



# LawKa PaLa

Legal Journal on Burma

ISSN 1513-9174

No. 28 [ December, 2007 ]



Burma Lawyers' Council



# **LawKa PaLa**

## **Legal Journal on Burma**

**BURMA LAWYERS' COUNCIL**

Published by the *Burma Lawyers' Council*

Copyright 2007

Cover and inside design & layout: *Saw Ta Kit*

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

Redistribution for educational purposes is encouraged. For other purposes, prior permission from the BLC is required.

**WISDOM IS POWER TO TRANSFORM A SOCIETY INTO  
A JUST, FREE, PEACEFUL AND DEVELOPED ONE**

## **Legal Journal on Burma**



Legal Journal on Burma is published three times a year by Burma Lawyers' Council. The journal contains academic articles relevant to legal and political issues in Burma including: constitutional reform, rule of law, federalism, refugees, judicial independence, martial law, and religious freedom. Articles are written by practising lawyers, academics, and experienced Burmese opposition activists. The views expressed in the articles are those of each author and not of Burma Lawyers' Council. The journal also, where relevant, reproduces copies of important documents relating to Burma, such as statements on behalf of the Burmese parliament. The journal's production is funded by the Friedrich Naumann Stiftung from Germany.

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

Reproduction of all or part of any article in this journal is welcome, provided acknowledgement of the source is made. Notification of such use would be appreciated.

The BLC Publication Team



# Legal Journal on Burma

No. 28 – DECEMBER 2007

ISSN 1513-9174

SECTION	<b>Contents</b>	PAGE
<b>Part A: On Constitutional Issue of Burma</b>		
(A.1)	"The Minimum Elements Necessary in Burma's Constitution for Economic Development"	1
(A.2)	IBA's Letter to the military regime in Burma on Constitutional Drafting Process"	13
<b>Part B: On Foreign Investment Issue and Relevant Economic Laws in Burma</b>		
	"An Analysis of the Application of Burma's Economic Laws in Myanmar Foodstuff Industry Vs. Yang Chi Oo Co., Ltd"	15
<b>Part C: On Criminal Accountability Issue in Bruma and Possible Referral of the UN Security Council to the International Criminal Court</b>		
(C.1)	Extracts from MOU of BLC and GJC for Joint Efforts of Criminal Accountability	32
(C.2)	International Lawyers Call for Criminal Accountability for Myanmar Regime	35
(C.3)	"BLC's Position on Mr. Ibrahim Gambari's October 5, 2007 Briefing to UNSC"	36
(C.4)	BLC's Participation in ICC meeting for criminal accountability issue	42
(C.5)	BLC's Efforts for the attention of the UNSC and the ICC on Criminal Accountability Issue of Burma	43
<b>Part (D): On the Rule of Law and Justice</b>		
(D.1)	Shooting Peacefully Demonstrating Monks	46
(D.2)	The BLC's call for Justice for the Burmese Military Junta's Violent Crackdown	48
(D.3)	Request for ILO's Intervention in Burma for Violations	53
(D.4)	Burma Justice Committee presents petitions to the UN	56





## Part A: On Constitutional Issue of Burma

### (A.1) "The Minimum Elements Necessary in Burma's Constitution for Economic Development"

#### THE ELEMENTS NECESSARY FOR THE DEVELOPMENT OF A FREE MARKET ECONOMIC SYSTEM IN BURMA

##### 1. The Rule of Law and an Impartial Judiciary

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. 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. A free market economy cannot succeed in such an environment. The almost complete lack of a judicial system means that domestic and foreign companies must negotiate directly with the government to resolve disputes.

##### 2. 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. In Burma, there is no accountability, transparency, or independent judicial system. Corruption is widespread. Economists and businesspeople consider corruption the most serious barrier to investment and commerce in Burma. Very little 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. 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. Most citizens view corruption as a normal practice and requirement for survival.

### **(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. 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.

### **(3) 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.

#### **(4) A legal framework for development**

A legal framework for development means a structure of rules and laws that are clear, predictable and stable. The laws must be applied impartially and fairly to all and provide a conflict resolution mechanism through an independent judicial system. This concept is explained more fully in Element 1 above.

### **3. Economic Freedom**

#### **(1) Minimizing government interference**

The government must guarantee economic freedom that is protected by laws. A free market is based on minimal government interference. The government must reduce its role in a market system and should facilitate, rather than participate, in the system. Market participants must provide the direction and fuel for the market, reacting to the supply and demand of goods and services. While the government must at times step in to ensure that the market treats everyone fairly and the public good is not jeopardized, the times it chooses to interfere must be kept to a minimum. Under no circumstances should the government seek to dominate the market or unnecessarily participate in the free flow of products.

In Burma, under the State-Owned Economic Enterprises Law, state-owned enterprises have the sole right to carry out some of the country's major economic activities. The Myanmar Investment Commission (MIC) can make exceptions to this law "in the interest of the State". The MIC has granted some exceptions in the areas of banking (for domestic investors only), mining, petroleum and natural gas extraction, and air services, but as with all major political and economic decisions, this discretion lies solely with the Cabinet and senior generals of the ruling junta.

In its 2007 Index of Economic Freedom, the Heritage Foundation ranked Burma as the fifth most repressed economy in the world. Burma's economy is 40.1% free, which makes it the world's 153<sup>rd</sup> freest economy out of 157. Burma is ranked 29<sup>th</sup> out of 30 countries in the Asia-Pacific region.



## **(2) 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.

## **(3) 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.

## **(4) 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.

## **(5) 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 for the following two reasons. First, as of 2006 Burma had in place interest rate controls that cap lending rates at 15 per cent per annum and do not allow deposit rates to fall below 9.5 per cent per annum. Given that Burma's inflation rate was estimated at a little over 20 per cent in 2005 (and in 2002, in excess of 55 per cent per annum), putting money in the bank results in an automatic loss. The regime has set these rates to minimize the interest rates paid on government debt. Furthermore, 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. 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.

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 K6.1:\$US1. The only relevant exchange rate to the people on the streets in Burma, however, is the black market rate, which stands at around K1,280:\$US1, 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.

#### **4. 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 Burmese macro-economic policy-making 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 SPDC'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. This policy, i.e. printing more money to satisfy the government's demands, seriously harms the functioning of the market economy.

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. 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. 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.

To ensure the stability and development of the country's economy, a Commission for Economic Observation should be formed comprising legal academicians, 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.

## **5. 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 because it has not honored the terms and conditions of investment agreements. In the late 1990's, two large Japanese firms voluntarily left Burma after they found they were not able to operate according to earlier investment agreements. Additionally, there have been several cases where the government seized the assets of foreign and local investors without compensation when the investment turned out to be very profitable.

## **6. 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. Pet infrastructure projects that are aimed to appease political favorites or business contracts that merely help friends must be avoided.

In Burma, the ruling regime has conducted a large program to improve infrastructure in the form of roads, dams, bridges, railroads, port facilities and buildings.



Many have questioned, however, the choice of some of the construction, the priorities attached to the projects, the financial costs, the use of forced labor, and the neglect of other potential uses, such as increasing social services. Furthermore, the construction of infrastructure also allows the military more access to the outer areas of the country where they are seeking military control over ethnic minorities and where they intend to exploit natural resources. Thus, the increase in infrastructure appears to have a self-serving purpose.

