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THE ECONOMIC DEVELOPMENT AND THE RULE OF LAW

There are presumptions that elections in 2010 and the following period may bring gradual economic development in Burma. Elections are often processes for democratic change, which in turn usually facilitates an open market economic system. After the elections, however, Burma's 2008 Constitution will certainly be implemented. This Constitution contains numerous flaws that will prevent true democracy to flourish and will allow the military to continue its control over the country. As of now, the governing State Peace and Development Council (SPDC) has given no indication that it will revise its highly flawed constitution.¹

The SPDC's disregard for the rule of law and international norms has impacted its economic prosperity. Burma's economy was recently ranked 5th to last in a ranking of economic freedom.² Burma is also ranked 138th on the United Nations Development Program's Human Development Index, indicating a severe lack of economic and social development in the country.³ Internationally, Burma's economy is regarded as corrupt and severely mis-managed.⁴ This trend will continue as long as the rule of law and good governance do not prevail in Burma.

This compilation will describe the fundamental elements of economic development, and will analyze the 2008 Constitution and its prospects for granting economic freedom to the people of Burma. It will also explore whether the Constitution adequately addresses the current economic problems in Burma and examines the connection between economic stagnation and rampant human rights abuses, pervasive criminality, and the denial of the rule of law.

A. THE RULE OF LAW

For a market economy system to succeed, it must be based on the rule of law and protected by an impartial judiciary. To a large extent, a successful market economy depends on the trust the market participants have in the legal system to uphold their rights and fairly adjudicate their disputes. There must be an efficient, just and affordable judicial mechanism to resolve disputes, including the disputes involving governments. The mechanism must have strong, enforceable safeguards to ensure that the parties are treated fairly. Disputes must be adjudicated based solely on the facts and the law, not on the identity of the party or the relationship the party has to the government. For example, if a business enters into a contract to purchase goods, it must know that it can obtain a legal remedy if the supplier fails to deliver the goods. Businesses justifiably



avoid markets that lack fair, efficient and unbiased courts because of the risk of uncompensated loss.

The Role of Legal and Judicial Institutions to Preserve the Rule of Law

For a market economy system to succeed, it must include strong institutions that protect the rule of law, an independent judiciary, and property rights. Economies consist of parties each trying to grow and develop, and institutions must ensure that the parties interact with each other and with the government fairly. To a large extent, a successful market economy depends on the trust the market participants have in the legal system to uphold their rights and fairly adjudicate their disputes. There must be an efficient, just and affordable judicial mechanism to resolve disputes, including the disputes involving governments. The mechanism must have strong, enforceable safeguards to ensure that the parties are treated fairly. Disputes must be adjudicated based solely on the facts and the law, not on the identity of the party or the relationship the party has to the government.

In order for an economy to grow, the law and corresponding legal institutions must protect private ownership rights. Citizens and foreigners must be assured that their legally obtained possessions will not be arbitrarily seized, and that they can obtain a legal remedy before a neutral, independent judiciary if the government disregards this law.

Case Study

In the Yaung Chi Oo case in Burma, for example, a private Singapore company made a joint venture with the Burmese government to manufacture beer. The government attempted to nationalize the company before the expiration of their contract. When the parties went to court, the judge ignored the Singapore company's arguments and unjustifiably used its broad discretion under the law to rule for the government.⁵ A free market economy cannot succeed in such an environment. The almost complete lack of rule of law and a judicial system that is partial to the government means that domestic and foreign companies must negotiate directly with the government to resolve disputes.

The Yaung Chi Oo case highlights the SPDC's disrespect of property rights. In order for an economy to grow, the law and corresponding legal institutions must protect private ownership rights. Citizens and foreigners must be assured that their legally obtained possessions will not be arbitrarily seized, and that they can obtain a legal remedy before a neutral, independent judiciary if the government disregards this law.



The Rule of Law and the Institutional Theory of Economic Development

The state of Burma's institutions will determine its future economic development. While there are many determinants of economic growth, recent research demonstrates that the quality of institutions is the greatest determinant of economic well-being.⁶ Strong institutions enhance the rule of law, property rights, transparency, and the capacity to trade.⁷ Institutions come in various forms, including courts which adjudicate disputes and protect property rights, banks that regulate financial transactions, and agencies that protect social interests such as education and health care. Institutions make sure that everyone understands the rules of the economy, that parties play by these rules, and that there are clear, anticipated, and fair procedures when a party breaks one of these rules. While robust institutions in all sectors are important for economic growth, this paper will focus on the importance of legal, judicial, and political institutions.

