



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.*

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