have a hard life. Having a hard life isn't the point. The point is that the hard life must be worthwhile, and then one can have endurance. So you must save your strength to make it all worthwhile.

## Part (2)

### **Courage and Perseverance Will Bring Burma Freedom**

*(The Nation, Thailand, Thursday, November 17, 2010)*

I want to tell you not to be dejected. Sometimes there may be some things in our country that will make you feel dejected. Surely you must feel that we have not gotten anywhere, or that there has been no development. But there is no reason to feel dejected. We must strive hard.

Perseverance is important. We must continue to persevere from the start to the finish. The work is never done. Even if something is finished, there will be something else. Building a nation is like this, one thing after the other has to be done. There will never be full satisfaction of the people, but we must strive to achieve a measure of satisfaction. I cannot promise this, but with the trust, dependence and support of the people, I will be fortified because I cannot do it alone. I don't want to do it alone. Doing it alone is not democracy. I have no intention to do it alone. I will do it with the majority, with the people of this country, and with the global community that has shown us goodwill and support. We will do it with everybody. We have to keep this firmly in mind.

Courage means not what some people think, to be up in arms and being a hero. Courage means the resolve to achieve one's goals. We must have this kind of courage. Go to the movies if you want a hero. Courage is a daily task. Don't we people have to muster the courage to face each day? We have to use this courage beneficially and effectively for our country.





It's not enough to think only of oneself or one's own family. I want to reiterate this. Please don't have the attitude that politics does not concern you. My father said that before, that you may not be concerned with politics but politics will be concerned with you. You can't avoid this. Everything is politics. Politics is not just coming here and supporting us. The housewife, who is cooking at home, also has something to do with politics because she is struggling to feed her family with the money she has. Struggling to send children to school is politics. Everything is politics. No one is free of politics. So saying that politics does not concern you and that you do not wish to be involved in politics is a lack of awareness of politics. So I ask the people to try and understand politics and to teach us. We must teach one another. Unless the people teach us what democracy is, we will not make mistakes.

What is important in a democracy is that the people at the back must be able to keep those who are working in the front, under control. This is democracy. The people, who are the majority, must have the right to keep the rulers, who are the minority, under control. This is democracy. So I will accept it if the people keep me under control. But then, I only say this in passing. During the time of my detention, I had a lot of interaction with the people who were in charge of my security. They have been good to me. I have to say what the truth is. Since one must show appreciation to those who are deserving, I say with sincerity that I am grateful to those who were in charge of my security.

I want the people to be able to have mutual understanding and gratitude. A revered monk once said when I was young, that those who were worthy of gratitude and those who showed gratitude were hard to find. I found the latter hard to accept. I thought that human beings were capable of showing gratitude. But this is not true. There are some who show ingratitude. What does showing gratitude mean? It means just to have mutual recognition.

You have to have a little forbearance. There is no question why you have to be angry just because someone stood up. As I said in front of my compound [yesterday], those in front must have forbearance and understanding of those at the back, and likewise, those at the back must have forbearance and understanding of those in the front.



So now I want to know how the people are going to embark on a journey of politics. So if we have to depend on the people, we must have an exchange of views. I will continue to work for national reconciliation among the people, among the people, among all of us. There is no one that I cannot work of talk with. If there is a will to work together, it can be done. If there is a will to talk to one another, it can be done. I will take this path. On taking this path, I declare that we need the might of the people. I ask you to support us with the might of the people. Whatever we decide, we will let the people know.

I haven't finished consulting with the NLD, but I will not only work with the NLD. I will work with all democratic entities and I would like the people to encompass us. We will tell the people, explain to them what our decisions are. There may be things that we decide which the people may not like. But this is natural. Not everyone can be of the same opinion.

Accepting that there can be a difference of opinion is a democratic principle. Why do we do this? We must gain the trust of the people, not the votes of the people. We will gain the understanding and support of the people. I apologise that I cannot clarify this further at this stage, but it would be reckless of me if I were to start announcing one activity after the other, just after my release.

In the meantime, we would like to hear the voices of the people. We will decide how to proceed after listening to the voices of the people. But as I have said, we will use the might of the people and work with all the democratic forces, and we will work for national reconciliation. In doing so, we will do it in a way that would bring the least damage to the people. I can't guarantee that there will be no damage at all. If I were to do so, it's another form of bribery to say that by following us, there will be no sacrifice. But we will find the least damaging way. There may be some sacrifice.



### Part (3)

## The Burmese People Have Suffered With Dignity

*(The Nation, Thailand, Thursday, November 18, 2010)*

We have suffered, our colleagues have suffered, so I ask you for a little forbearance if you have to sacrifice anything. You can't simply want something without sacrifice. If you say you had forbearance for too long, what was it that you had to forbear? It is important to differentiate between right and wrong, and to have the courage to stand by what is right. But what is right can be relative to the occasion. My father used to say that he was not afraid to stand before the court of his conscience. Since I have stood before the court, I am not afraid to stand before the court of my conscience every day. I ask the people to stand before the court of their conscience to find the answer as to whether one is undertaking what should be done. If you can do this, your might will increase immensely. Remember, if might is not used rightly, it is a menace. Might that is used rightly cannot be overcome by anyone. Let us now have a little test of your empathy, understanding and forbearance of one another.

So now I would like to thank all of you who took the trouble to come here and to show your support. We have repeatedly said that we depend on the might of the people, and we cannot succeed without the might of the people. This might of the people must be used systematically. [Addressing some jostling in the crowd] When the people in front stand up for too long, the people in the back get annoyed. The people in the front shouldn't be standing up for too long. The people in the back should also have a little forbearance if they are standing up for just a while. Well, so what, but it's different if they are standing up too long of course.

I would like to repeat what I said, that we have to work together to achieve success. You will not succeed just by wishing and hoping. You must be able to know how to achieve your aspirations and have the courage and ability to do so. We will find the best way. That is to find a way that avoids bringing suffering to the people as much as possible to achieve these goals. I am a fervent believer in national reconciliation. I believe that this is the path we should take. Let me openly tell the people here that I have no grudge against the people who kept me



under restriction. I believe in human rights and the rule of law. I will always strive for this. I don't harbor hatred of anyone. I have no time for this. I have too much to do to harbor any hatred. The people in charge of keeping me under restriction were good to me. This is the truth, and I value this and I am grateful.

Likewise in every aspect I would like everyone to have good interaction with one another. How wonderful would it be if the people were also treated as nicely as I was? But of course I don't mean that the people should be put under house arrest. So I would like to plead, "Please don't put the people under house arrest like I was, but please be nice to the people just as you were nice to me."

We must value the good things and be grateful [for] things that are worthy of gratitude. Just because one doesn't like it, it does not mean that everything is bad. There are good things and there are bad things. So don't be angry if people say you are doing bad things. If you don't want the people to say this, then just don't do anything bad. Just as I value what is good and am grateful, I am not hesitant to say so. It's so rewarding to be able to give recognition to someone worthy of gratitude. I want to do this. I want to be so grateful, so just do things that are worthy of gratitude and I will sing your praises all day. So I want to think each and every one of the people. Of course, I would end up with a sore throat.

So let me say thank you. Keep up your strong resolve. People say that the courage of the Burmese is like straw fire. I don't like this. This shouldn't be so. A human being must have all its manifestations and live in human dignity. Do you want human rights? The Universal Declaration of Human Rights beings by saying that everyone is born with inherent dignity. This dignity must be upheld. The dignity commensurate with these rights must be upheld. I don't wish to make a one-sided statement by repeating what should be done for the people. There are also things that the people must do. Everyone must know hai or her responsibility and be able to fulfill them. Only then will our country develop. So it goes without saying that whether or not our country has developed, is something that the people will know more than I do. But rather than blaming who is at fault for this lack of development, I would only like to ask for the opportunities for us to work together hand in hand.



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I don't like the people having to hold out their hands to beg. I shall not hold out my hands to beg. I shall not hold out my hands to beg, and I believe that my people do not wish to hold out their hands to beg. I believe that people want the right to development, so we must work to give the people the right to development. There must be opportunities for people to be able to feed themselves to the full.

We shall proceed in consultation with democratic entities, and the NLD shall not go it alone but hand in hand with [the] majority. Furthermore, the majority must be encompassed by the people. We cannot do it without the people, and we ask for their assistance. I ask for your faith and support. So keep up your strength. I feel bad to ask you to eat up (to keep up your strength) since I hear that you do not have enough to eat. I ask you to keep up your physical and mental strength. It is with this strength we shall work together to reach our goal. I would have to say that there are some of us who have lost sight of that goal. But to have to walk the path to reach this proper goal is priceless. Man is mortal. One day it will all be over, but before it is over, how one has led one's life is the most important.

So I take this opportunity to honour those of our colleagues and comrades who have given their lives to the cause for democracy; to honour our colleagues and comrades who are still in prison. Let us pray that they will be released as soon as possible.

\* \* \* \* \*



## Accountability and the Future A Commission of Inquiry into War Crimes in Burma

*by Kirsty*

There have been many calls for a Commission of Inquiry into crimes against humanity and war crimes in Burma. These calls often focus on the need to bring the ruling military regime to justice for the egregious human rights abuses it has committed over the past four decades. While the actions of the military regime in its various guises are thoroughly deplorable, it must be recognised that war crimes have been perpetrated by many parties to the conflicts in Burma. This article argues that for the sake of real national reconciliation, any such Commission of Inquiry should investigate the commission of war crimes by all parties. It is held that this could have both immediate preventative effects and help future relations between ethnic groups in Burma.

The UN has consistently noted that the ‘widespread and systematic’ grave crimes perpetrated by the Burmese authorities are the result of state policy at the highest levels<sup>1</sup>. The thorough review of UN human rights reports on Burma published by Harvard Law School in May 2009 emphasises that the knowledge already at the UN’s disposal clearly justifies the establishment of a Commission of Inquiry, or even a direct referral to the International Criminal Court, by the Security Council<sup>2</sup>. The latter is extremely unlikely due to the traditional positions of Russia and China. A Commission of Inquiry, by contrast, is an objective in-



investigative mission whose task is merely to ascertain the truth. Commissions of Inquiry, when truly objective, are thus less immediately menacing and perhaps less objectionable. Importantly, it is likely that China would at least consider supporting measures with the potential to lay the groundwork for genuine security in the border areas. Notably, Commissions of Inquiry established by the Security Council with regard to the former Yugoslavia, Rwanda and Darfur were all part of a process that ultimately resulted in international criminal proceedings.

Burma is home to approximately 135 minority groups, who mainly inhabit the volatile border regions. Ethnic tensions have troubled Burma's politics for centuries. Promises of self-determination made by the British and enshrined in the 1947 democratic constitution have never been realised. It is these people who have borne the brunt of the decades of conflict in Burma. As Burma moves forward, the interests of all civilians in the border regions must be fully respected.