As legal, judicial, and political institutions become more dedicated to protecting the rule of law, an independent judiciary, property rights, and political fairness, the economy of Burma will develop. Several studies have demonstrated that improvements in the quality of institutions will result in significant improvements in average income, key indicator of a country's wealth.⁸ As institutions become stronger, more accountable, and more transparent, they encourage investment and technological progress, which increases economic growth. The connection between strong institutions and economic growth continues: as a nation's economy strengthens, its population puts renewed energy into protecting and improving its institutions.

B. GOOD GOVERNANCE

A properly operating market economy system requires good governance. Good governance means an efficient, independent, accountable and open government without corruption and dedicated to the public good. Good governance focuses on four main areas: accountability, accessible information, transparency and a legal framework for development.

(1) Accountability

Accountability means holding government officials responsible for their actions. The laws must clearly provide for this accountability. A healthy market economy also needs strong anti-corruption laws that unambiguously prohibit the improper receipt of gifts and money. There must be clear regulations for lobbyists so that powerful groups cannot have an unfair advantage in policy making. Impartial



and fair treatment by the government is critical for attracting investments and maintaining a fair business environment. Government officials must not accept gifts and other incentives from business that might lead to favoritism or even the appearance of impropriety.

Economic failures are to some extent caused by a lack of transparency, cronyism, and corruption. The World Bank in its 2007 Worldwide Governance Indicators ranked the Burmese government as the lowest in the world.⁹ In Burma, there is no accountability, transparency, or independent judicial system.

(2) Accessible information

Information about economic conditions, markets, and government policies must be reliable and accessible to all. For instance, information regarding the government's use of public funds must be available promptly and economically. The government must promulgate laws that require public companies to periodically release important financial information and to make clear to their investors the risks involved in investing.

To keep the people informed, the government must also publish and distribute the financial budget of the country, the decision record of the parliament and the decisions made at different levels of the federal government relating to the development of the country. The information must be clear, accurate, understandable and complete.

Official statistics released by the SPDC indicate that Burma has experienced double-digit growth since 1999, making it the fastest-growing economy in the world.¹⁰ Releasing this type of false information is one of the characteristics of the current government, undermining the market's ability to accurately assess business needs. In Burma, official statistics are notoriously unreliable (and sometimes even deliberately misstated), and collecting data is difficult. Burma does not publish data on its spending or unemployment.

Case Studies in Connection with the 2008 Constitution

The SPDC keeps accurate information from the people. There is no law in Burma that guarantees unequivocally free access to information, and the government has cracked down on journalists and others who seek to make information accessible to the public. Reporters without Borders ranked Burma 171 out of 175 countries in its annual press freedom index.¹¹ Recently, the regime has served journalists with harsh prison sentences. Ma Hla Hla Win, a 25-year old freelance journalist who supplied information for the Democratic Voice of Burma, was recently sentenced to a 20-year prison term.¹² Ngwe Soe Lin, a reporter

for the Democratic Voice of Burma, was also arrested and sentenced to 13 years of imprisonment.¹³ The two are just the most recent examples of the regime's intolerance for freedom of the press.

The Electronic Transaction Law is often the basis for such harsh punishment of journalists. The law forbids "doing any act detrimental to the security of the State or prevalence of law and order or community peace and tranquility or national solidarity or national economy or national culture" or "receiving or sending and distributing any information relating to secrets of the security of the State or prevalence of law and order or community peace and tranquility or national solidarity or national economy or national culture."¹⁴ Reporters, journalists, and others who seek free access to information are common targets of this law.

The Constitution will perpetuate the crackdown on journalists and free speech rights. Article 354 indicates that free speech will be subject to pre-existing laws, including the Electronic Transactions Law. Such harsh restrictions on access to information in Burma therefore will continue after the enactment of the Constitution.

C. TRANSPARENCY

Transparency is a call for open government that results in greater accountability, limited corruption and a dialogue between government and private interests over policy development. The government's actions must not be hidden from the public. A market economy and democracy are founded on citizen participation and decision making. The government alone does not drive the focus and future of a country; citizen input is critical to guide the government's path. Meaningful citizen input and participation are not possible however, without a well-informed public, which means that the government must make available as much information as possible. The people must also be able to contribute to the lawmaking and decision making process through a comment and question procedure. In many democratic countries, the public is given a generous time period to review administrative regulations and provide insights that the government may not have. For instance, comments from companies can provide the government with a business perspective while private individuals may be able to identify ways in which their rights may lack protection under a new law.