## 7. 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 favourable 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 miniscule 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:

- Everyone, without any discrimination, has the right to equal pay for equal work. (Article 23(2))
- 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))
- Everyone has the right to form and to join trade unions for the protection of his interests. (Article 23(4))
- 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.

### **8. 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. Passports allowing overseas study are only issued if the applicant is officially sponsored by the government. 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.

### **9. Human Resources 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.

### **10. Social Development, including Education, Health and other Social Services**

The government must provide adequate education and health care services, regardless of race, class, nationality, or social background. Free education must be guaranteed by law in order to produce the skilled workers necessary for a market economy system. The government must also identify social goals such as poverty reduction, gender equality, reduction of infant mortality rates, improvement in reproductive health services and environmental preservation.

The long military rule and mismanagement in Burma have resulted in widespread poverty, poor health care and low educational standards. Extremely low spending on education and health have undermined the formation of a skilled workforce and reduced economic opportunities. Today the education system at all levels is crumbling because the regime has allocated minimal resource to public education. Of the national budget, over 40 percent is used for military forces while less than 1 percent is used for all civil education. Article 26(1) of the Universal Declaration of Human Rights provides: "Education shall be free, at least in the elementary and fundamental stages. Elementary



education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.” The standard of these opportunities must be high enough to produce qualified employees who are able to contribute to their employers immediately and make a positive impact on the economy. Business leaders and government officials need to understand that a market economy depends on even the youngest and most vulnerable of society being well-educated. Future leaders come from the next generation.

Similarly, Burma’s health care system is a disaster due to inadequate budget allocations. International reports rate Burma’s health services the second worst in the world. There is inadequate medicine supply and medical equipment in public hospitals and patients must pay high costs under the cost sharing health system. Furthermore, Burma is close to an HIV epidemic. A high number of young girls at high risk of contracting HIV are being trafficked to Thailand and China to work in the sex industry. According to the UN and other sources, only about 40% of Burmese households consumed calories at or above the recommended daily allowance, and only 55% consumed enough protein.

## **11. Regional Economic Development**

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.

## **12. 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.” 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.

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.<sup>1</sup>

### **The Minimum Elements Necessary in a Constitution for the Development of Burma’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. The government must reduce its role in a market system and should facilitate rather than participate in the system.
- (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.

\* \* \* \* \*

---

**(Endnotes)**

<sup>1</sup>Some of the economic data and other information for this article have come from the following sources: Burma/Myanmar: The Role of The Military in the Economy, by David I. Steinberg, Burma Economic Watch, Issue 1, 2005; Profile of Burma's Banks, by Sean Turnell, Burma Economic Watch, Issue 1, 2006; U.S. Department of State, 2007 Investment Climate Statement – Burma, <http://www.state.gov/e/eeb/ifd/2007/80685.htm>; Burma's Economic Prospects, Testimony before the Senate Foreign Relations Subcommittee on East Asian and Pacific Affairs, 29 March 2006, by Dr Sean Turnell, <http://www.uscampaignforburma.org/contact-resources/TurnellCongressTestimony.pdf>; Gathering Strength: Women from Burma on their Rights, by Brenda Belak (2002).

---



(A.2) "IBA's Letter to the military regima in Burma on Constitutional Drafting Process"



Foreign Minister Nyan Win  
Ministry of Foreign Affairs,  
Naypyitaw,  
Union of Myanmar

17 September 2007

Dear Minister,

Re: The Constitutional drafting process and the 'basic detailed principles' recently outlined by the National Convention

We are writing on behalf of the International Bar Association's Human Rights Institute (IBAHRI) in connection with the Constitutional drafting process and the 'basic detailed principles' recently outlined by the National Convention.

In its role as a dual membership organisation, comprising 30,000 individual lawyers and over 195 Bar Associations and Law Societies, the International Bar Association (IBA) influences the development of international law reform and shapes the future of the legal profession. Its Member Organisations cover all continents. The IBA's Human Rights Institute works across the association, helping to promote, protect and enforce human rights under a just rule of law, and to preserve the independence of the judiciary and legal profession world wide.

The IBAHRI has recently received a number of reports indicating that the drafting process of the basic detailed principles recently adopted by Myanmar's National Convention do not respect the fundamental principles of the rule of law. The 'basic detailed principles' are intended to serve as a basis for Myanmar's new Constitution. Reports indicate that the drafting process and the 'basic detailed principles' affect the independence of a number of Myanmar's key institutions, including the judiciary.

Specifically, it is alleged that the drafting process for the 'basic detailed principles' was conducted in a manner that excluded the majority of the population, as well as political parties. It is also reported that those who were permitted to attend and comment on the drafting sessions were not able to freely express their concerns or to contribute democratically to the process. Furthermore, many of the suggestions that were received from members of civil society were seemingly ignored. Ultimately, reports indicate that the 'basic detailed principles' reinforce military rule, reserving 25 per cent of seats in parliament for military appointees, thus ensuring the continued primacy of the military



in Myanmar's government. If the above allegations are correct, it appears that the fundamental principles of the rule of law have been seriously compromised.

The IBAHRI joins Ibrahim Gambari, United Nations envoy to Myanmar, in calling on Myanmar's authorities to reopen the discussions around the drafting of the new constitution and to 'improve the outcome of the convention in ways that are more inclusive, participatory and transparent'. In this regard, we would like to remind you of the importance of respect for the rule of law and the fundamental freedoms guaranteed to all by the Universal Declaration of Human Rights.

While commending Myanmar's ratification of the United Nations' Convention of the Elimination of all Forms of Discrimination against Women and the Convention on the Rights of the Child, the IBAHRI further calls on Myanmar to ratify all international human rights instruments, in particular the International Covenant on Civil and Political Rights, the International Covenant on Economic Social and Cultural Rights, the Convention on the Elimination of Racial Discrimination and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Finally, the IBHARI urges the government of Myanmar to take the necessary steps to ensure that that the drafting process of a new Constitution for Myanmar respects the principles of the Rule of Law and provides for the protection of fundamental human rights of Myanmar citizens, in accordance with international standards.

We look forward to your urgent response.

Yours sincerely,

Ambassador Emilio Cardenas

Human Rights Institute Council Chair

Justice Richard J. Goldstone

Human Rights Institute Council Chair

CC : General Than Shwe, State Peace and Development Council;  
U Aye Maung, Attorney General;  
Brig-General Khin Yi, Director General of Police;  
Burma Lawyers Council

\* \* \* \* \*



## Part B: On Foreign Investment Issue and Relevant Economic Laws in Burma

### "An Analysis of the Application of Burma's Economic Laws in Myanmar Foodstuff Industry vs. Yaung Chi Oo Co., Ltd."

July 18, 2007

By September Paw, Lway Poo Jaing, Eh Doh Doh and Kaung Seth<sup>1</sup>

*"Judicial Courts have to abide by the current existing laws. Not to substitute or amend the existing laws."*

— Sd. Aung Ngwe, Divisional Judge, Yangon Divisional Court, *Myanmar Foodstuff Industry of Ministry of Industry No. (1) vs. Myanmar Yaung Chi Oo Co., Ltd.* (Court Order dated 2 February 2000)

#### I Introduction

On 11 November 1998, the Burmese military forcefully occupied the Mandalay Beer factory and froze all the company's bank accounts. The case, an important dispute between the Burmese government and a foreign investor, was brought before Judge Sd. Aung Ngwe, Yangon Divisional Court, to apply the law and adjudicate the dispute fairly. This paper will examine whether Judge Aung Ngwe stood by his own words quoted above and objectively "abided by the current existing laws," or whether his biases and the influence of the military regime resulted in favorable treatment for the government.