### **The Laws of War**

International humanitarian law, or the law of armed conflict, has developed rapidly over the past hundred years largely in response to the barbarism witnessed in the mass conflicts of the twentieth century. The purpose of this corpus of rules is primarily to protect combatants and non-combatants from unnecessary suffering and to safeguard the fundamental human rights of persons who are not taking part in the conflict (including those who have ceased to take part). It is also hoped that by preventing the degeneration of conflicts into brutality and savagery, humanitarian law aids the restoration of peace and can promote the resumption of friendly relations between former belligerents.

Burma is a party to the four Geneva Conventions of 1949, which are in any case widely regarded to constitute customary international law. Burma is absolutely obliged to execute its military operations during armed conflicts in accordance with the minimum standards set out in Common Article 3 of the Geneva Conventions. The anti-government insurgencies in Burma certainly meet the 'internal armed conflict' threshold. Therefore, all armed belligerents are bound to



treat humanely all those taking no active part in hostilities, and to care for the wounded and sick. Violence towards non-belligerents, the taking of hostages, 'outrages upon personal dignity', torture and the extra-judicial passing of sentences and carrying out of executions are strictly prohibited.

## Accountability

Without an enforcement mechanism and an international judicial process, international law is but a charade followed by parties only at whim. Accountability is critical to ensure the adherence of individuals to international law. Supporters of international criminal justice consistently cite deterrence as a primary aim of punishing individuals found to be ultimately responsible for the perpetration of internationally condemned crimes.

In addition to the importance of deterrence, we must consider the more immediate purposes of international investigations and judicial processes. We must look beyond the purely legal. It is suggested that such processes are anthropologically cathartic. By giving victims of violence the opportunity to confront those held to have wronged them, these processes allow meaningful collective reconciliation and can avoid the perpetuation of enmity.

This retributive principle was expressly recognised by the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia in the Erdemovic case. It stated that, 'thwarting impunity even to a limited extent would contribute to appeasement and give the chance to the people who were sorely afflicted to mourn those among them who were unjustly killed'.

Beware 'victor's justice'. The punishment of only one party to a conflict denies the victims of other parties a voice in the process. A one-sided investigation could deny the real harm suffered by thousands of civilians at the hands of non-state armed forces. Enmities could remain unresolved, or, as history has demonstrated, deepen.





## The Recruitment of Child Soldiers

Burma is a State Party to the Convention on the Rights of the Child 1989, Article 38 of which prohibits the recruitment of anyone under the age of 15 into the armed forces and demands that 'all feasible measures' are taken to protect those under 15 from direct involvement in hostilities. In addition to this, there are also various hollow Burmese laws which purport to proscribe the recruitment of under-18s into the armed forces<sup>3</sup> and penalize 'employing or permitting a child to perform work which is hazardous to the life of the child [...] or which is harmful to the child's moral character'<sup>4</sup>.

Burma seriously breaches its obligations under both international and domestic law. Contrary to the Burmese government's claims that all of its soldiers are volunteers and that all those accepted are 18 or over, it is said that the number of children in the Tatmadaw Kyi is now inestimable<sup>5</sup>. In 2002, it was suggested that there were approximately 70,000 in the government forces alone<sup>6</sup>. Active recruitment is believed to have increased due to a drop in volunteers following the regime's deeply unpopular crackdowns in 1988 and 2007 and concurrent orders for increased security. Children are easy targets for those seeking to satisfy government quotas. Desertion is severely punished, with death or execution a real possibility.

The International Labor Organization has reported that the Burmese authorities have made some response to the ILO's complaints on under age recruitment by the Tatmadaw Kyi. Serious reprimands, the docking of wages or demotion have been imposed on 26 soldiers found guilty of recruiting under age soldiers. A commissioned officer is said to have been dismissed from the military and sentenced to a year's imprisonment, while two privates are believed to have been sentenced to three-month's imprisonment with hard labour.

According to the Secretary-General's 2010 report to the UN General Assembly on children and armed conflict, a tiny number of child soldiers have been released through Burmese Government mechanisms<sup>7</sup>. These commendable, if inadequate, steps demonstrate that objective investigations and recommendations can have some beneficial effect.



The Tatmadaw Kyi is by far the largest recruiter and user of child soldiers in Burma, but it is not alone. It is believed that up to 7,000 children serve within different non-state armed forces. This year, the UN Secretary-General reported that the following non-state opposition forces actively recruited and used children:

- Democratic Karen Buddhist Army
- Kachin Independence Army
- Karen National Union - Karen National Liberation Army Peace Council
- Karen National Liberation Army
- Karenni Army<sup>8</sup>
- Karenni Nationalities People's Liberation Front
- Myanmar National Democratic Alliance Army
- Shan State Army-South
- United Wa State Army
- Human Rights Watch has reported that the following groups may also have a history of conscripting child soldiers<sup>9</sup>:
  - Arakan Rohingya National Organization
  - Chin National Army
  - Kachin Democratic Army
  - Karen National Defense Organization
  - Karen Peace Army
  - Kayan New Land Party
  - Myanmar National Democratic Alliance Army-East
  - Mon National Liberation Army
  - Mongko Region Defense Army
  - National Socialist Council of Nagaland / Isaac-Muivah
  - National Socialist Council of Nagaland / Khaplang
  - New Democratic Army - Kachinland
  - Pa'O National Army
  - Palaung State Liberation Army
  - Shan State Army (North)
  - Shan State National Army
  - Shan State Nationalities People's Liberation Organization



The recruitment and use of under-age soldiers is a violation of international humanitarian and domestic Burmese law. The physical and psychological effects on these young soldiers and their families are profound. The children recruited by the non-state armed groups also deserve recognition as victims. Impunity must not be tolerated for any party. The threat of a Commission of Inquiry may do much to catalyse real change in the attitudes of all armed parties.

### **Use of Antipersonnel Landmines**

There is an emerging international norm prohibiting the use of antipersonnel landmines. Though Burma has still not acceded to the Mine Ban Treaty 1997, the continued use of landmines is strongly condemned by the international community and may be found to constitute a breach of customary international law. An objective investigation is needed to ascertain the scale of, and strategy behind, landmine use in Burma and to consider whether this use contravenes the basic principles of military necessity, humanity and proportionality that underpin humanitarian law.

The Burmese regime was the only government to lay antipersonnel landmines in the past year, according to the International Campaign to Ban Landmines<sup>10</sup>. Non-state armed groups in Burma also continue to cause concern with their use of the indiscriminate weapons. As well as the Tatmadaw Kyi, the Karen National Liberation Army and the Democratic Karen Buddhist Army are believed to have been responsible for laying mines in Karen areas. Villagers and internally displaced persons continue to be subjected to the terrible effects of landmines. Their continued use must be wholeheartedly discouraged. The threat of an investigation may well prompt a much-needed fall in the practice.

### **Violations of international law perpetrated against Tatmadaw soldiers**

It is suspected that treatment of captured Tatmadaw Kyi soldiers is cruel. Allegations of torture and summary execution must be investigated. This need is



only emphasised by the suspected numbers of child soldiers in the Tatmadaw, and the fact that many soldiers may have been forcibly conscripted.

## **Violations of international law perpetrated against civilians**

The abhorrent crimes of the Burmese regime against the civilian population are well-documented. There are, however, worrying allegations that non-state armed groups have also abused the civilian population<sup>11</sup>. Accusations of torture, forced labour and murder must be investigated.

## **Conclusion**

The people of Burma have for too long been victim to the most egregious of human rights abuses. While the vast majority of these abuses have been, and continue to be, perpetrated by the Burmese military regime, many people have been severely abused by non-state armed groups. It is essential that the suffering of these people is given the same recognition as those victims of the Tatmadaw. A Commission of Inquiry is sorely needed to establish the truth about all serious violations of humanitarian law in Burma.

The conflict in Burma is already brutal and savage. The education of the non-state armed groups is essential to ensure that they abide by humanitarian law. The threat of an investigation into the perpetration of war crimes by all parties may significantly encourage real compliance with these crucial rules. A process which prevents children from being forcibly recruited into armed forces, the laying of new anti-personnel landmines or other terrible abuses against civilians can only be positive.

One-sided justice should be avoided in the interests of Burma's future peace and stability. Those who have suffered at the hands of belligerents must be afforded real reconciliation so they can move forward.



Human rights arguments can only be truly credible if they are universally applied. The law is simple and unequivocal. All those who break it should be held accountable.

*(Footnotes)*

- <sup>1</sup> Such observations have been made by, for example, the past three Special Rapporteurs on the situation of human rights in Myanmar.
- <sup>2</sup> The International Human Rights Clinic at Harvard Law School, *Crimes in Burma*, 2009
- <sup>3</sup> Directive 13/73 (1974) of the Myanmar Defence Services and War Office Council
- <sup>4</sup> The Child Law 1993, Section 65
- <sup>5</sup> Human Rights Watch, *Sold to be Soldiers. The Recruitment and Use of Child Soldiers in Burma*, October 2007.
- <sup>6</sup> Human Rights Watch, *My Gun was as Tall as Me*, October 2002.
- <sup>7</sup> United Nations, *Children and Armed Conflict: Report of the Secretary-General*, 13 April 2010. At paragraph 23.
- <sup>8</sup> It is to be noted that the Karen National Liberation Army and the Karenni Army have both sought to conclude action plans with the UN in order to comply with Security Council Resolutions 1539 (2004) and 1612 (2005). The Burmese military regime has prevented both parties from working with the UN, and has refused to allow the UN to establish contact with any of the non-State armed groups listed. *Ibid.* At paragraph 15.
- <sup>9</sup> This information is taken from the Human Rights Watch report, *My Gun was as Tall as Me*, as above. Many of the groups listed are extremely small, and may no longer be operating.
- <sup>10</sup> Agence France-Presse, *Burma world's only landmine user*, *Democratic Voice of Burma*, 25 November 2010
- <sup>11</sup> David Scott Mathieson, Senior Researcher for Human Rights Watch, *Commission of Inquiry for Burma is long overdue*, *Bangkok Post*, 28 March 2010

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PO Box 144 Mae Sod Post Office Tak Province 63110 Thailand Tel : Fax (66) (055) : 542 910  
E-mail ; [blcsan@ksc.th.com](mailto:blcsan@ksc.th.com); Website : [www.blc-burma.org](http://www.blc-burma.org)

### **Demand for the Unconditional Release of Daw Aung San Suu Kyi**

1. Daw Aung San Suu Kyi is currently in detention by an order given under Article 10 (b) of the State Protection Act, which enables “the Central Board, in the protection of the State against dangers,” to “implement” a “restrictive order”. The Article then states, “The movements of a person against whom action is taken can be restricted for a period of up to one year”. After the arrival of an uninvited person to where she was being held under detention, Daw Aung San Suu Kyi was charged with an offence under Article 22 of the State Protection Act, which says that “any person against whom action is taken, who opposes, resists or disobeys any order passed under this Law shall be liable to imprisonment for a period of up to three years.”
2. According to the 1975 State Protection Act, the Central Board has the authority to restrict a person for a period of up to one year only after a “restrictive order” has been issued. However, the order issued to Daw Aung San Suu Kyi had no force of law from the start since it applies sections of the 1974 Constitution, a constitution that is no longer in use. In addition, although the restrictions imposed on Daw Aung San Suu Kyi by the ruling military regime are not in line with the provisions under Article 11 of the State Protection Act, she did not violate any restriction. She is absolutely innocent.
3. Detention of Daw Aung San Suu Kyi violates not only national law but also international human rights laws. The first detention period was from (20-7-1989) to (10-7-1995), lasting 5 years, 11 months, and 28 days. The second detention period was from (21-9-2001) to (6-5-2002), lasting 1 year, 7 months, and 16 days. The third detention period was from (31-5-2003) to (14-5-2009), lasting 5 years, 11 month, and 14 days. Thus, she was in detention for a total of 13 years, 6 months, and 28 days. As of now, she has been in detention for over 15 years. Such illegal detention constitutes an “imprisonment or other severe deprivation of physical liberty in violation of [the] fundamental rules of international law”, as stated under Article 7 (1) (e) of the Rome Statute of the International Criminal Court.