Burma lacks regulatory and legal transparency. All existing regulations are subject to change with no advance or written notice at the discretion of the regime's ruling generals. The country's decision-makers appear strongly influenced by their desire to support state-owned enterprises, wealthy friends, and military-controlled companies, such as the Myanmar Economic Corporation and

Myanmar Economic Holdings, Ltd. The government often issues new regulations with no advance notice and no opportunity for review or comment by domestic or foreign market participants. The regime rarely publishes its new regulations and regulatory changes; instead they communicate new rules verbally to interested parties and often refuse to confirm the changes in writing.

Corruption is a significant barrier to transparency, and is widespread in Burma. Economists and businesspeople consider corruption the most serious barrier to investment and commerce in Burma. Very little enterprises can be accomplished, from the smallest transactions to the largest, without paying a bribe. As inflation increases and investment declines, this problem appears to be worsening. Since 1948, corruption is officially a crime that can carry a jail term.¹⁵ However, the ruling generals apply the anti-corruption statute only when they want to take action against a rival or an official who has become an embarrassment. For instance, in October 2004, the SPDC arrested then-Prime Minister General Khin Nyunt and many of his colleagues and family members for corruption.¹⁶ Most citizens view corruption as a normal practice and requirement for survival.

D. POLITICAL INSTITUTIONS

A properly operating market economy system requires strong political institutions marked by good governance. Good governance means that efficient, independent, accountable and open political institutions exist without corruption and are dedicated to the public good. Political institutions are best formed and strengthened through participation of civil society groups and the general public. Individuals and groups can collectively choose what sort of institutions will work best for them, forming political institutions that will improve their daily lives. In order for civil society to effectively participate in this creation and strengthening of political institutions, there must be easy access to information in the country and individuals must be encouraged to fully participate in their government. Hallmarks of strong political institutions include accountability, accessible information, and transparency.

Independent political institutions are suppressed by the SPDC. The National League for Democracy (NLD), for example, has lost many members to the regime's harassment and intimidation.¹⁷ The main leadership of the NLD, Daw Aung San Suu Kyi and U Tin Oo, remain in detention, severely restricting the freedom of the party. The Constitution will legitimize the regime's restrictions on political institutions. Article 354 of the Constitution purports to allow individuals to form associations and organizations, to publish their thoughts freely, and to assemble peacefully. This article is rendered void by its exception clause, which grants these freedoms only "if not contrary to the laws, enacted for Union secu-

rity, prevalence of law and order, community peace and tranquility or public order and morality." The exception clause effectively denies independent political institutions from emerging and growing in Burma.

E. ECONOMIC FREEDOM

In its 2007 Index of Economic Freedom, the Heritage Foundation ranked Burma as the fifth most repressed economy in the world.¹⁸ Burma's economy is 40.1% free, which makes it the world's 153rd freest economy out of 157.¹⁹ Burma is ranked 29th out of 30 countries in the Asia-Pacific region.²⁰

(1) Protecting Intellectual Property

The government must facilitate the work of innovators by passing intellectual property laws. The rules of the marketplace must be established so that new products or processes are not pirated. Small inventors and large companies will only invest effort and money in research if they know that they will be financially rewarded for their good ideas. In Burma, there is almost a complete stifling of economic innovation by the SPDC. The few instances of innovation are subject to government corruption in the form of forced payments to officials and are often threatened with expropriation or nationalization. Burma's patent, trademark, and copyright laws are all deficient in regulation and enforcement. An intellectual property rights law, first drafted in 1994, still awaits government approval and implementation. Burma has no trademark law, although trademark registration is possible. There is no legal protection in Burma for foreign copyrights.

(2) Antitrust law

An antitrust law must be enacted to prevent companies or organizations from monopolizing the entire economy. This law must be established to (1) prohibit agreements or practices that restrict free trade and competition between business entities; (2) ban abusive behavior by a business dominating a market, or anti-competitive practices that tend to lead to such a dominant position; and (3) supervise the mergers and acquisitions of large corporations. Antitrust law prevents abusive manipulation of the economy by big market participants that seek to hinder competition. It is a critical component of a market economy that keeps the economy running fairly and properly.

Case Studies in Connection with the 2008 Constitution

Burma's economy is characterized by state-run monopolies. Allies of the SPDC have also exerted complete control various economic sectors. Htoo Trading, for example, is closely aligned with the junta and recently received a



major contract from the SPDC for the construction of two dams.²¹ Htoo Trading also began selling SIM cards for which they have exclusive rights.²² Htoo Trading chairman U Tay Za is involved in other economic endeavors that exploit his close connections with the SPDC.²³ While U Tay Za's enterprises are thriving, businesses run by ordinary citizens are struggling.