Section II of this paper provides a brief background of the case to help the reader understand the facts, the arguments of the parties and the court decision. Section III provides analysis of the case by examining how relevant economic laws were applied by the judge, focusing on whether the Burmese government, judiciary and laws support foreign investment and an open market economy. Section IV provides recommendations for foreign investors who want to do business in Burma and proposed changes in the current laws.

#### II. Facts, Arguments and Court Decision

Mandalay Brewery was established in Burma in 1886.<sup>2</sup> The Brewery was transferred to the government-controlled Ministry of Industry No. (1) in 1988-89.<sup>3</sup>

Since 1988, with the enactment of the Foreign Investment Law by the State Law and Order Restoration Council (SLORC),<sup>4</sup> efforts to attract foreign investors have increased.<sup>5</sup> Yaung Chi Oo Trading Pte. Ltd., a company from Singapore ("Singapore Company"), entered into a joint venture with government-controlled Myanmar Foodstuff Industry of Ministry of Industry No. (1) ("Government Company") to form the Myanmar Yaung Chi Oo Co. Ltd. ("Joint Venture Company"). The two companies would work together to operate the Mandalay Brewery.<sup>6</sup> The joint venture was approved by the



Myanmar Investment Commission on 26 October 1993.<sup>7</sup> On 29 November 1993, the Singapore Company and Government Company signed a Joint Venture Agreement, which provided the terms under which company would operate.<sup>8</sup> The Joint Venture Company commenced operations on 1 October 1994.<sup>9</sup>

Under the terms of the Joint Venture Agreement, the Singapore Company invested Myanmar Kyat 39,820,000 (US \$6,320,000) and the Government Company invested Myanmar Kyat 58,400,000 (US \$9,268,910).<sup>10</sup> Accordingly, the Government Company owned 55% of the joint venture and the Singapore Company owned 45%.<sup>11</sup> Over the first four-year period of operations, the Joint Venture Company earned US \$3.2 million in profits and, at the end of the 1997-98 term, it paid US \$0.58 million in taxes to the State.<sup>12</sup> The Joint Venture Agreement would last for five years with an option to renew for additional 5-year periods.<sup>13</sup>

On 15 November 1997, an important change occurred when U Aung Thuang became the new Minister of the Ministry of Industry No. (1).<sup>14</sup> Shortly after the change, on 17 December 1997, the Joint Venture Company was taken over by the government for the first time.<sup>15</sup> The factory was reopened on 12 January 1998.<sup>16</sup> On 5 August 1998, Daw Win Win Nu, the Managing Director of the Singapore Company, sent an application to the Myanmar Investment Commission to renew the registration of the Joint Venture Company for another 5-year period.<sup>17</sup> However, on 10 November 1998, the Government Company requested that the Myanmar Investment Commission liquidate the Joint Venture Company.<sup>18</sup> The next day, on 11 November 1998, the military took over the Joint Venture Company for the second time.<sup>19</sup> After this takeover, Daw Win Win Nu could not withdraw or transfer money in accounts under her name.<sup>20</sup>

On 22 February 1999, the Myanmar Investment Commission appointed an independent inspector, U Hla Tun, to investigate the dispute.<sup>21</sup> U Hla Tun concluded, among other things, that the government takeover violated the Joint Venture Agreement and that the Joint Venture Company could not be terminated without the consent of the Singapore Company.<sup>22</sup>

On 29 September 1999, U Kyaw Myint, Managing Director of the Government Company, submitted an application to the Yangon Divisional Court to liquidate the Joint Venture Company.<sup>23</sup> In its application, the Government Company argued that the 5-year period had finished and the application for another 5-year period had not been approved by the Myanmar Investment Commission.<sup>24</sup> Moreover, there were “no circumstances favoring to jointly carry out the business continuously.”<sup>25</sup>

In its response, the Singapore Company made five counterarguments. First, the military did not obtain permission from the court to take over the factory, and thus this action was unlawful.<sup>26</sup> Second, the parties had agreed by contract to an option to extend the 5-year term for 24 months due to the delay of construction of the factory for 18 months and 6 months for testing operations, and thus the Joint Venture Agreement would end on 30 September 2001.<sup>27</sup> Third, the Joint Venture Agreement allows the Company to extend the 5-year term and the Singapore Company had requested the renewal but no response was received yet from the Myanmar Investment Commission.<sup>28</sup> Fourth, the application by the Government Company was invalid because the official who submitted it did not have proper authority.<sup>29</sup> Fifth, the government’s application should be rejected because it was not accompanied by a required affidavit.<sup>30</sup>



On 24 December 1999, the Yangon Divisional Civil Court issued its Judgment in the Myanmar Yang Chi Oo Company case, ruling in favor of the Government Company.<sup>31</sup> The Court based its authority to terminate the Joint Venture Company on Section 162(vi) of the Burma Companies Act, which allows a court to wind up a company if it is of the opinion that it is just and equitable to do so.<sup>32</sup>

In its Judgment, the court addressed six points raised by the parties. First, the court found that the five-year period was complete, starting from the date of commencement of operations, 1 October 1994, and ending on 30 September 1999.<sup>33</sup> Second, the delay for 24 months due to the construction and testing period was merely the desire of the Singapore Company and there was no supporting evidence submitted.<sup>34</sup> Third, a 5-year renewal had been requested but not been granted by the Myanmar Foreign Investment Commission and thus the Joint Venture Company could not legally continue to operate.<sup>35</sup> Fourth, the two parties were in a “state of impossible relations” so the company could not function.<sup>36</sup> Fifth, the application made by U Kyaw Myint was acceptable because authority was given to him to file the application in a letter signed by the Deputy Minister of the Government Company.<sup>37</sup> Sixth, the Government Company’s failure to file an affidavit with its initial application was cured because it was filed later.<sup>38</sup>

### III. Legal Analysis

#### A. Joint Venture Agreement

To document their business relationship, the Singapore Company and the Government Company entered into a Joint Venture Agreement.<sup>39</sup> The Joint Venture Agreement contains the key terms that govern the enterprise, explaining each party’s rights and duties.<sup>40</sup> It includes the amounts of shares owned by each member and provides procedures to resolve disputes, such as arbitration requirements and a process to use in case of a breach.<sup>41</sup> The Joint Venture Agreement is a legally binding contract with which the parties must comply.

Several actions and legal claims of the parties were inconsistent with the Joint Venture Agreement. An analysis of these inconsistencies and how they were evaluated by the court reveals that the judge placed great importance on the Singapore Company’s inconsistencies but failed to consider the Government Company’s.