**BURMA LAWYERS' COUNCIL**

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The Burma Lawyers' Council demands that the release of Daw Aung San Suu Kyi be immediate and unconditional. After her release, she must be allowed to enjoy the fundamental rights and freedoms of a national. Senior General Than Shwe must not apply Section 401 of the Criminal Procedure Code, which authorizes the President of the Union to suspend, on any condition, the execution of a prisoner's sentence.

**Burma Lawyers' Council**

**November 12, 2010**

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## Suu Kyi says she is seeking: A Non-Violent Revolution

*AGNCIES, Rangoon*

In an interview with the BBC, Burma's newly freed opposition leader Aung San Suu Kyi said she sought 'a non-violent revolution' and offered some reassuring words for the military. 'I don't want to see the military falling. I want to see the military rising to dignified heights of professionalism and true patriotism,' she said.

The British-educated Suu Kyi also said she did not fear being detained again. "I'm not scared," she said. "I know that there is always a possibility, of course. They've done it back in the past, they might do it again."

Her lawyer said yesterday, Suu Kyi is "ready to fight" for the existence of her political party, which was disbanded ahead of controversial elections. On her third day of freedom after seven years of house arrest, Suu Kyi signed papers at Rangoon's Supreme Court- the latest step of a lawsuit against the junta on behalf of her National League for Democracy (NLD).

"She is ready to fight for the existence of the NLD. She will continue the legal process," her lawyer and NLD spokesman Nyan Win said. "She went to the Supreme Court to sign an affidavit because she could not do it before."

Suu Kyi was released over from detention over the weekend. On Sunday, she told thousands of wildly cheering supporters at the NLD headquarters that she would continue to fight for human rights and the rule of law in the military-controlled nation.





The 65-year-old Nobel Peace laureate must balance the expectations of the country's pro-democracy movement with the realities of freedom that could be withdrawn anytime by the regime. Although her party is officially dissolved, it has continued operating with the same structure. But without official recognition, it is in legal limbo, leaving it – and her – vulnerable to government crack-downs.

The junta recently staged the country's first elections in 20 years, and in a step that will blunt some of the long-standing international criticism of its conduct, released Suu Kyi a week later. Having made those ostensible moves toward democratization after five decades of military rule, it is unlikely to make more concessions – like restoring the NLD's legal status – without getting something back from Suu Kyi and her party, such as dropping its support for Western sanctions.

Suu Kyi, who has been detained for 15 of the past 21 years, has indicated she would continue with her political activity but not whether she would challenge the military with mass rallies and other activities. She has been noncommittal on sanctions, saying that she would support lifting them if the people of Burma provided strong justification for doing so.

Nyan Win said Suu Kyi met with her lawyers on Monday and also party officials from areas outside Rangoon who have been keeping her political network alive during yerars of repression. He said the High Court will tomorrow hold a hearing to decide whether to accept a case from Suu Kyi arguing that her party's dissolution “is not in accordance with the law”. The party was disbanded earlier this year under a new law because it failed to reregister for the November 7 elections, complaining conditions set by the junta were unfair and undemocratic.

Suu Kyi's side says the new Election Commission has no right to deregister parties that were registered under a different Election Commission in 1990. The party also contends that the court is legally bound to hear their case. Full results from this month's elections have yet to be released, but figures so far give a military-backed party a solid majority in both houses of parliament.



In London, British Prime Minister David Cameron told the House of Commons he talked to Suu Kyi by telephone on Monday. “Her tenacity and courage in the face of injustice has been truly inspiring. I spoke to her this morning to pass on the congratulations of everyone in the country on her release and her remarkable stand on democracy and human rights,” Cameron told lawmakers. “We must now work to ensure that her release is followed by freedom for more than 2,000 other political prisoners.”

US State Department spokesman P J Crowley said the Obama administration will ask the regime about its plans for other political prisoners and ethnic minorities. “You could see over the weekend in the public response to the release of Aung San Suu Kyi that the Burmese people yearn for a different kind of society, an opportunity to participate in the future of their country,” he said.

(The Nation, Thailand Wednesday, November 17, 2010)

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## Excerpt from paper on the National Convention's Principles of a Constitution

*[ Editor's Note: This is Part 3 and Final of a four-part series of articles excerpted from "Position Paper on the National Conventions' Principles for a Constitution for the Union of Burma" prepared by David C. Williams, Director, Center for Constitutional Democracy in Plural Societies. With the permission of the author, specific recommendations made by the Ethnic Nationalities Council have been omitted.]*

### III. The Power of the President

The NC Principles also over-concentrate power in the president. In new democracies, the greatest danger comes from the executive branch, especially presidents, because they often over-extend their own power. Sometimes they even take over the government altogether and reign as dictator. The solution is to limit the power of the president in three ways: first, choose the president in such a way that he will feel accountable to many different groups; second, give the other branches power to balance the president; third, make sure that the president's own powers would not make it easy for him to seize control. Unfortunately, the NC Principles do none of these things. The principles would create a very powerful president—clearly the dominant power in the country. No democracy has succeeded with a president this powerful.



**(A) Under the NC Principles, the president would not feel accountable to the whole society.**

The Principles would create a novel and complicated selection method for the president. The people would not actually choose the president; the legislature would. (In this sense, the president is more like a prime minister). The upper house would nominate one person; the lower house would nominate a second person; and the Tatmadaw representatives would nominate a third. The whole Pyidaungsu Hluttaw would then become the electoral college and choose the president from among those three candidates. In other words, the legislature as a whole would choose the president from a field of candidates nominated by different parts of the legislature. See Principle III/5. (The other two candidates then become vice-presidents). The president then has a fixed term in office of five years, and he can stand for re-election once. See Principle III/6. In other words, once he is in power, he will stay in power for an extended time, and there will be no way to dislodge him, short of impeachment, which requires a two-thirds majority of the very Hluttaw that selected him in the first place. See Principle III/16.

As we have shown, the Pyidaungsu Hluttaw—when voting as a single body—will be dominated by the majority, and the ethnic minorities will have no real power. Choosing the president in this way would therefore push the minorities to the side-lines. To avoid over-concentrating power, the Burmese constitution needs to balance majority and minority power, but the NC Principles would deliver both the legislature and the executive to the majority group—and as we will soon see, they would also place the judiciary firmly under the power of the president.

Presidential systems are very risky for societies that have known division and conflict. In a presidential constitution, one person holds all the executive power, and he has a fixed term in office, so he cannot be removed. The losers get no share in the executive power, so they often feel that presidentialism has robbed them of any real voice. If the society is divided, the danger is great, because the majority group might get control of the presidency and ignore or oppress other groups, who have no influence on the president. If the power of the president is



great, then the risk is even greater, because the president will have more power to ignore or oppress groups other than his own. Everyone hopes that Burma will see harmony among all its groups in the future, but for now, the divisions are deep and real.

Instead, Burma needs an executive branch that shares power among different groups. There are different ways to choose a president, and the different methods can increase or decrease the danger that one dominant group will capture the presidency. If Burma is to have a president—rather than a prime minister—the method of choosing the president should be designed to minimize this danger by requiring support from a number of different areas and groups.

If the people are directly to elect the president, then there should be a requirement that the winning candidate must have support in many different areas of the country, as is done in a number of other states today. For example, the Burmese constitution could require that in order to win, any candidate must win at least a certain percentage of the vote in all of Burma's states. As a result, a presidential candidate will have to appeal to all of Burma's groups and peoples.

If the legislature is to choose the president, then the legislature must be structured in such a way as to balance majority and minority power, so that the winner will be acceptable to both groups. The best way would be to ensure that the ethnic minorities have control of the upper house and to require that the winning candidate must have the support of a majority of the members of the upper house, voting separately and independently from the lower house.

Either of these methods would help make the president feel accountable to the whole society. In addition, the method for terminating the president's term in office should also make him feel accountable to the whole society. Under the NC Principles, the president would serve one five year term, then have the opportunity to stand for re-election for one more term but no more. This provision is sound so long as Burma's presidents actually obey it. In many new democracies, powerful presidents sometimes amend the constitution to allow them to stay in office for life. The term limit provision should therefore be unamendable.



The alternative is that the president should serve in office only as long as he has the support of the legislature (which, again, must properly balance majority and minority power). Already, the president is chosen by the legislature; this alternative would allow the legislature to remove him, not through impeachment but through a simple vote of no confidence. (The president is already like a prime minister in the selection method; if he can be removed through a no confidence motion, then he will be a prime minister, plain and simple).

Finally, the executive branch could be made accountable to the whole society by also requiring that cabinet ministers must come from all different parts of the country. The president might nominate such ministers, but they would be appointed only with assent of the relevant state legislature.

The Ethnic Nationalities Council believes that instead

- *if the legislature is to choose the executive, the upper house and the lower house, voting separately, must both support the winning candidate'*
- *if the people are to choose the president, the winning candidate must have substantial support in all of Burma's states;*
- *either the president's term limit should be unamendable, or else the legislature should be able to remove the president through a vote of no confidence;*
- *the constitution should require that the cabinet be composed of people from all of Burma's states, with the approval of the various state legislatures.*

**(B). Under the NC principles, the other branches do not have power to balance the president.**

The NC principles seem to recognize that a president should not dominate the other branches. Fundamental Principle 5(a) insists that "the three branches of State power, namely legislative power, executive power, and judicial power are separated as much as possible and exert reciprocal control, check and balance among themselves." But again, this recognition is only lip service. The NC



Principles would not create a system of checks and balances. Instead, they would create a super-presidential form of government. A truer guide to the principles' intent is contained at Principle III/3: "The President of the Union occupies a position of the highest honour in the whole of the Union of Myanmar." In a system of checks and balances, the three branches are co-equal, so that the president, the chief justice, and the speakers of the legislature would all enjoy the same honor.