The SPDC is currently trying to privatize, which would normally be a step in the right direction for the formation of a market economy. Instead of proceeding fairly, however, the SPDC is selling parts of its monopolized businesses to its allies. For example, the SPDC recently announced that it is selling off state-owned buildings and factories to private buyers, but most of these properties are being sold to SPDC allies at prices below market rate.²⁴ The SPDC will effectively remain in control of its assets. This is not true privatization, but rather a continuation of government monopoly of the economy. The 2008 Constitution does not counter this faux privatization and serves to further the regime's economic plans.



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(3) Facilitating the lawful transfer of currency

The government must not prohibit the lawful transfer of money and properties that are legally owned, whether the transfer originates from inside or outside the country. Every citizen and foreigner living legally in a country must have the right under law to hold and exchange domestic and foreign currency. The unrestricted transfer of legally owned money and property keeps a market economy

moving. Quick and cheap transfers lead to more efficient business transactions. A government that attempts to unnecessarily control or even prohibit the movement of money and property hinders business. While some restrictions are reasonable, such as preventing immediate withdrawal of suspicious transfers in order to prevent money laundering, unnecessary government interference must be avoided. In particular, international transfers of money and property must not be unnecessarily delayed.

Holding currency is a prerequisite to participating in a market. There must be no restrictions on any citizen or foreigner that restrict their right to legally obtain, possess, and utilize domestic currency. Additionally, every person must also have the unfettered right to exchange their domestic currency into foreign currency, and vice versa. Today's market is increasingly international. Exchange restrictions harm a country's commerce.

(4) The Central Bank and monetary controls

The free formation of financial and monitoring institutions must be protected by law. Moreover, a central bank must have the capacity and authority to ensure the well-being of a free market economy. A central bank, reserve bank or monetary authority, is in charge of establishing monetary policy. Its primary responsibility is to maintain the stability of the national currency and money supply. The central bank may also control subsidized-loan interest rates and assist the banking sector through loans during a financial crisis. The central bank should also have supervisory powers to ensure that banks and other financial institutions do not behave recklessly or fraudulently.

In Burma, the Central Bank of Myanmar devotes a great amount of effort to lending to the government. Although monetary policy in Burma is formally the responsibility of the Central Bank, the Bank actually has almost no influence over monetary conditions.²⁵ The Central Bank does not have operational independence from the state, and thus has no credibility. It also has little power, as was evidenced during the 2002-2003 banking crisis, when the authority to handle the crisis was given to an obscure brigade commander instead of the Central Bank.²⁶ The small amount of government bonds held by the general public (much less than one per cent) indicates the lack of confidence the citizens have in state-created financial assets.²⁷

The exchange rate of the Myanmar Kyat is another problem that undermines the effectiveness of the Burmese economy. Burma has a fixed-exchange rate policy that officially links the Kyat to the U.S. Dollar at K6: \$US 1. The only relevant exchange rate to the people on the streets in Burma, however, is the black market rate, which stands at around (K 1,280: \$ US 1) over two hundred

times below the official standard. The black market rate changes daily and sometimes hourly, depending on the perceptions of the country's prospects. Instead of engaging in currency reform, the SPDC simply tries from time to time to arrest well-known foreign exchange dealers.

F. MACRO-ECONOMIC STABILITY

Macroeconomics deals with the broad and general aspects of an economy, such as income, output, and the interrelationship among diverse economic sectors. When government spending expands too far, large deficits, excessive borrowing, monetary expansion and problems in the financial sector often result. In turn, these are followed by inflation, overvaluation of the currency, and a loss of export competitiveness. Excessive borrowing can also lead to domestic and external debt problems and crowding out of private investment.

The macro-economic policy-making in Burma has been characterized as arbitrary, often contradictory and ill-informed. Under the military administration, the country has faced macroeconomic instability such as high inflation, a persistent fiscal deficit largely financed by the central bank, a low savings rate, a widening trade deficit, a drastic fall in foreign investment, and a widening gap between official and free-market exchange rates. Burma's macro-economic policy is dominated by the SPCD's constant demand for the country's output, which far exceeds the regime's ability to raise tax revenue. Consequently, the state finances its spending by selling government bonds to the central bank.²⁸ This policy, i.e. printing more money to satisfy the government's demands, seriously harms the functioning of the market economy.