Firstly, Section 12 of the Joint Venture Agreement provides that the term of the Agreement is five years.<sup>42</sup> If either of the parties wishes to terminate the Agreement before the end of the five-year period, Section 4(c) provides that it can only do so in the case of breach and only after giving at least 90 days written notice.<sup>43</sup> The Government Company ignored these requirements and, accompanied by the military on 11 November 1998, took over the Joint Venture Company without giving any notice or reason at that time.<sup>44</sup> The government then froze Daw Win Win Nu’s bank accounts, later claiming that they thought that she was misusing company money.<sup>45</sup>

The Government Company’s takeover was inconsistent with Section 4(c) of the Joint Venture Agreement for two reasons. First, Section 4(c) only permits early termination of the Joint Venture Agreement in the case of a breach. At the time of the takeover, the Government Company gave no reasons for occupying the factory.



Moreover, the Government Company never provided any concrete evidence of a breach by the Singapore Company. Second, Section 4(c) requires that 90 days written notice be provided before terminating the Joint Venture Agreement in the case of breach. The Government Company never gave any written notice. The Agreement does not give either of the parties the power to forcefully take over the Company without notice, even if it suspects wrongdoing by the other party or if it wants to “safeguard” assets. Therefore, the Government Company clearly violated Section 4(c) of the Joint Venture Agreement. The judge completely ignored the Singapore Company’s argument that the takeover was unlawful. There is no mention of it in the Judgment.

Some claims of the Singapore Company were also inconsistent with the Joint Venture Agreement. The Singapore Company argued to the court that the term of the Joint Venture Agreement should have been extended by 24 months due to a delay for factory construction and testing.<sup>46</sup> The parties allegedly agreed to such an extension in Section 7(e) of a document called “the proposal for factory establishment.”<sup>47</sup> It appears, however, that this document was never provided to the court. The judge concluded that the 24-month postponement was merely a “presumption and desire” of the Singapore Company.<sup>48</sup> The Joint Venture Agreement clearly states that its term is for five years. A delay for 24 months is an important alteration of this provision and either should have been included in the Joint Venture Agreement or, if agreed to after the signing, in an amendment to the Agreement. Without evidence demonstrating that the parties agreed to extend the five-year term, the Singapore’s argument was inconsistent with the unambiguous terms of the Joint Venture Agreement.

The Singapore Company also argued to the court that the Joint Venture Company should not be wound up because it had submitted a five-year renewal application to the Myanmar Investment Commission but no reply had yet been received.<sup>49</sup> This argument was also inconsistent with the Joint Venture Agreement. Section 12 of the Joint Venture Agreement provides: “The term of this agreement, unless otherwise determined, shall be for the period of five (5) years, subject to the option to renew after every five (5) years with the approval of Foreign Investment Commission.”<sup>50</sup> While Section 12 does not explicitly state that both parties must agree to exercise the option to renew, it is clear within the context of the Joint Venture Agreement that one party alone did not have the authority to seek a renewal. For instance, Section 17 (Modification) provides: “This Agreement shall not be annulled, amended or modified in respect except by the mutual consent in writing of the parties.”<sup>51</sup> An extension of the term of the Agreement is the equivalent of a modification or amendment. Thus, if the parties wanted to renew the Joint Venture Agreement, both of them had to agree, not only one side. In this case, only the Singapore Company submitted the application. Moreover, the Singapore Company was a minority member, owning only 45% of the shares. A minority member would not alone have the ability to exercise the renewal option. The judge also concluded: “In such application for renewal of another (5) year term to continue the business, it was applied only by “B” shareholder Yaung Chi Oo Trading Pte., Ltd and “A” shareholder Myanmar Foodstuff Industry was not included was noticed hereat.”<sup>52</sup>

The judge had a duty to equally consider the actions and claims of the two parties that were inconsistent with the Joint Venture Agreement. The judge failed to fulfill his duty in this case by addressing and dismissing the Singapore Company’s



arguments but ignoring the unlawful takeover by the Government Company. In this way, the court's judgment treated the Singapore Company unfairly. Foreign investors should be aware, therefore, that while they may have good arguments that demonstrate clear violations by their government partner, a Burmese court may select the arguments it wishes to consider and ignore those it does not.

### **B. The Foreign Investment Law**

The Government Company's actions similarly violated Burma's Foreign Investment Law. As described above, on 10 November 1998, less than five years after the date of the Joint Venture Agreement and the commencement of operations, the Government Company requested the Myanmar Investment Commission to liquidate the Joint Venture Company.<sup>53</sup> The next day, the Government Company used security personnel to take over of the affairs of the Joint Venture Company, later claiming that they needed to make sure that all the assets of the company were properly safeguarded during the liquidation process.<sup>54</sup> On that same day, all Joint Venture Company bank accounts, both in US dollars and Myanmar Kyat in Yangon and Mandalay, were closed.<sup>55</sup>

The Foreign Investment Law was enacted by the State Law and Order Restoration Council (the predecessor to the State Peace and Development Council (SPDC)) to attract foreign investors to Burma. Section 22 of the Foreign Investment Law guarantees that properly formed companies will not be nationalized during the term of the applicable agreement: "The Government guarantees that an economic enterprise formed under a permit shall not be nationalized during the term of the contract or during and extended term, if so extended." Contrarily, on 10 November 1998, the government attempted to terminate the Joint Venture Company and thus completely exclude the Singapore Company from ownership of the Mandalay Beer enterprise. Then the military seized the factory without any permission from the court and with no consent from its business partner. Together, these two acts were the equivalent of nationalization because if successful they would have resulted in 100% ownership of the enterprise by the Burmese government. Furthermore, the nationalization attempt occurred prior to the termination of the Joint Venture Agreement.<sup>56</sup> According to the court, the five-year term of the Joint Venture Agreement expired on 30 September 1999, almost one year after the takeover.<sup>57</sup> Even counting from the date of the signing of the Joint Venture Agreement, the termination date would have been 28 November 1998, nineteen days after the filing for liquidation and eighteen days after the takeover. Daw Win Win Nu has stated, "At that time, Senior General Than Shwe was in Mandalay. Gradually, I have come to realize that Than Shwe gave the direct order to nationalize the company".<sup>58</sup>

The Burmese government's violation of Section 22 of the Foreign Investment Law is clear. The government's motives for nationalization are also clear: the Joint Venture Company was a great financial success, becoming a high taxpayer in Burma.<sup>59</sup> Mandalay Beer was and still is a very famous beer brand. According to Daw Win Win Nu, she had done all that she could to improve the image of Mandalay Beer and she would hate to throw everything away.<sup>60</sup> The Singapore Company had helped the Joint Venture become a success; now the government wanted to reap the future rewards of a revitalized enterprise. Once it became clear Mandalay Beer had a good reputation and a bright future, the government wanted to own 100% so that it would not have to



share the profits with a foreign company.