### **1. The President will dominate the judiciary.**

Under the NC Principles, the President will dominate the courts. The President appoints the justices of the Supreme Court and the justices of the High Courts of the states and regions. The legislature cannot reject his nominees except on the grounds that they do not meet the formal qualifications laid down by the constitution itself, such as age, citizenship, and experience. See Principle VI/2(c) and 10(c). In other words, the legislature cannot reject a nominee on the grounds that he is incompetent, corrupt, a crony of the president, or likely to act in unfair ways. In short, the President can stack the courts with his political allies, and no-one can do anything about it. Because the lower courts are subordinate to these high courts, the President can control them as well through his appointees to the high courts.

The President can also remove judges if they ever defy him. Principle VI/6 stipulates that the justices of the Union Supreme Court shall hold office only until "asked to resign by the President of the State," so apparently the President can remove Union Supreme Court justices at any time and for any reason.

The President may also bring impeachment charges against justices of the Union Supreme Court and the High Courts of the States and Regions. The legislatures will actually hear and decide on the charges: in the case of Union justices, the Union legislature; and in the case of State and Region justices, the State or Region legislature. But the President will act as prosecutor, presenting evidence and using the power and prestige of the presidency to force judges out of office. Worse still, justices may be impeached for a variety of reasons. For



example, "misconduct" is a basis for impeachment, but that term is not defined, so Presidents could decide that misconduct includes deciding a case in a way that the President does not like. In addition, "violation of any of the provisions of the Constitution" constitutes cause for impeachment, so apparently the President and the legislature have the power to decide whether a judicial decision violates the constitution. In other words, the real court of final review for constitutional questions is the President. Finally, judges may be removed for "inefficient discharge of duties"—so that the president can remove a judge merely because he does not like how the judge is doing his job. See Principle VI/4 and 12.

Theoretically, the legislature could acquit a justice accused by the President, but given the general power and prestige of the presidency, it will be practically difficult for legislators to stand up to the President in that way. If they nonetheless decide to acquit, the Constitution nowhere says that the President must allow the accused judge to remain on the bench. The principles specify that the legislature shall communicate their decision to the President, but they do not say that the President must abide by it. See Principle VI/ 4(k) and 12(k).

The principles also contain some glaring omissions. There is no prohibition on the President's interfering in the administration of justice. Nowhere do these principles stipulate that the President may not bribe, pressure, threaten, or coerce judges to decide cases in his favor. Nowhere do they provide that the President may not take retribution against justices for deciding cases against his wishes. Nowhere do they provide that the justices will be guaranteed the resources to do their job—such as adequate space, research materials, salaries, and so forth.

The president has somewhat less power over appointments to the Constitutional Tribunal. He will appoint three of its nine members, but the speakers of the Amyotha Hluttaw and the Pyithu Hluttaw will appoint the others. See Principle XV/10. Again, the legislature has no power to reject the president's nominees except on the grounds that they lack the formal qualifications. See Principle XV/12. And the president still has the power to impeach members of the constitutional tribunal, see Principle XV/19, and again the principles contain no prohibition on the president's interference in the tribunal's work.





In addition, the term of tribunal members is very short for a judge, only five years, and it would normally cover the same period as the Pyidaungsu Hluttaw and the president that appointed them. See Principle XV/15. Clearly, the principles anticipate that the tribunal would have limited independence because every new president and Hluttaw would have the chance to clean house, turn out all the old tribunal members, and appoint their own. If the tribunal members want to be re-appointed, they would have to be careful to keep the political branches happy. They might also be unwilling to make unpopular decisions for fear of suffering the consequences after they leave office.

Finally, although the president has great power over the courts, the courts will have no power over the president. Theoretically, the Constitutional Tribunal has the power "to scrutinize functions of executive authorities . . . are in conformity with the Constitution." Principle XV/20(c). But this provision allows the courts merely to scrutinize executive actions, not to void them. Such a power might be implicit in the provision, but if so, it should be made explicit.

And even if the courts have the power to strike down executive actions in general, it is not at all clear that they have the power to issue orders of any kind to the president. The Principles specifically provide: "The President shall not be responsible for answering to any Hluttaw or to any Court for the exercise or performance of the duties vested in him by this Constitution or any of the existing laws or for any of his actions in the exercise and performance of these powers and functions. But the exemption should not concern the stipulation contained in this Constitution in connection with the impeachment made against him." Principle on the Sharing of Executive Power 14. The provision does not stipulate what it means by ordering that the president shall not "be responsible for answering . . . to any Court." It might mean only that courts cannot punish the president for misdeeds. If so, the courts could still order the president to stop behaving in an illegal way—without punishing him at all. But the phrase could equally mean that no court may ever inquire into the legality of the president's actions—so that courts could not even order the president to stop behaving illegally. The latter interpretation seems likely. If it is right, then the president is essentially above the law: he can do whatever he wants, and no-one can hold him to account except through impeachment.



The Ethnic Nationalities Council believes that instead

- *the President may nominate persons for the courts, including the constitutional tribunal, only from a list of qualified candidates prepared by an independent commission, and the legislature should have the power to reject the chosen candidates;*
- *the President should have no role in impeaching judges; instead, an independent commission should be charged with that responsibility;*
- *the Constitution should specifically prohibit the president from interfering in the administration of justice;*
- *the members of the constitutional tribunal should serve the same term as Supreme Court justices—until the age of seventy;*
- *the courts should be able to issue injunctions against the President to ensure that he conducts himself in accord with the law.*

## **2. Under the NC Principles, The Legislature will not be able to balance the power of the president.**

Similarly, the power of the president will far out-weigh the power of the legislature. The president does not, of course, choose the legislators; the voters do that. But the president does appoint the members of the Election Commission, see Principle IX/8, which has the power to order the recall of legislators, see Principle IV/6. Typically, a "recall" means that a majority of the voters choose to remove their legislator, but that is not the meaning under the principles. Instead, one percent of the voters may bring a charge against a legislator for various reasons, including "misbehavior" (which is undefined) and "inefficient discharge of duties." Principle IX/6(a). The Election Commission then investigates and sits in judgment on the accused legislator. See *id.* at 6(c)-(d). Presumably, it takes only a majority vote of the commission to remove a legislator—the people's choice—from office. In other words, the president appoints those who will prosecute, judge, and condemn the legislators. All that they need is a complaint from one percent of the voters—a number so small that it will rarely be difficult to obtain from political supporters in the region.



The Electoral Commission also has the power to supervise elections, arrange constituencies, issue laws on elections and political parties, and resolve electoral disputes. See Principle IX/9. Its electoral decisions are "final and conclusive." Principle IX/12. In other words, it will have great control over who gets elected to the legislature. And it will be the president's creature, as he will appoint the members and has the power to impeach them. See Principle IX/10. The principles do not specify the term of office for the commission members, but presumably it is no longer than the term of the president who appointed them. As a result, every five years, the president will have a chance to clean house and appoint new, compliant commissioners. If Burma has an election commission of this sort, it will have enormous power, and it should be truly independent, not the servant of the executive branch.

Although the president will have great power over the legislature, the legislature will have very little power over the president. In a system of checks and balances, the legislature makes the law, and the executive carries it out. Some of the principles do stipulate that the president must get the approval of the legislature to perform certain actions. For example, the president must secure the approval of the Pyidaungsu Hluttaw to establish or sever diplomatic relations, see Principle on the Sharing of Executive Power 5, to enter many international agreements, see *id.* at 8(a), to declare war or to make peace, see *id.* at 12(c), or to continue an emergency executive order beyond sixty days, see *id.* at 11. These are all good provisions.

But the principles nowhere state that the president is generally subject to the laws. They nowhere require the president to enforce the rules laid down by the legislature; they nowhere specify that the president may not take action outside of the law; they nowhere specify that the president has only those powers enumerated in the constitution—no "inherent" power to "protect the union" in defiance of the legislative will. In addition, if the president does violate the law, it is unclear whether anyone can really do anything about it. Technically, the Hluttaw can impeach the president but only on a two-thirds vote. See Principle III/16. As we have seen, aside from impeachment, the president will not "be responsible for answering to any Hluttaw or to any Court" for his actions in office. Principle on the Sharing of Executive Power 14. That provision might be read to mean that the legislature may never investigate the actions of the



president, and the courts may not hold the president accountable to the laws laid down by the legislature. (The Principles oddly do state that the President "shall be responsible to Pyidaungsu Hluttaw," Principle on the Sharing of the Executive Power 1, but apparently this means only that the legislature can impeach him).

The Ethnic Nationalities Council believes that instead

- *only the voters should be able to recall legislators, by a majority vote;*
- *the Electoral Commission should be independent, not the President's creature;*
- *the President's powers should be limited to those specified in the constitution;*
- *the President should never be able to act in contradiction to the constitution or statutory law.*

### **3. Under the NC Principles, the president has certain powers, over appointments, the budget, and states of emergency, that would allow executive tyranny.**

In a new democracy, one of the greatest risks is that the president might try to take too much power. As we have seen, the judges and the legislators will not have much power to resist the president. In addition, the president has some very dangerous powers, powers that would allow him to seize almost monarchical power.

First, the power of appointment: under the principles, the president has the power to appoint and remove virtually every office-holder. We have already seen his power over the executive departments of the state and regional governments; over the leading bodies of the self-administered areas; over the territorial council of the capital; over the election commission; over the union justices; over the state and regional judges; and over one-third of the members of the constitutional tribunal. In addition, he appoints union ministers (except for



the Tatmadaw ministries), see Principle V/2, the union attorney-general, see Principle V/7, the union auditor-general, see Principle V/13, and the civil service board, see Principle V/18. Through this network of agents, the president will be able to exercise great power all through the country, and he will also have very large powers of patronage at his fingertips. No-one should have such power; the legislature should instead be able to accept or reject the president's nominees for key posts.

The only important appointment that the president does not control is the commander-in-chief, because in practice the Tatmadaw will control the selection to that post. The National Defence and Security Council proposes and approves nominees for that office, and the president merely ceremonially appoints. See Principle VII/9. The NDSC has eleven members, but at least six of them—a majority—belong to the Tatmadaw: the Commander-in-Chief, the Deputy Commander-in-Chief, the Ministers for Defence, Home Affairs, and Border Affairs (as we will see, the Tatmadaw chooses these ministers), and either the president himself or one of the two vice-presidents (recall that the Tatmadaw representatives to the Hluttaw nominate one of the presidential candidates, who then becomes either the president or one of the vice-presidents). But the over-concentration of power in the Tatmadaw is a different problem, not a solution to the problem of over-powerful presidents.

Second, the president would also have excessive powers over the budget. The Financial Commission has the duty to prepare the budget bill, and all the commission members are responsible to the president, who also chairs the commission. See Principle on the Sharing of Legislative Power 16(c). Union ministries and organizations submit budget requests to the commission, as do the state and regional governments, for money from the union fund. See *id.*, at 16(a) and (b). The commission then submits the draft of the union budget to the legislature, which has the power to "pass approval and to make rejection and deduction" except for certain dedicated allocations. Principle on the Sharing of Legislative Power 16(i). In other words, the legislature may remove amounts from the budget bill but not add them; there will be no legislative spending. As a result, the president is the sole gateway into the federal budget: no organization, no ministry, no private association will receive any money from the government except through the president's initiative. Apparently, even the legislature and



the judiciary must petition the president for their own salaries and expenses. Such power over money will again give the president tremendous power over all the government and much of the society: the only way that anyone will receive federal funds is by making the president happy.