Case Studies in Connection with the 2008 Constitution

Burma's macroeconomic policy-making has been called capricious, arbitrary, selective and sometimes illogical. For instance, in October 2005, the SPDC suddenly announced an eight-fold increase in the retail price of gasoline.²⁹ In 2004, to slow the rise of domestic prices, the SPDC announced a ban on rice exports, when just a year earlier the SPDC had tried to implement measure to increase rice exports.³⁰ The SPDC made several announcements in 2005 that exporters and importers in Burma had to use the Euro rather than the US dollar in their transactions.³¹ The SPDC is known for other erratic and unexplainable decisions, including the moving of the capital in 2005 from Rangoon to Naypyidaw, a town approximately 200 miles north of the former capital.³²

The SPDC had a virtually unlimited military budget for the establishment of the new capital, which now includes luxury buildings for the government.³³ While the regime is pouring significant funds into the new capital, the rest of the country remains in severe poverty. Decisions on spending such as these are made



solely by the SPDC. The junta has significant power in controlling the nation's economy through its monopoly over spending decisions and institutions of its own creation. The Myanmar Economic Holdings Limited (MEHL), for example, is run by the Defense Ministry and is involved in almost all deals with foreign businesses.³⁴ The MEHL ensures that the military controls foreign enterprises in Burma to the exclusion of independent parties.

Analysis from the Aspect of the 2008 Constitution

The Constitution ensures that the military will continue to exert control over economic decision making after the elections. Article 229 of the Constitution, for example, describes the formation of the Financial Commission, and notes that the Commission will be promulgated by the President. Because the President will be an individual with a military background,³⁵ the Commission will likely mirror the military's current economic policies. Additionally, article 230 indicates that the Commission will submit budget proposals to the Hluttaw which will make decisions based on the Commission's information. Because one quarter of the individuals in both chambers of the Hluttaw must be from the military,³⁶ the Hluttaw will be able to continue the military budgetary practices of the past.

The National Defense and Security Council, described in article 201 of the Constitution, is made up of individuals at the highest level of government including the President, Vice-President, parliamentary speakers, and commanders and ministers of defense services – individuals with a military background. The Council will support the executive in the discharging of the Constitution and other laws, thereby ensuring the military has control over how laws are executed. Any laws relating to economic development will be made and executed by the military, which likely will continue to dedicate significant funds to its own endeavors.

The Commission for Economic Observation

To ensure the stability and development of the country's economy, a Commission for Economic Observation should be formed comprising legal academics, government representatives, and economists. The commission should be represented by members from different economic interest groups as well as neutral members. This body will advise the government on economic policy based on their observations of growth, obstacles, opportunities and remedies.

G. PRIVATE OWNERSHIP RIGHTS

Private ownership rights must be protected by law. Citizens and foreigners must be assured that their legally obtained possessions will not be arbitrarily seized, and that they can obtain a legal remedy before a neutral, independent

judiciary if the government disregards this law. The government cannot nationalize businesses or seize private property except in rare circumstances where the public good is at risk and where adequate compensation is paid. The Burmese Foreign Investment Law (FIL) guarantees that no foreign company shall be nationalized during the permitted period of investment. However, the Burma government has forced a number of foreign companies in various sectors to leave the country after it refused to honor the terms of investment agreements.³⁷ In the late 1990's, two large Japanese firms left Burma after the government kept them from operating according to earlier investment agreements.³⁸ The government also has seized the assets of foreign and local investors without compensation when the investment turned out to be profitable.³⁹

Analysis from the Aspect of the 2008 Constitution

Article 356 of the Constitution purports to protect property rights, stating that "[t]he Union shall protect according to law movable and immovable properties of every citizen that are lawfully acquired." Note, however, that this article coexists with article 37, which states that "[t]he Union...is the ultimate owner of all lands and all natural resources above and below the ground, above and beneath the water and in the atmosphere in the Union." Because the state will ultimately own all land and resources, the Constitution serves as a pretext for the future violation of property rights in Burma.

H. INFRASTRUCTURE DEVELOPMENT

The government must promote the basic infrastructure of the country. The infrastructural industries, such as electricity, water supply, communication, and transportation, must be used primarily for the development of the people. Infrastructure is vital to a successful market economy. For instance, many goods are transported on highways, transactions are made over the phone and cable lines, companies depend on reliable energy sources, and everyone needs clean water to live. The government must use its resources to improve the country's infrastructure with the aim of helping the people's living conditions and economic prosperity.

Case Studies in Connection with the 2008 Constitution

Burma's infrastructure is currently underdeveloped. Electricity is used mainly for government administration and not for public use.⁴⁰ Communication is difficult for ordinary Burmese. Cell phones are rendered inaccessible by their exorbitantly high cost: approximately 1,500,000 kyat or \$1500 US dollars. The regime has gone to great lengths to prevent Burmese people from taking advantage of communication tools. After Cyclone Nargis devastated the country in



2008, for example, the Chinese government donated supplies to survivors, including 2000 radios.⁴¹ The SPDC was worried that people would use the radios to access non-state-run radio stations such as Voice of America, the BBC, Radio Free Asia, and the Democratic Voice of Burma. The regime hired engineers to adapt all 2000 radios so that they could only broadcast state-run radio programs, restricting communication and access to information in the country.