In addition to Section 22's prohibition against nationalization, Section 14 of the Procedures Relating to the Union of Myanmar Foreign Investment Law bars early termination of a joint venture without "mutual agreement" and without approval from the Myanmar Investment Commission.<sup>61</sup> Section 14 provides: "On submission of a desire to terminate the business by mutual agreement, before the expiry of the term of the contract, the Commission may, based upon the following particulars, scrutinize as to whether or not it is correct and justified, and allow the termination:-

In his report, U Hla Tun, the inspector appointed by Myanmar Investment Commission, wrote: "The termination of a business before the expiry of its term, require mutual agreement Party A & B and also MIC approval.... Action taken by Party A on 11/11/98 was incorrect in that MIC had not taken any action or approved termination of the Joint Venture Company, a decision to be made in accordance with Union of Myanmar Foreign Investment Law".<sup>62</sup> When it became evident that the government could not terminate the company under Section 14 of the Foreign Investment Law Procedures, it then opted for an alternative route and asked the court for termination under Section 162(vi) of the Burma Companies Act, which gives wide power and discretion to the court to wind up a company if the court is of opinion that it is just and equitable to do so.<sup>63</sup>

Furthermore, the SPDC's actions also violated its own policy of promoting foreign investment. This policy is made clear in Section 16 of the Foreign Investment Law, which provides: "The Commission shall from time to time report its performance to the Government. It shall recommend to the Government measures necessary to facilitate and promote foreign investments". In his report, Inspector U Hla Tun also highlights the importance of foreign investment and an open market economy. He says that the action taken by the Government Company badly damaged the image of the Union of Myanmar in the international commercial community and any action that violated an existing law applicable to the Joint Venture Company would undermine the Open Market Economic Policy of the Myanmar government.<sup>64</sup>

While the government violated the law, the court endorsed the violations by permitting the government to terminate and then nationalize the Joint Venture Company. Foreign investors should be wary about doing business in Burma because the Burmese courts agree to terminate companies in the face of obvious legal violations by the government company seeking the termination. This case demonstrates that the Burmese government violates its own laws and policies by first trying to attract foreign investment and then taking over the company when it is doing well.

### **C. The Burma Companies Act**

In its application to terminate the Joint Venture Company, the Government Company requested the court to exercise its power under Section 162(vi)<sup>65</sup> of the Burma Companies Act. This section gives very broad power to the court by authorizing it to wind up a company when it "is of opinion that it is just and equitable that the company should be wound up."<sup>66</sup> Unlike subsections (i) – (v), subsection (vi) does not require that the court find some objective fact about the company to be true. Rather, the only basis it needs is a belief that the winding up is fair, in the judge's opinion. Notably, all



of the other subsections of Section 162 were inapplicable to the Joint Venture Company's circumstances. For instance, Section 162(v)<sup>67</sup> provides that the court can terminate the company if the company cannot pay its debts. The court in this case therefore could not terminate the Joint Venture Company under this subsection because the Company was able to pay its debts.<sup>68</sup> The other subsections were similarly inapplicable. The government clearly knew that its only option was to rely on the judge's discretion granted under Section 162(vi).

Burmese case law, however, provides limitations on the judge's power to employ Section 162(vi). According to two precedents referenced by the court, there must be "very strong" and "sufficient" grounds for winding up a company under Section 162(vi).<sup>69</sup> A close examination of the court's rationale reveals that, rather than having adequate reasons for winding up the Joint Venture Company, the court may actually have been manipulated by the government when making its ruling.

The first reason given by the court for terminating the Company was that the parties had a bad relationship and could no longer work together.<sup>70</sup> The existence of serious conflicts appears to have been true, but the problems were all initiated by the Government Company.<sup>71</sup> When the Burmese government knows what it can do to facilitate its desires, it will do it without hesitation. A party with strong legal advice would be well aware that courts are more willing to terminate companies when there is evidence that the parties cannot get along. Thus, a party intending to terminate a company but without agreement from the other members may intentionally create conflicts, as it knows that the judge will wind up the company. From the evidence in this case, it is clear that the government wanted to terminate the Joint Venture Company and also was the source of the problems. These two facts, along with law that allows termination if there are member disputes, creates a plain impression that the government manipulated the judge to use Section 162(vi) to liquidate the joint venture. Such a situation is undoubtedly unfair to a party that merely defends itself against the conflicts and does not want to terminate.

The second reason that the court gave for terminating the company was that the Joint Venture Company did not obtain permission from the MIC to extend the business for five more years. It is true that the MIC did not grant permission and it did not because only one party, the Singapore Company, holding only 45% of the shares, applied for the extension.<sup>72</sup> Why did the Government Company refuse to apply for an extension when the company was so successful? There were no valid reasons for termination, such as breach of contract, failure of the joint venture, national disaster, or some other adverse condition. Rather, the government apparently wanted to terminate because it wanted to nationalize the Joint Venture Company. Therefore, the judge in this case did exactly what the government wanted him to do by holding that termination was justified because the MIC did not grant an extension. In other words, the court rewarded the government's unfair intentions.<sup>73</sup>

In addition to lacking strong reasons for winding up the Joint Venture Company, the court's decision was also inconsistent with the legal principle that a very high percentage of members must consent to an important decision such as winding up a company. This legal principle is embodied in Sections 203 and 81 of the Burma Companies Act. Under Section 203, members that voluntarily wish to wind up a company must gather enough support to pass either a special resolution or an extraordinary resolution.<sup>74</sup>



Both types of resolutions require a vote of not less than three-fourths of the members entitled to vote.<sup>75</sup> This section prevents majority members that own less than 75% of the shares from making significant decisions alone. These members must obtain the support of a minority member. Similarly, a minority shareholder would need another member's votes to reach the three-fourths requirement.

In the *Yaung Chi Oo* case, the Government Company owned only 55% of the shares. Therefore, the judge undermined the principle of requiring the consent of a significant majority, 75%, when it decided that a 55% shareholder could alone determine that the company would be terminated.

#### **D. Arbitration**

The Joint Venture Agreement requires that the parties arbitrate any conflict before going to court: "Disputes arising between the contracting parties that cannot be settled amicably as mentioned above shall be settled in the Union of Myanmar by arbitration ... The venue of arbitration shall be Yangon, Myanmar."<sup>76</sup>

Instead of seeking arbitration, however, the Government Company directly filed the case before the court. There appears to have been no opposition from the Singapore Company.<sup>77</sup> Moreover, the judge did not mention the arbitration requirement in the judgment, leaving the impression that it was never raised in court.

Shortly after the court decision, the Singapore Company tried to arbitrate the case before the Association of Southeast Asian Nations (ASEAN), which has a dispute-settlement mechanism for the protection of foreign investments.<sup>78</sup> On 29 June 2000, the Singapore Company sent a Notice of Arbitration to the Managing Director of the Government Company.<sup>79</sup> On 31 August 2000, the Singapore Company sent a second letter to the Government of the Union of Myanmar under the 1987 ASEAN Agreement for the Promotion and Protection of Investments and its 1996 Protocol.<sup>80</sup> On 28 February 2001, the Singapore Company sent a letter to the President of the International Court of Justice (ICJ), requesting that the President appoint an arbitral tribunal.<sup>81</sup> The President of the ICJ appointed a tribunal, which ruled that it did not have jurisdiction over the case because, among other things, the Singapore Company did not receive proper written approval of the investment by the Burmese government, as was required by Article II(3) of the 1987 ASEAN Agreement.<sup>82</sup>

The Singapore Company was clearly aware of the arbitration provision in the Joint Venture Agreement, yet it chose not to arbitrate in Burma and instead looked to the ASEAN for justice. While we do not have evidence of the Singapore Company's motives, it is clear that the company's managing director, Daw Win Win Noo, has no confidence in the Burmese judiciary. For instance, upon receiving a notice from the Burmese Embassy in Singapore demanding that she face a lawsuit in Rangoon Divisional Court, she said "There is no point in going to Rangoon, because there is no law."<sup>83</sup> She added, "No judges in Burma have the power to evaluate this case impartially. They have to do everything that the generals order."<sup>84</sup> Arbitration in Burma would have most likely encountered the same problems as in a court of law. It is well known that corruption and undue governmental influence is common in Burma.<sup>85</sup> The Singapore Company



would naturally believe that it would be nearly impossible to get a fair arbitration in Rangoon, directly under the shadow of the SPDC. Accordingly, the Company instead sought a neutral forum like the ASEAN because it trusted that it would get a fairer hearing.