Third, the president would also have excessive powers in a state of emergency. The NC Principles distinguish between three different states of emergency: those where "administrative functions cannot be carried out in accord with the Constitution in a Region or a State or a Union territory or a Self-Administered Area" (hereinafter Type I emergencies), Principle XI/1; those where there are dangers to life and property in a particular area (hereinafter Type II emergencies, see Principle XI/4 ); and those where events threaten the breakup of the union because of armed insurrection or usurpation of state power (hereinafter Type III emergencies), see Principle XI/8.

In Type I emergencies, the president can declare an emergency whenever a local administrative body feels that it cannot carry out its administrative functions. But as all the local administrative bodies are subordinate to the president, the President will be able to declare a state of emergency whenever he so desires. At most, he need show only some inability to perform some administrative function. Even in normal times, executives are sometimes unable to perform some executive functions to some degree.

In short, then, the President may declare a Type I state of emergency pretty much at will. When he has issued such a declaration, the President has the power to exercise executive power in the affected area, with the help of an appointed body, see Principle XI/2(a), and he shall also "have the power to exercise the legislative power concerning the executive affairs." Principle XI/2(b). In other words, during a state of emergency, the President has both executive and some legislative power; in contradiction to Fundamental Principle 5(a), there is no "reciprocal control, check [or] balance" among the branches. And because the President can declare a state of emergency whenever he likes, he can also divest the legislature of its power whenever he likes, within the area affected.

In Type II emergencies, involving danger to life and property, the president may



not unilaterally declare a state of emergency; instead, he must get the approval of the National Security and Defence Council, which is controlled by the Tatmadaw. See Principle XI/3. He may then declare martial law in a detailed order that specifies the length of the emergency, its geographical scope, the functions given to the military, and the rights curtailed during the state of emergency. See Principle XI/4(b) and 5. In this situation, the president is not taking power to himself but giving it to the Tatmadaw, and he cannot make the decision on his own, as he must get the approval of the Tatmadaw-dominated NDSC. Under Type II emergencies, therefore, power is concentrated not in the president alone but in the president acting in concert with the Tatmadaw.

But the powers given to the two together might be extraordinary and abusive. The president can apparently give the Tatmadaw the power to exercise legislative, executive, and judicial power, and citizens might lose all of their fundamental rights. In addition, it is very easy to declare martial law: all the president must demonstrate is some threat to life or property, but such threats are always present everywhere in human life.

In both Type I and II emergencies, there is one check on the power of the president and the Tatmadaw: within sixty days, the president must consult the legislature, which has the power to cancel the state of emergency. See Principle XI/6 and 7. This legislative oversight is vitally important to balance power, but sixty days is far too long, especially for Type II emergencies involving martial law. The citizens of Burma should be subject to unchecked power for no longer than absolutely necessary. Moreover, the longer the president and the Tatmadaw hold unchecked power, the less likely it is that they will relinquish it again.

For those reasons, all states of emergency should end unless both houses of the legislature approve them within seven days of the declaration. In addition, the legislature should have the right to oversee both types of emergency, over-riding the actions of the president or the Tatmadaw in particular instances. The courts should always stay open, and no fundamental rights should be abridged. Civilian government should always remain in charge everywhere in Burma, and martial law should never be declared, though the civilian government might use the military to deal with a threat. Finally, a state of emergency should be declared



only in the event of a very grave threat to public safety, health, or welfare. Difficulty in carrying out administrative functions or general threats to property and safety are not enough.

In Type III emergencies, the president essentially surrenders the government to the Tatmadaw, and the legislature cannot revoke the order. For that reason, we take up Type III emergencies in the next section on over-concentration of power in the Tatmadaw.

The Ethnic Nationalities Council believes that instead

- *the president should have the power to make important appointments only with the consent of the legislature;*
- *the legislature should have the power to develop its own, alternative proposed budget;*
- *martial law should never be declared;*
- *a state of emergency should be declared only in the event of gravest threats to the public order, and it should end if the legislature does not approve it within one week;*
- *during a state of emergency, civilian government should function as usual; individual rights should not be restricted; and the legislature should retain oversight of the executive department.*

#### IV. The Power of the Tatmadaw

The NC principles insist that Burma should be democratic. They call, for example, for the "flourishing of a discipline-flourishing genuine multiparty democracy." Fundamental Principle 2(d). In practice, however, the NC Principles would also give the non-democratic Tatmadaw a central role in the government of Burma. They stipulate that the Tatmadaw will participate in "the national political leadership role of the state," Fundamental Principle 2(f); and that it will be "mainly responsible for safeguarding non-disintegration of the Union, non-disintegration of national solidarity, and perpetuation of sovereignty" and "for safeguarding the State Constitution," Fundamental Principles 9(e) and (f). Militaries are not democratic. Soldiers follow orders; they do not vote on mili-





tary policy. To give the military a dominant political role is to ensure that Burma will not in fact be a true democracy. Militaries are important institutions, and they are often honorable. And they should not be democratic, because their primary job is to fight wars. But that is the point: because they are not democratic, militaries should be good at fighting wars; because they are not democratic, they will certainly be bad at governing a democratic country.

In practice, the Tatmadaw's "leadership role" has two facets. First, the military will have substantial power in the legislative and executive branches. Second, the military will have full power—completely independent of the civil government—over security matters, a category that could include everything.

**(A) Under the NC Principles, the undemocratic  
Tatmadaw will have substantial power in the  
legislatures of Burma.**

The Commander-in-Chief of the Tatmadaw will choose at least twenty-five percent of the representatives in every legislative body. See Principle IV/4(b)(lower house of the Union legislature); IV/13(b)(upper house of the Union legislature); IV/23(d)(State and Region legislatures). Clearly, this military participation in the legislature is not democratic. As we have seen, the National Defence and Security Council chooses the Commander-in-Chief, but the council will be controlled by the Tatmadaw itself. In other words, the Tatmadaw chooses the Commander-in-Chief, who then chooses its representatives to the legislatures. Voters have no role in the process.

In addition, the NC Principles specify that the Tatmadaw representatives will remain in the Tatmadaw even while they are sitting in the legislature: the principles insist that legislators cannot serve in the civil service but then specifically provide that service in the Tatmadaw does not come under that general ban. See Principle IV/33(j). As a result, these Tatmadaw representatives will be directly subject to the order of their commanding officers. Of course, the Tatmadaw may well respond that the Tatmadaw is an important part of society, so it should have some representation in the legislature. But if so, then it should



seek representation the same way as everyone else: by standing for election and letting the voters, rather than the commanders decide. That is the democratic way. If the Tatmadaw does have any direct representation in the legislature, it should be much less than twenty-five percent.

In addition, as the principles are currently written, the Tatmadaw could end up with substantially more than twenty-five percent. Let us take the Pyithu Hluttaw as an example. The principles require that this lower house have "a maximum of 440 Hluttaw representatives," but the principles allow for a smaller number—without specifying how that number will actually be determined. Principle IV/4. Similarly, the principles break down the membership as follows: "Not more than 330 Hluttaw representatives elected on the basis of population" and "Not more than 110 Tatmadaw member representatives." Principle IV/4(a) and (b). Again, the numbers for both could be less, but the principles do not specify how that number will be determined. Nowhere does this provision actually require that the Tatmadaw shall have no more than twenty-five percent of the legislature: merely that the overall number not exceed 440, and that the Tatmadaw number not exceed 110. Suppose that the decision is made to have a smaller legislature, as the principles allow, of 150 members. Consistent with the principles, the Tatmadaw could have 110 of those representatives (because the principles stipulate only that the Tatmadaw number may not exceed 110) and the elected representatives will number only 40 (because the principles stipulate only that their number may not exceed 330 but say nothing about how low they might fall). As a result, the Tatmadaw will have almost three-quarters of the lower house. The same is true of the upper house. In other words, the NC Principles should carefully specify a maximum that the Tatmadaw will be allowed to control.

The Ethnic Nationalities Council believes that instead

- *only the voters should choose representatives to the legislature, not the army;*
- *if the Tatmadaw has a share of the legislature, it should be much less than twenty-five percent, and the constitution should carefully specify the maximum.*



**(B) Under the NC Principles, the Tatmadaw will have complete control over security, defense, border affairs, and the Tatmadaw itself.**

The Tatmadaw will dominate those organs of the civilian government charged with formulating policy in the areas of security, defense, border affairs, and Tatmadaw policy. The Principles provide that the legislative committees for defense, security, and Tatmadaw affairs will be composed exclusively of Tatmadaw member and their appointees. See Principle IV/11(a)(2)(lower house of the Union legislature); IV/19(b)(upper house of the Union legislature).

In the executive branch, the Tatmadaw will choose the Union ministers and deputy ministers for defense, security/home affairs, and border affairs. See Principle V/2(a)(2)(union ministers); 3(b)(deputy ministers), as well as State and Region ministers for security and border affairs, see Principle V/22(a)(2) and those members of the leading bodies of self-administered areas in charge of security and border affairs, see Principle V/34(d)(2). Although ministers must resign from the civil service and refrain from participating in a political party, the Tatmadaw members will remain in the Tatmadaw, so they will be subject to orders. See Principle V/5(f)-(g).

In addition, the Tatmadaw will have control over its own operations, immune from regulation by the civilian government. The commander-in-chief is not the President but the leader of the Tatmadaw: "[T]he Defence Services Commander-in-Chief is the Supreme Commander of all armed forces." Fundamental Principle 9(c). Furthermore, the "Tatmadaw has the right independently to administer all affairs concerning the forces"—including, presumably, security and border control. Fundamental Principle 9(b). Under the Principles, the Tatmadaw's responsibilities are enormous: to safeguard the constitution, to safeguard the non-disintegration of the union, non-disintegration of national solidarity and perpetuation of sovereignty, to take the leading role in safeguarding the union against all internal and external dangers. See Principles VII/2-4. If the Tatmadaw has the right independently to administer those responsibilities—without interference from the civilian government—then it really has the right to run the country.



Finally, the principles would give the Tatmadaw the right to take over the country: "[W]hen there arises a state of emergency that could cause disintegration of the Union, disintegration of national solidarity and loss of national sovereignty, due to takeover of sovereign State power or attempts therefore by wrongful forcible means such as insurgency or violence, the Defence Services Commander-in-Chief has the right to take over and exercise State power in accord with provisions of the State Constitution." Fundamental Principle 28(c).

This provision refers to a Type III state of emergency. Under the detailed principles, the President has the right to declare this sort of emergency, in consultation with the Tatmadaw-controlled NSDC. The President must also submit the declaration to the legislature, though the principles say nothing about whether the legislature has the power to cancel the declaration. See Principle XI/12(a). But Fundamental Principle 28(c) states quite clearly that the Commander-in-Chief really has the right to take power when such an emergency exists.

