



## Part ( C ) Labor Issue

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**"The Limits of Permissible Forced Labour"**

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

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

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

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

Both parties agree that the SPDC continues to use forced labour schemes to carry out re-construction efforts in the Irrawaddy Delta. As the authors of *After the Storm* describe: "the junta used civilians' vulnerabilities to their benefit forcing many communities to provide free labor or donations to the military for 'reconstruction efforts', often for prolonged periods of time and with no provisions for food, transportation, equipment, or safety."<sup>1</sup> These findings are similar



to numerous reports by other international media outlets and non-governmental organizations. According to a recent article published by the Democratic Voice of Burma, "(i)n the past two years the International Labour Organisation (ILO) has received 152 complaints of forced labour in Burma."<sup>2</sup>

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

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

#### **Forced Labour Convention, 1930<sup>4</sup>**

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

##### Article 1

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

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

##### Article 2

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

*(a) any work or service exacted in virtue of compulsory military service laws for work of a purely military character;*



*(b) any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country;*

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

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

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

## **Analysis**

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

With particular regard to Article 2(d), we may all agree that certain emergencies constitute a fatal threat to "the existence...of the whole...population", and may necessitate an "any means possible" reaction. For example, if the tiny Pacific Island nation of Tuvalu were facing an imminent tsunami, it is conceivable that the international legal community would accept that the use of forced labour to establish safety, rescue and infrastructure preparations is contemplated by this justificatory provision.



However, Article 2(d) does not leave the legal community with a clear understanding of what might constitute merely a danger to "the well-being...of part of the population". And it is this grey area that one would have to be focusing on when one analyzes an attempt to justify the SPDC's use of forced labour a full year after Cyclone Nargis.

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

### **Moving Forward**

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

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

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

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

### **Conclusion**

At present, the international law of forced labour remains in obscurity. The exemptions listed in Article 2 are ill-defined and await further clarification by international courts. The absence of clear rulings on these legal questions allow



the SPDC to continue to use Cyclone Nargis as a justification for forced labour schemes that have very likely extended beyond the time limitations that were contemplated by the authors of the Forced Labour Convention. The health and safety of the Burmese workers would be greatly benefited by this clarification to international law. This paper has sought to provide a single and narrow question of international law, as well as three avenues through which ILO members may bring the SPDC to an international tribunal. It is hoped that this issue will be resolved.

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### (Endnotes)

<sup>1</sup> Emergency Assistance Team (EAT) and John Hopkins University, *After the Storm: Voices from the Delta*, p.58.

<sup>2</sup> "ILO Condemns Burma's Use of Forced Labour," *Democratic Voice of Burma*, July 24 2009, < <http://english.dvb.no/news.php?id=2603>>

<sup>3</sup> "Joint Response to *After the Storm: Voices from the Delta*," April 8 2009, p.3.

<sup>4</sup> *Convention on the Use of Forced or Compulsory Labour*, 1930. <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C029>>