### E. Special Companies Act

The Yang Chi Oo Joint Venture Company was formed under the Burma Companies Act and, significantly, the Burma Special Companies Act. While the Special Companies Act was not part of the dispute in this case, it is important that foreign investors and companies understand the powers that “special companies” have, how the Joint Venture Company used those powers, and how those powers can be abused.

The Special Companies Act provides almost unlimited power for companies formed under the Act to ignore the provisions of the Burma Companies Act and any other law. Section 6 of Special Companies Act provides:

“On the publication of a notification by the President of the Union approving the memorandum and articles or any subsequent amendments or additions thereto every provision of the memorandum and articles or every provision of the subsequent amendments or addition thereto shall, notwithstanding contained in the Myanmar Companies Act or any other existing law, be lawful for all purposes.”<sup>86</sup>

In other words, the President’s approval of a Special Company’s memorandum and articles automatically makes them lawful, even if they are not consistent with the laws that other companies have to follow.

The Joint Venture Company took advantage of its special company status in at least two instances. First, the Burma Companies Act does not permit companies formed in Burma to have foreign directors.<sup>87</sup> Nonetheless, the Joint Venture Company, exercising its broad powers granted under the Special Company Act, appointed a foreign director.<sup>88</sup> In his written opinion, Inspector U Hla Tun made it clear that this option was only available because the Joint Venture Company was a Special Company: “A Myanmar Company cannot appoint a Director who is a foreigner, however, this provision does not apply to a Special Company under the Special Company Act 1950 and therefore the appointment of Mr. Carl Lindquist as a Director is valid.”<sup>89</sup>

A second instance in which the Joint Venture Company chose to disregard the rules that apply to non-special companies is when, in its Memorandum of Association, it declared that it was not a “foreign company.”<sup>90</sup> Under the definitions of the Burma Companies Act, a company is either a “Burmese company” or a “foreign company.”<sup>91</sup> A “Burmese company” is a company whose “entire share capital is, at all times, owned and controlled by the citizens of the Union of Burma.”<sup>92</sup> In this case, 45% of the Joint Venture Company was controlled by a Singapore company. Thus, the Joint Venture Company was clearly not a “Burmese company.” There are two definitions of a “foreign company.” First, a company incorporated outside the Union of Burma with a place of business inside Burma is a foreign company.<sup>93</sup> The Joint Venture Company does not fit this definition because it was incorporated inside Burma. Second, a foreign company is also “any company other than a Burmese company or a special company formed under the Special Company Act, 1950.”<sup>94</sup> The Joint Venture Company was a



special company, and thus was also excluded from this second definition of a “foreign company”. This rather complicated examination of definitions leads to one conclusion: special companies are neither Burmese companies nor foreign companies; they have their own special category. This characterization is important because it allows special companies with foreign members to disregard the regulations that apply only to foreign companies, such as obtaining a special permit.<sup>95</sup> If the Joint Venture Company had only incorporated under the Burma Companies Act, it would have fit the definition of “foreign company” due to its Singapore shareholder and thus would have been obligated to abide by the laws that other foreign companies must follow.

There are two significant lessons here for foreign investors. First, incorporating under the Special Companies Act can have great advantages. It essentially allows companies to make their own laws and rules. The language of the Act is extremely broad, permitting special companies to act inconsistently with the Burma Companies Act or “any other existing law.” The business flexibility that this law appears to provide is enormous.

Second, and importantly, the President’s approval is required for special company status. This requirement means that for a company to enjoy special company powers, it must have a particularly favorable relationship with the Burmese government. There are no objective criteria used to determine whether a company can be a special company. The decision is entirely within the discretion of government officials. A law like this that gives full discretion to government officials to grant broad powers is automatically suspect because of the likelihood of corruption and favoritism, particularly in a country notorious for abuse of power like Burma. For instance, a government official may be tempted to accept a bribe in exchange for granting special company status. An administrator may permit a friend’s company to become a special company for no other reason other than because they are friends.

There is no evidence that the Joint Venture Company obtained special company status by means of corruption or some other improper method. Nevertheless, foreign investors must understand that they are not investing on a level playing field. The broad power for businesses to ignore all other laws can be granted to some companies while being denied to others. This decision is not based on independent and impartial factors, but rather is susceptible to favorable treatment for allies of the military regime.

### **F. Impact of the Decision on the Free Market**

One of the adverse effects of the Yaung Chi Oo decision is that free market competition suffered when the Joint Venture Company was terminated. The Singapore Company’s forced departure left the Mandalay Beer name and assets (other than cash distributed to the Singapore Company as compensation for its ownership interest) to the Burmese government and eliminated a foreign competitor. The Irrawaddy, a well-known independent publication that covers Burma and Southeast Asia news, explained as follows:

“According to business sources in Rangoon, another possible factor involved in this case is the Union of Myanmar Economic Holdings (UMEH) company - run by the army - which set up a joint venture called “Myanmar Brewery” with Tiger Beer,



producing both Myanmar Beer and Tiger Beer in 1996. After that, Mandalay Beer became the biggest rival to the Myanmar Brewery, so finally, the Burmese army ended up nationalizing Mandalay Beer. Currently, Myanmar Beer is in the leading position in Burma's beer market. At almost the same time, the army-run Myanmar Economic Corporation (MEC), a sister company of UME, set up another joint-venture brewery called Dragon Brewery Co. Ltd, and started producing SKOL Beer."<sup>96</sup>

The Joint Venture Company ownership was divided between the Burmese Company (55%) and the Singapore Company (45%).<sup>97</sup> In contrast, 100% of Tiger Beer, Mandalay Beer's rival, was owned by the Myanmar government.<sup>98</sup> Eliminating the Singapore Company's ownership would be a logical step for the government so that it could take all the profits from the beer market and not have to share them with a foreign investor. Put simply, the Singapore Company was brought in to improve the operations and sales of Mandalay Beer, a failing company. Once the company turned around and profits increased, the Singapore Company was no longer needed or wanted. By permitting the Burmese government to terminate the Joint Venture Company and eliminate the Singapore Company's ownership, the court contributed to the lack of competition in the Burmese economy and discouraged other foreign investors from doing business in Burma.

Free competition is an important characteristic of an open market economy. A market economy is guided by a free price system.<sup>99</sup> Businesses and consumers decide their own what products to purchase and produce.<sup>100</sup> Resources are owned by individuals who make decisions about how to allocate the resources without government intervention.<sup>101</sup> Foreign investors should understand that the open market characteristics that they are accustomed to in other countries are at times undermined by the laws and judicial system in Burma. In particular, the government's influence over the drafting of laws and the rendering of judicial decisions means that there is no guarantee that all companies will be treated equally and fairly. A healthy, properly functioning market is influenced by the pressures of competition, supply and demand.<sup>102</sup> In Burma, the pressure of the military junta is another factor that must be considered before deciding to invest.