When a Type III emergency is declared, the President must transfer all legislative, executive, and judicial powers to the Commander-in-Chief. See Principle XI/9(a). The C-in-C may restrict or terminate any and all fundamental rights. See Principle XI/11. The Hluttaws cease their legislative functions immediately, and at the end of their normal term in office, the Hluttaws are dissolved, and no further elections will take place. See Principle XI/9(a). The Principles also specifically provide that any action taken by the Tatmadaw is "legitimate," and "[n]o legal action shall be taken against them for those legitimate measures." Principle XI/23. Every Type III declaration of emergency will cover the entire nation and must extend for one year. See Principle XI/8. In other words, for at least one year, the Commander-in-Chief is an absolute dictator over the whole country.

At the end of the year, the Commander-in-Chief must report to the President and NDSC. Customarily, he may extend the state of emergency twice, by six months each time, so long as he presents "reasonable facts." Principle XI/12(b). (Recall that when making this report, the C-in-C is running the country, so the President is unlikely to reject his report). After two years from the declaration, he must return power to the civilian authorities. If the term of the Hluttaws has not ended, the President will restore legislative power to them. If



the term of the Hluttaws has ended, then the Tatmadaw-controlled NDSC will take steps to re-establish civil government. See Principles IX/14 and 17-21.

In short, the Commander-in-Chief may choose to take over the country and then run it, all by himself, for two years, with no regard for anyone's rights. Ordinary government will cease. At the end of the two years, he must theoretically return power, but as he now holds all the power, no-one can make him return power if he does not want to do so. This arrangement is the ultimate concentration of power. It is a dagger aimed at the heart of democracy and the rule of law. It allows the military to resume command of the country whenever they want. It makes a mockery of the whole project of writing a constitution for Burma.

The Ethnic Nationalities Council believes that instead

- *the civilian government should set policy in all areas;*
- *the Tatmadaw should be subject to the civilian government at all times.*

\* \* \* \* \*



# SPDC'S 2010 ELECTION RESULT

## Seats declared in the Burma 2010 election

*Sources from D.V.B*

### Overview

#### In numbers:

- Parties: 37
- Candidates: 3153
- Independent candidates: 82
- Constituencies: 1158
- Constituencies w/one candidate: 54
- Polling stations: c.40,000
- Parliaments: 3
- Seats: 1158
- % military seats: 25
- % needed for constitutional change: 75
- Eligible voters: 29 million
- Voting age: 18
- Population: 52.4 million

Date: 7 November 2010



## BURMA LAWYERS' COUNCIL

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<b>Party</b>	<b>People's parliamen</b>	<b>Nationalities Parliament</b>	<b>Regions and States Parliament</b>	<b>Total seats</b>
Union Solidarity and Deve- lopment Party (USDP)	258	128	487	873
National Unity Party (NUP)	12	5	48	65
Shan Nationalities Democratic Party (SNDP)	18	3	36	57
Rakhine Nationalities Development Party (RNDP)	9	7	19	35
National Democratic Force (NDF)	8	4	4	16
All Mon Region Democracy Party (AMRDP)	3	9	4	16
Chin Progressive Party (CPP)	2	4	5	11
Pa O National Organisation (PNO)	3	1	6	10
Phalon-Sawaw Democratic Party (PSDP)	2	3	4	9
Chin National Party (CNP)	2	2	5	9
Independent (IND)	1	1	4	6
Kayin Peoples Party (KPP)	1	1	4	6
Taaung (Palaung) National Party (TPNP)	1	1	4	6
Unity and Democracy Party of Kachin State (UDPKS)	1	1	2	4
Inn National Development Party (INDP)	1	0	3	4
Wa Democratic Party (WDP)	1	0	3	4
Democratic Party Myanmar (DPM)	0	0	3	3
Kayin State Democracy and Development Party (KSDD)	0	1	1	2
National Democratic Party for Development (NDPD)	0	0	2	2



<b>Party</b>	<b>People's parliamen</b>	<b>Nationalities Parliament</b>	<b>Regions and States Parliament</b>	<b>Total seats</b>
88 Generation Student Youths (Union of Myanmar) (GSY)	0	0	1	1
Ethnic National Development Party (ENDP)	0	0	1	1
Kayan National Party (KNP)	0	0	1	1
Lahu National Development Party (LNDP)	0	0	1	1
Democracy and Peace Party (DPP)	0	0	0	0
Kaman National Progressive Party (KNPP)	0	0	0	0
Khami National Development Party (KNDP)	0	0	0	0
Kokang Democracy and Unity Party (KDUP)	0	0	0	0
Modern People's Party (MPP)	0	0	0	0
Mro National Solidarity Organisation (MKN)	0	0	0	0
National Development and Peace Party (NDPP)	0	0	0	0
National Political Alliances League (NPAL)	0	0	0	0
Peace and Diversity Party (PDP)	0	0	0	0
Rakhine State National Force of Myanmar Party (RSNFMP)	0	0	0	0
Union Democracy Party (UNDP)	0	0	0	0
Union of Myanmar Federation of National Politics (UMFNP)	0	0	0	0
United Democratic Party (UDP)	0	0	0	0
Wa National Unity Party (WNUP)	0	0	0	0
Wunthanu National League for Demo- cracy (Union of Myanmar) (WNLD)	0	0	0	0





**Elected Parliamentary Seats in the New Legislative Bodies**

People's Parliament = 330 seats  
Nationalities Parliament = 168 seats  
State and Region Parliament = 665 (including 29 minority seats)  
Total Seats for all Parliaments = 1,163 seats

**Distribution of Parliamentary Seats in States and Regions**

**Kachin State**

People's Parliament = 18 seats  
Nationalities Parliament = 12 seats  
State & Region Parliament = 40 seats

**Kayah State**

People's Parliament = 7 seats  
Nationalities Parliament = 12 seats  
State & Region Parliament = 15 seats

**Karen (Kayin) State**

People's Parliament = 7 seats  
Nationalities Parliament = 12 seats  
State & Region Parliament = 17 seats

**Chin State**

People's Parliament = 9 seats  
Nationalities Parliament = 12 seats  
State & Region Parliament = 18 seats

**Sagaing Division**

People's Parliament = 37 seats  
Nationalities Parliament = 12 seats  
State & Region Parliament = 76 seats

**Tenasserim (Tanintharyi) Division**

People's Parliament = 10 seats  
Nationalities Parliament = 12 seats  
State & Region Parliament = 21 seats

**Pegu (Bago) Division**

People's Parliament = 28 seats  
Nationalities Parliament = 12 seats  
State & Region Parliament = 57 seats

**Magway (Magwe) Division**

People's Parliament = 25 seats  
Nationalities Parliament = 12 seats  
State & Region Parliament = 51 seats

**Mandalay Division**

People's Parliament = 36 seats  
Nationalities Parliament = 12 seats  
State & Region Parliament = 57 seats

**Mon State**

People's Parliament = 10 seats  
Nationalities Parliament = 12 seats  
State & Region Parliament = 23 seats



**Arakan (Rakhine) State**

People's Parliament = 17 seats  
Nationalities Parliament = 12 seats  
State & Region Parliament = 35 seats

**Rangoon (Yangon) Division**

People's Parliament = 45 seats  
Nationalities Parliament = 12 seats  
State & Region Parliament = 92 seats

**Shan State**

People's Parliament = 55 seats  
Nationalities Parliament = 12 seats  
State & Region Parliament = 109 seats

**Irrawaddy (Ayeyarwady) Division**

People's Parliament = 26 seats  
Nationalities Parliament = 12 seats  
State & Region Parliament = 54 seats



## **Part (B): Judiciary**

# **The Issue on the Stability of Society in Thailand: Judicial Review and the Role of Courts**

Mr. Bowornsak Uwanno, the former Dean of the Chulalongkorn University Faculty of Law selected to serve as Secretary of the Constitution Drafting Committee for the 1997 Constitution of Thailand (“1997 Constitution”), described the primary deficiencies of the then existing Thai political system: “Politics were dominated by the politicians rather than the people, who enjoyed only few rights and liberties. Politics were rife with dishonesty and corruption, resulting in politicians being commonly perceived as lacking legitimacy in their exercise of authority.”<sup>1</sup> To rectify these deficiencies, the 1997 Constitution explicitly granted an unprecedented number of rights and liberties to Thai citizens, opened new avenues for them to participate in politics, and supported efforts to combat vote buying.<sup>2</sup> Despite these provisions, however, vote buying continued to take place:

Vote buying was occurring in many rural areas, and the police were unable to prevent it. The practice of vote buying is illegal, but in Thailand, only the buying is criminalized, while vote selling is not (Appendix II, Sections 44, 45 of Thai Election Law). Observers in northeastern Thailand (i.e, Khon Kaen, Sisaket, Buriram, and Surin provinces) heard that vote buying was a major concern and problem during the election. . . . Because the northeast is the poorest region in Thailand, vote buying there is very likely an effective tool in political campaigning.<sup>3</sup>



"The intention of the Constitution has thus been foiled, as most of the independent watchdog agencies have been co-opted, emasculated, or circumvented, leaving Thaksin's government with almost absolute authority."<sup>4</sup> Thaksin Shinawatra's regime, which came to power among allegations of election fraud and vote buying in particular, ruled Thailand from 2001 to 2006. Under the façade of democracy, Thaksin's Thai Rak Thai party was able to control parliament with an overwhelming electoral majority, establishing the strongest government in the history of modern Thailand since 1932.

Although Thaksin was ousted from his position as prime minister in the aftermath of the military coup in 2006, the army was not able to resolve Thailand's underlying political issues. Subsequently, not only the middle class, NGOs, educated and royalists, but also majority leaders of the army relied on the judiciary, as an independent institution, to be the final arbiter in resolving challenging societal disputes. General Anupong Paochinda, the Army Commander-in-Chief, stated that the judiciary was one of the three pillars of government that everyone must respect to ensure that society continues to function properly.<sup>5</sup> Former Prime Minister Chavalit Yongchaiyudh also portrayed the judiciary as the chair umpire that has been keeping the balance in society.<sup>6</sup> Thai media constantly showed its support for the judiciary, particularly in the aftermath of the military coup of 2006. Since then, the judiciary has consolidated its power step by step.

### **Adjudication of Political Disputes**

In May 2007, the Thai Rak Thai party was dissolved by the Constitutional Court, and its executives, including ousted Prime Minister Thaksin Shinawatra, were banned from politics after being found guilty of electoral fraud.<sup>7</sup> Surprisingly, Thai Rak Thai leader Chaturon Chaisang urged party loyalists not to fight the Court's decision or protest the ruling.<sup>8</sup> Similarly, in response to the ruling Thaksin himself mentioned that if the rule of law is observed, the ruling is to be respected.<sup>9</sup> As a consequence of the above decision, the Court solidified its authority as an independent arbiter capable of imposing checks on the other branches of the government. Then, the Thai Rak Thai transformed itself into the People's Power Party, led by Samak Sundaravej and former allies of Thaksin.



Unfortunately, not much has changed in Thai politics in terms of election fraud since the previous elections. The new elections, held at the end of 2007, were again fraught with instances of vote buying. The People's Power Party, including Thaksin's brother-in-law and eventual prime minister Somchai Wongsawat, assumed power by proxy on behalf of former members of the Thai Rak Thai and Thaksin.<sup>10</sup> Courts came under increased pressure of the government after Samak Sundaravej assumed the post of prime minister. In June 2008, Prime Minister Samak Sundaravej criticized the judiciary, alleging that courts wielded excessive power and meddled in politics.<sup>11</sup> Similar criticism was also made by deposed Prime Minister Thaksin, who contended that Thailand's judicial system suffered from political interference.<sup>12</sup> The Supreme Court later rejected these criticisms,<sup>13</sup> and the courts continued to exercise their power without fear or favor.<sup>14</sup>

On June 25, 2008, the Supreme Court sentenced three of former Prime Minister Thaksin's lawyers found guilty on charges of attempting to bribe court officials with 2 million baht stashed in a snack bag.<sup>15</sup> On July 8, 2008, the Supreme Court ruled unconstitutional the government's signing of the Preah Vihear Joint Communiqué with Cambodia on June 18, citing Article 190 of the 2007 Constitution, because the communiqué was a kind of international treaty.<sup>16</sup> It was one of the landmark judgments of the Supreme Court which checked the power of the government by exercising judicial review. Furthermore, on July 10, 2008, the Constitutional Court disqualified Public Health Minister Chaiya Sasomsap from holding office for failing to declare some of his wife's assets within a specified deadline.<sup>17</sup> Finally, on July 31, 2008, the Criminal Court delivered another landmark verdict that marked a crucial step towards the restoration of the rule of law and sentenced Khunying Pojaman, Thaksin's wife, to three years of imprisonment on charges of tax avoidance in the alleged amount of 546 million baht arising out of a stock transfer in 1997.<sup>18</sup> According to *The Nation*, "the court cited moral shortcomings in its ruling, saying Khunying Pojaman, while being Thailand's first lady, failed to act as a good example for society."<sup>19</sup>

The courts continued to solidify their reputation as an institution capable of independently adjudicating politically motivated cases, notwithstanding the constant pressure created by politicians who garnered the support of a majority of the



Thai people by means of election fraud. In another such case adjudicated on September 9, 2008, as described in *The Nation*, "the Constitutional Court made a historic ruling by ordering Prime Minister Samak Sundaravej to stand down immediately over the scandal surrounding his TV cooking show."<sup>20</sup>

On December 2, 2008, the Constitutional Court ruled that Prime Minister Somchai Wongsawat, Samak's successor, must step down over election fraud, that his governing People Power Party and two of its coalition partners must be dissolved, and that the parties' leaders must be barred from politics for five years.<sup>21</sup>

The foregoing rulings of the courts have had a far-reaching impact and effect on Thai society and Thai politics, despite the fact that some of those rulings have been met with harsh popular criticism.<sup>22</sup> The Constitutional Court reached the apex of its power by courageously pronouncing controversial, historical decisions while facing pressure from often unruly supporters of three political parties, which are no longer legal:

Although the mob prevented Constitutional Court justices and officials from entering the courthouse and forced the change of venue of the hearing and decision, the ruling of the Constitutional Court is in accordance with the provisions of the Constitution, thus upholding the rule of law without yielding to the pressure from any group.<sup>23</sup>

Anti-government protesters terminating their crippling, week-long occupation of Thailand's airports after the courts' foregoing rulings is further evidence of the judicial power.<sup>24</sup>

(The abovementioned part is extracted from a legal and judicial analysis paper entitled "Seeking Judicial Power" compiled by Aung Htoo, General Secretary of the Burma Lawyers' Council, on June 9, 2010.)

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**(Footnotes)**

1 ANFREL Report on Thai Elections in 2005, Published by Asian Network for Free Elections (ANFREL), p.12; website: [www.anfrel.org](http://www.anfrel.org)

2 Ibid



- 3 Ibid. at p. 44
- 4 Ibid. at p. 33
- 5 The Nation, August 15, 2008.
- 6 Ibid.
- 7 <http://newsinfo.inquirer.net/breakingnews/world/view/20070531->
- 8 Ibid.
- 9 [http://en.wikinews.org/wiki/Thai\\_Rak\\_Thai\\_dissolved,\\_ex-premier\\_Thaksin\\_banned\\_from\\_politics](http://en.wikinews.org/wiki/Thai_Rak_Thai_dissolved,_ex-premier_Thaksin_banned_from_politics)
- 10 <http://news.bbc.co.uk/2/hi/7759960.stm>
- 11 “The Nation,” July 23, 2008.
- 12 “The Nation,” August 15, 2008.
- 13 The First World Conference on Constitutional Justice, Cape Town, South Africa, 22-24 January 2009.
- 14 Ibid.
- 15 “The Nation,” June 26 and July 7, 2008.
- 16 “Bangkok Post,” July 9, 2008; “The Nation,” July 9, 2008.
- 17 “The Nation,” July 10, 2008.
- 18 “The Nation,” August 1, 2008.
- 19 Ibid.
- 20 “The Nation,” September 10, 2008.
- 21 <http://news.bbc.co.uk/2/hi/7759960.stm>
- 22 Statement made by Mr. Chat Chonlaworn, President of the Constitutional Court of Thailand, The First World Conference on Constitutional Justice, Cape Town, South Africa, 22-24 January 2009. <http://www.constitutionalcourt.or.th/download/twccjth.pdf>
- 23 Ibid.
- 24 <http://www.capitalequitypartners.com/cep/news/Constitutional-Court-of-Thailand.html>

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**Part (C): Rule of Law**

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**Kosovo decision by the  
International Court of Justice:  
a landmark verdict on separatism**

*Mr. B. K. Sen*

On 22 July 2010, the International Court of Justice (ICJ) ruled in a 10-4 decision that the unilateral declaration of independence by Kosovo in February 2008 did not violate international law.<sup>1</sup> Kosovo, a region in the Former Yugoslavia that Serbia considers to be within its sovereign territory, had been under transitional UN administration since 1999. Kosovo was first declared a UN protectorate on the alleged ground that Slovakia perpetrated acts of genocide there, however there are allegations of violations against both sides involved in the conflict in the region throughout the 1990s.<sup>2</sup>

Following NATO and then UN military interventions, since 2003 the UN encouraged talks about the status of Kosovo. From 2003 onwards, talks about Kosovo's status and political developments within Serbia and Kosovo progressed; as did the progress of the International Criminal Tribunal in the Hague with officials from both sides being indicted for war crimes and crimes against humanity. In 2006-2008, talks and ballots occurred in both Serbia and Kosovo and in late 2007 the Kosovo Assembly (parliament) was elected and held its first session in early 2008. Despite opposition from Serbia and other countries, in February 2008 the Kosovo Assembly declared Kosovo an independent sovereign nation.<sup>3</sup> Serbia responded, informing the UN that this represented a 'force-



ful and unilateral secession of a part of the territory of Serbia'.<sup>4</sup> Various governments supported the declaration and recognized Kosovo as an independent state; but other governments did not. The UN General Assembly asked the ICJ to issue an advisory opinion on the following question: 'Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?'<sup>5</sup> The case was argued before the ICJ in late 2009, and submissions and statements were provided to the Court from many countries (including China, Cyprus, Croatia, Russia, the US and UK) in addition to Serbia and the authors of Kosovo's declaration of independence.

The Court, as to be expected, was judicial in its approach. It considered the General Assembly's question and noted the Assembly had only asked for advice on whether the unilateral declaration accorded with international law.<sup>6</sup> The ICJ specifically noted that it was not being asked 'about the legal consequences of that declaration. In particular [the General Assembly's question] does not ask whether or not Kosovo has achieved statehood'.<sup>7</sup> And the ICJ accordingly limited its answer<sup>8</sup> deciding that the Kosovo declaration of independence accorded with international law<sup>9</sup> but that didn't necessarily mean that independence had been achieved.<sup>10</sup>

Despite these caveats, one could argue that the ICJ has taken a clear decision on the issues of self-determination and territorial integrity for the first time in 40 years.

Pandora's box has been opened. There are about 50 Kosovos waiting to happen on the African continent alone. The ruling strengthens the case for separatists around the globe. Cases that have been confronted with very brutal repression may feel that their chances for an independent state have increased. Since the division of Pakistan in the 1970s, Bangladesh has become truly independent despite strong opposition and predictions to the contrary from what was then West Pakistan. The Kosovo ruling will give additional legal ammunition to independence movements in Kashmir, Burma, Iraq, Russia and China, to name but a few. One could also wonder what effect it may have on movements calling for greater indigenous autonomy within states, such as in Australia, Canada, New Zealand and the United States.<sup>11</sup>





The United States of America has endorsed the ICJ's verdict and has asked all states to recognise Kosovo's statehood. China has reacted strongly and commented critically on the decision. Currently 72 countries, including the US, the United Kingdom and France, have extended recognition to Kosovo. The ICJ's landmark ruling could help Kosovo to cross the magic figure of 100, which would then allow it to qualify for formal membership of the UN. However continued significant opposition from various countries makes this uncertain.<sup>12</sup>

The ruling of the ICJ, though merely advisory, is a very important milestone in the struggle for self-determination. As noted earlier, the caveat on the ruling is that it pertains only to Kosovo's declaration of independence and not to its status as an independent state. But these exceptions do not dilute the high moral level of the struggle of the oppressed people for their right to self-determination. Edwin Baker, an expert on international law, has said that the Karen and Shan conflicts in Burma, the Kurd struggles in Iraq and the Kashmiri conflict were all comparable to the Kosovan situation. In this context, the struggle of the ethnic nationalities in Burma will be reinvigorated. Baker made a special reference to Burma because of the intensity of its ethnic campaigns. Inhabited by several ethnic nationalities in defined geographical areas, the ethnic struggles in Burma have received worldwide attention. Burma was under British rule as a single unit for almost a century, although for the purposes of administration it was split into Burma Proper and the Federated Shan States. There are certainly arguments that some ethnic groups, who have consistently opposed external rule and asserted their autonomy, may find points of support and encouragement from the ICJ ruling.

But the ICJ's decision reinforces that the question of recognition of statehood is also significantly a political question.<sup>13</sup> One of the majority judges in the ICJ's decision, renowned international law professor Cançado Trindade, issued a separate opinion in which he identified some of the important issues in considering these types of cases.

Meeting the 'criteria of statehood' at international law involves having a permanent population,<sup>14</sup> which is frequently understood as involving an identified 'people'. Judge Trindade noted 'There is in fact no terminological precision as to what constitutes a "people" in international law... despite the large experi-



ence on the matter. ...[T]here is conjugation of factors, of an objective as well as subjective character, such as traditions and culture, ethnicity, historical ties and heritage, language, religion, sense of identity or kinship, the will to constitute a people; these are all *factual*, not *legal*, elements, which usually overlap each other'.<sup>15</sup> So one relevant question will be whether those facts exist in relation to those groups asserting independence from Burma.

The Judge also explained that self-determination in international law has progressed from its initial focus simply on decolonization, to now also addressing people who are being oppressed. The Judge stated: 'No State can invoke territorial integrity in order to commit atrocities (such as the practices of torture, and ethnic cleansing, and massive forced displacement of the population), nor perpetrate them on the assumption of State sovereignty, nor commit atrocities and then rely on a claim of territorial integrity notwithstanding the sentiments and ineluctable resentments of the "people" or "population" victimized.'<sup>16</sup> Again, some interesting parallels will be seen here with Burma.

**(Footnotes)**

<sup>1</sup> The ICJ's majority decision is available at <[www.icj-cij.org/docket/files/141/15987.pdf?PHPSESSID=53f9fcf5327dda735b8c0d7a7abf84b4](http://www.icj-cij.org/docket/files/141/15987.pdf?PHPSESSID=53f9fcf5327dda735b8c0d7a7abf84b4)> ('**ICJ Decision**'). Four of the majority judges issued separate opinions, in which one expressed the issue pithily: 'Declarations of the kind are neither authorized nor prohibited by international law': para [227] of Separate Opinion of Judge A. A. Cançado Trindade available <[www.icj-cij.org/docket/files/141/16003.pdf](http://www.icj-cij.org/docket/files/141/16003.pdf)>.

<sup>2</sup> The 'background' you consider in understanding the conflict depends on what perspective you take (eg. is the reaction to the 1998 violence the main issue; or we instead refer back to the 1980s/1990s broader Yugoslavia dynamics; or should we begin with Kosovo as part of Serbia since the first world war; or go earlier again?). The BBC website as a timeline of significant events in Kosovo, from 1300s to 2010: <[http://news.bbc.co.uk/2/hi/europe/country\\_profiles/3550401.stm](http://news.bbc.co.uk/2/hi/europe/country_profiles/3550401.stm)>.

<sup>3</sup> Detail of the events leading to the declaration are contained in the ICJ Decision (see n1 above), para's [64]-[75].

<sup>4</sup> ICJ Decision, para [77].

<sup>5</sup> UN General Assembly Resolution 63/3, 8 October 2008. Available <<http://>



/daccess-ods.un.org/access.nsf/Get?Open&DS=A/RES/63/3&Lang=E>.

<sup>6</sup> ICJ Decision para's [49]-[56].

<sup>7</sup> ICJ Decision para [51].

<sup>8</sup> The ICJ specifically noted the difference from a question in the 1990s about Quebec independence, which asked for the Canadian Supreme Court to decide whether international law supported a unilateral declaration of independence: para [55]-[56].

<sup>9</sup> The ICJ Decision on the Kosovo declaration contains three parts: (1) the declaration was permissible under general international law [84], (2) it wasn't prohibited by the UN Security Council's [119], and (3) it was legal within Kosovo's constitutional framework [120]-[121].

<sup>10</sup> '[I]t is entirely possible for a particular act - such as a unilateral declaration of independence - not to be in violation of international law without necessarily constituting the exercise of a right conferred by it. The Court has been asked for an opinion on the first point, not the second': ICJ Decision para [56].

<sup>11</sup> Indigenous claims for greater recognition and rights have been strengthened in recent years by the establishment of the UN Permanent Forum on Indigenous Issues in 2002 which comprises members from UN states but also from indigenous groups; and the UN General Assembly's adoption of the Declaration on the Rights of Indigenous Peoples 2007.

<sup>12</sup> 'The [ICJ's] opinion doesn't change or challenge the geopolitical reality... [Many countries including] China, Russia, India and Serbia have opposed Kosovo's secession [and although the ICJ's decision will result in] a number of countries that ... will recognize Kosovo, but not enough to ensure Kosovo's entry into major international organizations like the UN. And the most important resisters won't change their view... The same political incentives and calculations exist today [after the ICJ's decision] as yesterday [before the decision]': T Waters, Kosovo decision means continued uncertainty, instability in Balkans, 23 Jul 2010. Available <<http://info.law.indiana.edu/news/page/normal/15047.html>>

<sup>13</sup> Eg. Chiang Huang-chih, 'ICJ's Kosovo decision is vague and very limited', Taipei Times, 28 Jul 2010. Available <[www.taipeitimes.com/News/editorials/archives/2010/07/28/2003478995](http://www.taipeitimes.com/News/editorials/archives/2010/07/28/2003478995)>.

<sup>14</sup> Convention on the Rights and Duties of States (1933), art 1, available <[www.oas.org/juridico/english/treaties/a-40.html](http://www.oas.org/juridico/english/treaties/a-40.html)>.

<sup>15</sup> Separate Opinion of Judge Cançado Trindade (n1 above) para [228].

<sup>16</sup> Separate Opinion of Judge Cançado Trindade, para [176].



## Supreme Court Rejects NLD Appeal to be Reinstated

*By KO HTWE*

*Tuesday, November 23, 2010*

The Burmese Supreme Court in Naypyidaw on Monday rejected the lawsuit by pro-democracy leader Aung San Suu Kyi's National League for Democracy (NLD) challenging its disbandment for failing to register as a political party. A senior official in Naypyidaw said the lawsuit had been rejected, according to Deutsche Presse Agentur (DPA).

However, Tin Oo, the NLD vice chairman, said, "We still haven't received any information about the rejection." Normally, the court's rulings are posted publicly, said also NLD lawyers.

After her release from house arrest last week, Suu Kyi met with the NLD legal team and discussed the military government's disbandment of the party after it decided not to participate in the national election, the first in 20 years, saying it was undemocratic.

On Thursday, lawyers for the NLD argued in a hearing before the court in Naypyidaw that the Election Commission was wrong in banning the party. "In the mind of the public and all NLD members, the party still exists," Tin Oo said. Many youth are more interested in joining the NLD after Suu Kyi's release, he said.

The NLD was officially disbanded after it failed to register for the Nov. 7 election. In the appeal before the Supreme Court, the NLD called for the cancellation of Article 25 of the Political Parties Registration Law, which required existing political parties to re-register or face disbandment.



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Article 25 reads: "The political parties established in accord with the Political Parties Registration Law 4/88 shall apply for registration to the Election Commission within 60 days after the promulgation of this law." The NLD claimed the provision did not apply to the NLD.

The NLD first presented its case to the Supreme Court in Rangoon in April. It was one of a number of law suits it filed, including an appeal by 26 party members who won in the 1990 election. They asked for the election results to be recognized and for the establishment of a parliament in accordance with the Pyithu Hluttaw Election Law 14/89, which was issued in 1989.

The regime rejected the results of the 1990 election and promulgated a new Pyithu Hluttaw Election Law, repealing the 1989 law.

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## Part (D): Burmese Migrant Workers Issues

### **Ministry of Labor vows to control alien migrants —no pregnancy or they will be sent back.**

*(Saw Ku from IRC)*

[LEAD] Being afraid that Thailand will be flooded by the huge number of migrant's children, the Minister of Labor has proposed a birth control plan [for the migrants]—sending the pregnant labor back. The remark was made without fear to be condemned. It was revealed that the number of illegal labor force is not less than 1 million. [The government] should speed up the framing guideline. NGO slams[the idea] for going backward, suggest better family planning campaigns.

[Body] Mr. Chalermchai Sri-on. The Labour Minister is preparing to set up a measure to control the unregistered migrant labor. The Minister revealed that the Migrant Labour Administration Committee had considered to seek appropriate measures and set up principle [to deal with migrant workers].

The committee gave nod to proceed the management of the unregistered migrant labor and include them into the system. The number of this group of people are expected to be at least 1 million. No other agencies can give a more accurate number even the National Security Council.

The Department of Employment, Ministry of Labour will proceed with 2 plans, 1) a continuation of the national verification process, 2) start registering those who have not been enlisted in the NV, while waiting for being sent to NV as agreed with their home country.

Mr. Chalermchai said the framework which has been approved by the commit-



tee is to identify the total number of migrant workers, how many are working outside the system or how many are working illegal. The new proposed procedure is to record all data in a work permit paper which is similar to a passport. Personal information, fingerprint, facial structure, history of residency, registering district, and the owner's photograph will be included in the new document, so that they can be traced when changing workplaces.

“We have to accept that the current documents are mixed-up sometimes by cut/past pages. The new document will solve the problem. The new registration will enable [the government] to control [these people]. The more important thing is it will enable these people to access health service, so we can trace back contagious diseases. Every party now has to accept that numerous number of illegal migrant labor are working in Thailand. If we don't do anything we will not be able to control the situation at all. Neither can we push them back. This is a hot issue that we have to fix.”

The Minister said that if all illegal workers were pushed back, it is believed that Thailand's economy would be in trouble. However, for the time being, no one knows the exact number of these illegal migrant workers. If all of these migrants were brought up on the ground [so the total number is known], we will be able to answer the questions asked by the society and the international community –how the Thai government is taking care of their human rights, how we let these migrants work without being taken advantages or exploited by human traffickers. In the pass, they have been discriminately/selectively arrested and there have been a lot of complaints on the issue.

“Only on the subject of their children, we don't really know how many babies are delivered per year – but the number is huge. Some countries have restrictive policy, they sent them back immediately when found pregnant. So, they must do birth control or will be sent back. However, by humanitarian principle, we will surely take care them. “

When asked if his proposal for birth control will attract criticism from human rights activists, the Minister said his remark was just a concept. If we do not do anything, we will be condemned anyway. The important question is why other countries can issue regulation to control migrant workers but Thailand cannot. This is the time that we have to regulate and systemize the migrant workers. Not only those from Burma, Lao, Cambodia, but also those from Vietnam, Indonesia, Bangladesh, Nepal and others. Although the regulation will not be finalized in 3 or 6 months but we should start laying the foundation now.

Meanwhile, Mr. **Adisorn Kerdmongkol**, the manager of the project —quality of Life development for migrant workers and people with national status problem, Thai Health Promotion Foundation, commented that the birth control policy



does not seem effective. As these migrant workers are mostly those fleeing the conflict from their home country and cross the border into Thailand. They definitely want to bring with them their family members. Even if we send them back, they will keep re-entering. The practice will force them to live in hiding for fear of being repatriated.

“The concept seemed going backward. Prior to this, there was a policy to allow children with nationality problem to enroll in Thai schools. One possible way to solve the problem is to support family planning scheme, as this is their actual problem. The government should also encourage these children to get educated, so they can use their knowledge to develop our country, rather than sending them back to the conflicted area.’

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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**  
P.O Box 144 Mae Sod, Tak, 63110 Thailand  
Email: [blesan@ksc.th.com](mailto:blesan@ksc.th.com), Website: [www.blc-burma.org](http://www.blc-burma.org)