The government remains in exclusive control of many sectors related to the nation's infrastructure, including energy, electricity, mining, transport, communication, and construction.⁴² After the election, these sectors will likely remain in the hands of the military.

Analysis from the Aspect of the 2008 Constitution

The Constitution also allows the Hluttaw, similar to Parliament, of which at least one quarter will be nominated from the military, to make laws relating to items listed on Schedule One of the Union Legislative List. This list includes the economic sector, energy and electricity, communication, finance and planning, the judiciary, and other aspects of the nation that directly concern infrastructure development. The Constitution indicates that these fundamental aspects of economic development will be used for the exclusive benefit of the military to the detriment of the public.

I. PROTECTING LABOR RIGHTS AND MINIMUM WAGES

Citizens' labor rights must be protected by law, and all people must have the freedom to work and choose an occupation. First, everyone must have the right to work. Article 23(1) of the Universal Declaration of Human Rights



provides that "everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment." The laws must facilitate, rather than hinder, the opportunities of citizens to establish businesses, carry out their economic activities and invest their income in worthwhile endeavors.

A minimum wage that allows workers to cover their basic necessities in accordance with the present cost of living must be protected by law. Other labor laws must be enacted relating to worker rights such as same wages for the same work, proper work hours, leisure, job security, wages based on skill level, and allowance of the formation of labor unions. The U.S. Department of State reported in 2007 that the minimum wage in Burma is the minuscule amount of 500 kyat (roughly \$0.40) per day and that an average worker in Burma earns about 500-1000 kyat (roughly \$0.40 to \$0.80) per day.

The fair and proper treatment of workers is a fundamental component of a successful market economy. Business rights must be balanced with workers' rights so that both groups can flourish and collaborate in a mutually beneficial relationship. The Universal Declaration of Human Rights provides clear standards for the protection of people's economic security:

- a. Everyone, without any discrimination, has the right to equal pay for equal work. (Article 23(2))
- b. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. (Article 23(3))
- c. Everyone has the right to form and to join trade unions for the protection of his interests. (Article 23(4))
- d. Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay. (Article 24)

The government must ensure that labor laws make these rights a reality and that offending employers are adequately punished for violations. In Burma, independent labor unions are illegal. Workers are not allowed to organize, negotiate, or otherwise exercise control over their working conditions. Although government regulations set a minimum employment age, wage rate, and maximum work hours, many managers do not follow these regulations. The government uses forced labor in many areas of its work.

Case Studies

The current state of labor protections in Burma is dismal. The SPDC forcibly extracts labor from its citizens, which is illegal under international law. The International Labour Organization has concluded that there is a peremptory norm prohibiting forced labor.⁴³ This means that forced labor is outlawed everywhere in the world, and that any country that conducts or supports forced labor in its territory has committed a breach of an international obligation and possibly an international crime.⁴⁴ In clear disregard for well-settled international



law, the SPDC has used forced labor to a shocking degree. The Democratic Voice of Burma recently reported that cases of forced labor in Burma have increased by fifty percent.⁴⁵ The SPDC has harassed those who confront the regime's trend of using forced labor, and the regime even jailed a lawyer, U Po Phyu, who was representing a client in a forced labor case.⁴⁶

Analysis from the Aspect of the 2008 Constitution

Article 359 of the Constitution purports to ban forced labor, except for "...duties assigned by the Union in accord with the law in the interest of the public." This article mirrors other domestic laws that support the use of forced labor. Burma's domestic law demonstrates a departure from international norms and authorized forced labor in a surprising number of situations. Contrary to international law, Burma's Village Act and Town Act include provisions that allow for forced labor and are so vaguely worded that many acts of forced labor are rendered "legal."⁴⁷ There is a domestic law that provides significant punishment for "illegal" forced labor, or that done outside the bounds of the Village Act and Town Act.⁴⁸ Because the Acts are written so broadly, many acts of forced labor would not be considered illegal and under domestic law perpetrators would not be subject to a penalty. The Constitution will perpetuate the illegal use of forced labor.

While organized labor could lessen the use of forced labor in the country, Article 354 of the 2008 Constitution effectively denies the emergence of independent labor unions. The article includes an exception clause that allows the formation of organizations or associations only if it is "not contrary to the laws, enacted for Union security, prevalence of law and order, community peace and tranquility or public order and morality." This exception clause indicates the supremacy of pre-existing national laws and policies regarding the formation of independent organizations, therefore inhibiting the future emergence of labor unions and other independent organizations.



Forced labour in fencing of Kanbauk-Myaingkalay gas pipeline.



J. FREEDOM TO TRAVEL ABROAD

The law must protect the right of every citizen to legally travel and live abroad. Countries that not only allow, but also encourage, their citizens to gain international experience reap the benefit in increased cultural understanding and networking opportunities which inevitably lead to economic advantages. In Burma, passports are difficult and expensive to obtain without government connections. Passports generally must be obtained through an agent and, since 1996, women under 30 have not been able to apply for work passports.⁴⁹ Passports allowing overseas study are only issued if the applicant is officially sponsored by the government.⁵⁰ The time that it takes to receive the passport can take between a few days and many months, depending on the applicant's age and the amount of bribes paid.⁵¹

K. HUMAN RESOURCE DEVELOPMENT AND THE ROLE OF TECHNOLOGY

Every citizen must enjoy the opportunity to receive human resource development provided by the government. Safeguards must be in place to make certain that these services are accessible without discrimination. A strong market economy depends on the adequate development of a skilled workforce. The government must use sufficient resources to enhance the population's ability to contribute to the economy.

Every citizen must also have the right to study modern communication methods, such as internet and e-mail, and explore, collect and distribute information using these methods. Restrictions on technology inhibit market economies. Today's international markets depend heavily on modern communication methods for their efficiency, accuracy and reliability. Business opportunities on the internet are unparalleled in history. A society needs to know how to find these opportunities, take advantage of them and create the opportunities of tomorrow. The markets economies that do not keep up with the quickly changing technology in the business world remain narrow and experience slower growth.

L. ECONOMIC DEVELOPMENT WITHIN THE CONSTITUENT UNITS OF THE UNION

The government must take steps to balance economic development between rural and urban states and divisions. Urban areas naturally develop more quickly than rural ones as a result of population imbalances. While the government must not unnecessarily meddle in a market to force rural development when there is little demand, it must also formulate policies to ensure that all of its citizens are able to enjoy a reasonable standard of living. For instance, essentials such as electricity, water and transportation routes must be accessible by



rural inhabitants even though a private company may not find it economically feasible to extend services to the area. In such a case, the government may need to intervene to make sure its rural citizens are able to participate in the country's development. Similarly, development must be fairly spread throughout the states and divisions without favoritism. Currently the ethnic minority areas in Burma suffer from economic neglect. Furthermore, agriculture, which provides the livelihood for the majority of the Burmese people, is chronically (and, often deliberately) under supported.

Case Studies in Connection with the 2008 Constitution

Economic development in ethnic areas is often thwarted by the regime's rampant forced relocation of minority groups in rural areas.⁵² International law prohibits the forced displacement of civilians unless it is strictly for civilians' security or for an imperative military objective.⁵³ The SPDC is currently violating international law by its continued acts of forced relocation. The regime jailed U Aye Myint, a human rights defender, for helping farmers resolve land disputes.⁵⁴ In that particular case, the SPDC confiscated agricultural land and then accused the farmers of destroying public property when they encroached on their former land. This case is one example of how the regime is forcibly relocating its population and not providing any legal recourse to victims. The Constitution lays the foundation for continued abuses. The Article 37 of the Constitution states that the Union is the ultimate owner of all land and resources in the nation, indicating government's absolute control over all land following the elections in 2010 and the following period.

M. OPENING THE DOMESTIC MARKET TO THE INTERNATIONAL ECONOMY

A country's laws must ensure participation in the international economy through trade, foreign direct investment (FDI) and Overseas Development Assistance (ODA). Nowadays, no country can develop without opening up to the international economy. Economic mismanagement by the SPDC means that Burma attracts little foreign investment. The little money that does arrive is strongly concentrated in the gas and oil sectors, and other extractive industries. Little employment results from these investments, and there is negligible technology and skill acquisition. To make matters worse, all of the revenues from Burma's exports of gas and oil are collected by the regime. Very little FDI makes its way to industry, and even less to agriculture.

Burma is regarded by the international business community as a high risk destination for foreign investment, and a difficult place to do business. In a recent report on economic freedom, the Washington-based Heritage Foundation ranked Burma third from the bottom (above only Iran and North Korea) with regard to



restrictions on business activity. According to the Foundation, "pervasive corruption, non-existent rule of law, arbitrary policy-making, and tight restrictions on imports and exports all make Burma an unattractive investment destination and have severely restrained economic growth."⁵⁵ Some investors report that their Burmese military partners make unreasonable demands, provide no cost-sharing, and sometimes force out the foreign investor after an investment becomes profitable.⁵⁶

To illustrate the importance in good policy-making, the Asian Newly Industrialized Countries (NICs) share an important common feature of having an open and outward-looking economic strategy. Evidence of this policy is demonstrated by their high export to gross domestic product ratios. A focus on exports has enabled them to raise their total productivity factor. In contrast, Burma has not exploited the advantage of international trade due to its closed door policy.

Moreover, the Asian NICs have depended on various forms of foreign capital flow to supplement their domestic capital formation. With a very low level of saving, Burma needs foreign investment and foreign aid to fill both its savings-investment gap and foreign exchange gap. The actual FDI into Burma has been slow compared with China and Vietnam as a result of frequent changes in rules, import restrictions, and other restrictions on the movement of goods and services or trade practices. Dealing with the different ministers causes further delays and operational costs.⁵⁷





The Minimum Elements Necessary to be Enshrined in the Future Constitution of Burma for the Development of Country's Economy Based on a Market Economy System

- (1) For a market economy system to succeed, it must be based on the rule of law and protected by an impartial judiciary.
- (3) Private ownership rights must be protected by law. Moreover, an antitrust law must be enacted to prevent companies or organizations from monopolizing the entire economy.
- (4) The government must not favor one company over another. The government must establish a conflict resolution office or other judicial mechanism related to the economy to resolve disputes fairly between companies and employees, governments or local authorities.
- (5) The free formation of financial and monitoring institutions, including a central bank, must be protected by law. The amount of money used in the country and the printing and production of the money must be operated by a central bank.
- (6) The parliament must independently manage the country's budget, deciding how much income is obtained from taxes and other methods and how much money is spent, and release this budgetary information to the public.
- (7) The government must not confiscate the legally owned property of citizens, whether moveable or immovable, or land leased and property owned by foreigners, without paying fair market value.
- (8) In order to develop a country's economy, the law must protect the citizens' ability to freely produce goods and trade domestically and internationally from interference by other businesses and organizations.
- (9) The law must protect the right of every citizen to make a living and choose an occupation, as well as to legally travel and live abroad for work and study purposes.
- (10) Every citizen must have the right to study modern communication methods, such as internet and e-mail, and explore, collect and distribute information using these methods.



- (11) No one shall prohibit the lawful transfer of money and properties that are legally owned, whether the transfer originates from inside or outside the country.
- (12) Every citizen and foreigner living legally in a country must have the right under law to hold and exchange domestic and foreign currency.
- (13) The government must promote the basic infrastructure of the country. The infrastructural industries, such as electricity, water supply, communication, and transportation must be used primarily for the development of the people. Every citizen must enjoy the same opportunity to receive human resource development promoted by the government, including an education and health care services, regardless of their race, class, nationality, or social background.
- (14) A properly operating market economy system requires good governance, including transparency, accountability, and restraint from corruption.
- (15) To keep the people informed, the government should annually publish and distribute the financial budget of the country, the decision record of the parliament and the decisions made at different levels of the federal government relating to the development of the country. The people must have the right to access information related to the government's performance and activities and provide comments and questions.
- (16) Everyone shall have the same job opportunities based on their level of education and skill. Free education must be guaranteed by law in order to produce the skilled workers necessary for a market economy system.
- (17) A minimum wage that allows workers to cover their basic necessities in accordance with the present cost of living must be protected by law. Labor laws must be enacted relating to worker rights such as same wages for the same work, proper work hours, leisure, job security, wages based on skill level, and allowance of the formation of labor unions.
- (18) To ensure the stability and development of the country's economy, an agency such as a Commission for Economic Observation should

be formed by law comprising legal academicians, government representatives, and economists.

- (19) The government must facilitate domestic and foreign competition, inventors, skilled workers, and research relating to economic development.
- (20) To operate a market economy system properly, the government must restrain itself from interfering in and prohibiting economic activity. The government must try to balance the economic development between rural and urban states and divisions.

N. CONCLUSION

When analyzing Burma's economy, one must not forget that economic development is linked with the status of human rights. Any improvements in a highly militarized state will only strengthen the junta's grip on the nation and will not translate into meaningful development for the people of Burma. The population can only take advantage of increased economic opportunity when the SPDC ends its trend of committing international crimes and oppressing political opponents and ethnic groups. Significant advances in economic development will only occur when the current climate of criminality and oppression ends and perpetrators are brought to justice. Because the Constitution and the elections will continue the abuses of the SPDC and enshrine impunity for criminals, they will destroy Burma's capability to effectively develop its economy.

(Endnotes)

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