#### **IV. Conclusion and Recommendations**

Things have not improved since the end of the court case. In 2001, the government tried to get at Daw Win Win Nu again, this time filing a lawsuit against her individually, claiming that she made false statements to foreign media.<sup>103</sup> Today, 100% of the Mandalay Brewery is owned by the Burmese government. The government's plan to nationalize the company, therefore, was ultimately successful.

In conclusion, the Myanma Yang Chi Oo Company case reveals important weaknesses in the Burmese legal system, including: (1) Burmese judges are not afraid to ignore evidence that is unfavorable for the government; (2) Burmese courts will not necessarily enforce the Foreign Investment Law's guarantee against nationalization; (3) Burmese judges will use their judiciary discretion under the law to terminate companies when it is in the government's best interest; and (4) the Special Company Act provides broad power that may favor some companies unfairly. Before investing in Burma, foreigners need to be aware of these pitfalls.



**Recommendations for Foreign Investors**

- Foreign investors who want to do business in Burma should put all important business terms in the joint venture agreement and make sure that everything is clear, understandable and unambiguous.
- Foreign investors who wish to extend the term of a company if it is profitable should make the extension mandatory if certain financial successes are achieved.
- Foreign investors from ASEAN countries should make sure that their investments meet the requirements under ASEAN agreements so that they can get protection from the ASEAN.
  - Foreign investors should try to own at least 50% of the company's shares so that they can have an equal or controlling voice in major decisions.
  - Foreign investors need to understand the Special Company Act.
  - Foreign investors have to be careful about competing with companies that are wholly owned by the Burma government and must be familiar with the influence that the military has over the legal system.

**Recommendation for changes to the laws**

- Section 162(vi) of the Burma Companies Act should either be deleted or revised to include specific conditions and circumstances, or a less subjective standard, under which the court can use its discretion to wind up a company.
- The Foreign Investment Law should be amended to provide a penalty for the government if it breaches guarantees made under the law, such as the guarantee against nationalization.
  - The Foreign Investment Law should be amended to permit a foreign company to choose to arbitrate disputes in a neutral forum even if there is no neutral arbitration provided for in the joint venture agreement.
  - ASEAN should be invited to review the Foreign Investment Law and make recommendations to provide greater protections for foreign investors.
  - The term "nationalization" in the Foreign Investment Law should be defined to include a government takeover or other attempt to prematurely terminate a company in the absence of a major breach.

\* \* \* \* \*

---

**(Endnotes)**

<sup>1</sup> The authors of this paper are currently attending the Advanced Internship Program in Law and Human Rights at the Burma Lawyer Council's Peace Law Academy. The authors would like to thank U Aung Htoo, U Myint San, B.K. Sen, U Aung Aung, Stewart Manley and Than Naing Htway for their assistance with this paper.

<sup>2</sup> True Facts occurring till date from the date of incorporation of the Myanma Young Chi Oo Co. Ltd. (prepared by Young Chi Oo Trading Pte. Ltd.) ("True Facts").



- <sup>3</sup> True Facts at Section 2.
- <sup>4</sup> The SLORC was the military government that preceded the current regime, the State Peace and Development Council (SPDC).
- <sup>5</sup> DAVID I. STEINBERG, *THE BURMESE POLITICAL ECONOMY: OPPORTUNITIES AND TENSIONS*, Burma: Myanmar in the Twenty-First Century, Dynamics of Continuity and Change (Undated) at p. 117.
- <sup>6</sup> Maung Myaung Oo, More trouble brewing for Mandalay beer, *The Irrawaddy*, Vol. 9, No. 9 (December 2001) at p. 2.
- <sup>7</sup> True Facts at Section (1).
- <sup>8</sup> *Myanma Yaung Chi Oo Co. Ltd Joint Venture Agreement* (29 November 1993) (“Joint Venture Agreement”) at p. 8.
- <sup>9</sup> *Myanma Foodstuff Industry Ministry of Industry No. (1) vs. Myanma Yaung Chi Oo Co., Ltd.*, Yangon Divisional Court, 1999 Civil Miscellaneous Suit No. 425, (24 December 1999) (“Judgment”) at p. 2.
- <sup>10</sup> Joint Venture Agreement at Sections 1.1 - 1.3.
- <sup>11</sup> *Id.* at Section 1.4.
- <sup>12</sup> Letter from the Yaung Chi Oo Trading Ptd. Ltd to the Senior General Than Shwe, 12 November 1998 (“Than Shwe Letter”) at P. (1).
- <sup>13</sup> Joint Venture Agreement at Section 12.1.
- <sup>14</sup> *Yaung Chi Oo Trading Pte. Ltd v. Government of the Union of Myanmar*, ASEAN I.D. Case No. ARB/01/1, 42 ILM 540 (2003)+ (“ASEAN Arbitration Award”) at Section 4.
- <sup>15</sup> True Facts at Section 11. The information available did not explain the reason for this takeover.
- <sup>16</sup> *Id.* at Section 4.
- <sup>17</sup> Judgment at p. 3.
- <sup>18</sup> U Hla Tun, C.P.A, Investigation into the affairs of Myanma Yaung Chi Oo Company Ltd. (State JV Company) Final Inspection Report (23 June 1999) (“U Hla Tun Final Inspection Report”) at Section 1.1 (1.3).
- <sup>19</sup> True Facts at Section 5.
- <sup>20</sup> More trouble brewing for Mandalay Beer at p. 2.
- <sup>21</sup> U Hla Tun Final Inspection Report at Section 1.1(1.6).
- <sup>22</sup> *Id.* at Section 1.2.1
- <sup>23</sup> True Facts at Section 15.
- <sup>24</sup> Judgment at p. 3.
- <sup>25</sup> *Id.* at p. 2. While this language is unclear, it appears to mean that there were significant disputes between the parties and thus the company could not continue to operate. Ultimately, the judge used the conflicts between the parties as a primary reason for terminating the Joint Venture Company.
- <sup>26</sup> *Id.* at p. 3.
- <sup>27</sup> *Id.* The writers of this paper were unable to find a copy of the contract containing the 24-month delay agreement and were unable to obtain a copy from the Singapore Company’s attorney.



<sup>28</sup> Id.

<sup>29</sup> Id. at p. 2.

<sup>30</sup> Id.

<sup>31</sup> ASEAN Arbitration Award at Section 7.

<sup>32</sup> Judgment at p. 4. Section 162(vi) provides: “Circumstances in which company may be wound up the Court – A company may be wound up by the Court:-... (vi) if the Court is of opinion that it is just and equitable that the company should be wound up.”

<sup>33</sup> Id at p. 5.

<sup>34</sup> Id. As noted above, the writers of this paper were also unable to find a copy of the contract containing the provision for a 24-month delay.

<sup>35</sup> Id.

<sup>36</sup> Id at p. 6.

<sup>37</sup> Id at p. 8.

<sup>38</sup> Id.

<sup>39</sup> Joint Venture Agreement at p. 8.

<sup>40</sup> Id. at Sections 3, 4, and 10.

<sup>41</sup> Id. at Sections 3, 9 and 10.

<sup>42</sup> Id. at Section 12. Section 12 provides in its entirety: “The term of this agreement, unless otherwise determined, shall be for a period of five (5) years, subject to the option to renew after every five (5) years with the approval of Foreign Investment Commission.”

<sup>43</sup> Section 4.1 provides: “Either party shall be entitled to terminate this Agreement in its entirety (sic) by giving 90 (ninety) days written notice if a breach of condition of the Agreement major breach which will ofcourse (sic) result of Myanmar Financial law is committed by the other party provided such a breach is proved (sic).”

<sup>44</sup> True Facts at Section 5.

<sup>45</sup> More trouble brewing for Mandalay Beer at p. 2.

<sup>46</sup> Judgment at p. 2.

<sup>47</sup> Id.

<sup>48</sup> Id. at p. 5. As noted above, the writers of this paper were unable to find a copy of the contract containing the provision of a 24-month delay.

<sup>49</sup> Id. at p. 3.

<sup>50</sup> Joint Venture Agreement at Section 12.1.

<sup>51</sup> Id. at Section 17.1.

<sup>52</sup> Judgment at p. 3.

<sup>53</sup> U Hla Tun Final Inspection Report at Section 1.2 .

<sup>54</sup> Id. at Section 1.3.

<sup>55</sup> Id. at Section 1.4.

<sup>56</sup> See also B.K SEN AND PETER GUTTER, *The Burmese Junta’s Abuse of Investment Laws*, Legal Issues on Burma Journal No. 9 (August 2001), <http://www.ibiblio.org/obl/docs/LIOB09-InvestmentLaw.htm>.



<sup>57</sup> Judgment at p. 2. The Court reasoned that the five year period started from 1 October 1994, the date that the company started its operations.

<sup>58</sup> More Trouble Brewing for Mandalay Beer at p. 2.

<sup>59</sup> The Than Shwe Letter states "...the joint venture had brought in assortment of taxes and levies worth United States Dollars 0.58 million and Myanmar Kyat 488.00 million by the financial yet end 1997-98."

<sup>60</sup> Myanmar Investment Commission Minutes of the coordination meeting in connection with Myanmar Yang Chi Oo Company Limited (13 January 1999) at p. 7.

(a) substantial and continuous losses in the enterprise

(b) breach of the terms of contract by one of the parties to the same;

(c) occurrence of force majeure."

(d) incapability of implementing the original aims and objects of the enterprise."

<sup>62</sup> U Hla Tun, Part II: Highlights, Fact-findings & Legal Aspects- Opinion at Section 1.1.4, Part II, p. 1.

<sup>63</sup> Burma Companies Act (1914) at Section 162 provides: "A company may be wound up by the Court:- ... (vi) if the Court is of opinion that it is just and equitable that the company should be wound up".

<sup>64</sup> U Hla Tun, Part II: Highlights, Fact-findings & Legal Aspects- Opinion at Section 1.1.4, Part II, P. 2: "The Ministry of Industry No. (1) wrote to MIC to liquidate the JVC on 10/11/98 but before awaiting MIC's decision, the Management of the affairs of the JVC, Mandalay and Yangon, was taken over the next day with a group of security personnel on 11/11/98. This action in my opinion badly tarnished the image of the Union of Myanmar in the international commercial community. Any action taken which could be considered as not strictly in keeping with the UMFI Law and also the terms and conditions of the JVA MOA and AOA, or, any existing law applicable to the JVC, would undermine the Open Market Economic Policy of the Government of the Union of Myanmar".

<sup>64</sup> Burma Companies Act (1914) at Section 162 provides: "A company may be wound up by the Court:-<sup>65</sup> Burma Companies Act (1914) at Section 162 provides: "A company may be wound up by the Court: -

(i) if the company has by special resolution resolved that the company wound up by the Court

(ii) if defaults is made in filing the statutory report or in holding the statutory meeting;

(iii) if the company doesn't not commence its business within a year from its incorporation, or suspends its business for a whole year,

(iv) if the number of members is reduced, in the case of a private company, below two; or, in the case of any other company,

(v) if the company is unable to pay its debts; if the court is of opinion that it is just and equitable that the company should be wound up."

<sup>66</sup> Id.

<sup>67</sup> Id.

<sup>68</sup> U Hla Tun, Part II: Highlights, Fact-findings & Legal Aspects- Opinion at Section 1.2.1 states: "In the case of MYCOL (Joint Venture Company) it has the ability to pay its debt in full."



<sup>69</sup> Judgment at p. 4. See *In the Matter of The Mohanamdal Shastra Prakashak Samity Limited (1)* (“A power of this kind is not to be acted upon, unless there is very strong ground for acting upon it xxxx”); *B. Cowashigi and Others Vs. Nath Singh Oil Company Ltd. (2)* (whether there has sufficient ground to wind up the company is to be considered). The authors of this article were unable to obtain copies of these cases to determine how the facts in those cases were similar or different to those in the Yang Chi Oo case.

<sup>70</sup> Id. at p. 6 provides: “...the condition to jointly carry on business of both sides by “A shareholder and “B” shareholders to continue the joint venture business is the state of impossible relations arising between....”

<sup>71</sup> For instance, the government initiated the two takeovers, froze the corporate bank accounts and allegedly misused three hundred million Kyats of company money.

<sup>72</sup> Judgment at p. 6.

<sup>73</sup> It is important to note that the Joint Venture Agreement provided for an option to extend, not a requirement to extend. Thus, the Government Company was completely within its contractual rights to refuse to apply for the extension. The Singapore Company should have negotiated terms under which there would be an obligation to extend if certain factors existed, such as financial success. Nonetheless, the point here is that the Government Company faced no adverse judicial consequences for essentially taking

g over a company and forcing the other shareholder out so that it could run Mandalay Beer on its own. This is not “just and equitable”, as is required by Section 162(vi).

<sup>74</sup> Burma Companies Act (1914) at Section 203 provides: “A company may be wound up voluntarily: ...

(2) - if the company resolves by special resolution that the company be wound up voluntarily;

(3) - if the company resolves by extraordinary resolution to the effect that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up”.

<sup>75</sup> Id. at Section 81 provides: (1) “A resolution shall be an extraordinary resolution when it has been passed by a majority of not less than three-fourths of such members entitled to vote as are present in person or by proxy (where proxies are allowed) at the general meeting of which notice specifying the intention to propose the resolution as an extraordinary resolution has been duly given.

(2) A resolution shall be a special resolution when it has been passed by such a majority as is required for the passing of an extraordinary resolution and at a general meeting of which not less than twenty-one (21) days notice specifying the intention to propose the resolution as a special resolution has been duly given.”

<sup>76</sup> Section 5 of the Joint Venture Agreement provides in full: “If any dispute arises over the interpretation or implementation of this Joint Venture Agreement, such dispute shall be settled amicably between both contracting parties through mutual discussion. Disputes arising between the contracting parties that cannot be settled amicably as mentioned above shall be settled in the Union of Myanmar by arbitration, through two arbitrators appointed by and each representing one of the two contracting parties. Should the arbitrators fail to reach an agreement, the dispute shall be referred to an Umpire nominated by the arbitrators. The decisions of the arbitrators and the Umpire shall be final and binding upon both parties. The arbitration proceeding shall in all respect conform to the Arbitration Act, 1944 (Myanmar Act No. IV of 1944) or any subsisting statutory modifications thereof. The venue of arbitration shall be Yangon, