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Burma Lawyers' Council Statement on the Failure of the 2008 SPDC Constitution to Protect Judicial Independence

1. The independence of Thailand's judiciary was on display Tuesday when the Thai Constitutional Court unanimously ordered the People Power Party to disband due to vote-buying. Dozens of the PPP's executive members, including Prime Minister Somchai Wongsawat, were also found guilty of personal involvement and banned from politics for five years. Despite great pressure from pro-government supporters who surrounded the courthouse, the judges remained independent of the ruling party. The ruling by the court has generally been accepted by the disputing parties and the people of Thailand. Mr. Somchai himself acknowledged the court's verdict, saying he was now "an ordinary citizen". This respect for the court's decision is only possible because of the independent, objective, and impartial nature of Thailand's judiciary.
2. In contrast, Burma is plagued with a judiciary that is merely a pawn of the ruling regime. The courts of Burma continue to hold sham trials in which defendants have no rights and the government always wins. Judges purposefully misinterpret, misapply or completely ignore applicable laws to arrive at judgments in the government's favor. UN Special Rapporteur Tomás Ojea Quintana stated in his September 2008 Report: "[U]nder the current functioning, the judiciary is not independent and is under the direct control of the Government and the military."
3. Unfortunately, there is no hope for an independent judiciary in the future either, under the SPDC's 2008 Constitution of the Republic of the Union of Myanmar. While the Constitution prescribes that justice be administered "independently according to law", in reality the Constitution ensures that after the 2010 elections the judiciary will remain under the control of the military-domi-



nated ruling party.

4. Appointment of Judges. The procedure for appointing judges is an essential factor in the independence of the judiciary. The power to appoint means the power to control who serves in the judiciary. There must be adequate checks and balances to ensure that one person or party does not dominate appointments. Under the SPDC Constitution, the President, who will surely be either a former military officer or an ally of the military, will essentially have complete control over appointment of judges of the Supreme Court, the Constitutional Tribunal and the High Courts of States and Regions. (Articles 299, 308, 327) The Parliament can only reject the nominees on technical qualifications and for lack of loyalty to the Union, not if they are corrupt or have a history of being unfair. (Articles 299(c)(ii), 308(b)(ii), 328). These provisions will result in courts packed with judges who favor the President and his party.

5. Removal of Judges. If it is too easy for one person to remove judges, they will decide cases that favor that person out of fear of losing their jobs. The SPDC Constitution gives the President broad power to remove judges by allowing him to begin impeachment proceedings for a wide variety of ill-defined reasons, such as "misconduct", "high treason" or "inefficient discharge of duties". (Articles 302, 311, 334) These grounds give the President power to eliminate judges who issue rulings that the President dislikes, thus undermining judicial independence. In fact, the threat of impeachment is alone enough to give the President extreme influence. Even though the Parliament has the power to acquit a judge of impeachment charges, the Constitution does not obligate the President to follow the decision.

6. Length of Term. In general, longer terms for judges results in greater independence. Judges with short terms are less secure in their jobs, which in turn can influence their decision-making so that it favors whoever will reappoint them. Importantly, the term of each member of the Constitutional Tribunal is only five years. (Article 335) This provision will likely lead members of the Tribunal to interpret the Constitution the way that the President wants.

7. Amount of Judges. Increasing the number of judges is another way to control the court. The Constitution provides that the Supreme Court can have between 7 and 11 judges, while the High Courts can have between 3 and 7. (Articles 299, 308(a)(ii)) If a court is issuing decisions that the President does not like, he can simply add more judges who will rule differently. This flexibility will likely be used by the regime to undermine independence of the judiciary.

8. No Prohibitions against Interference. Significantly, there are no constitutional prohibitions on interference of the judiciary, by the President or



anyone else. Thus, the President or Commander-in-Chief faces no constitutional barrier to bribing, threatening or retaliating against judges. Considering the history of coercion and corruption in the Burmese judiciary, this lack of institutionalized protection against undue interference poses a major threat to the independence of the judiciary.

9. The Burma Lawyers' Council has determined that, under the 2008 SPDC Constitution, there is no potential for an independent judiciary. The provisions discussed above as well as the impossibility of amending the Constitution without military approval make the Constitution a document that puts the judiciary under the total control of the military regime. If it is not rewritten or at least significantly revised, the people of Burma can expect to see more one-sided justice with no accountability.

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Burma Lawyers' Council

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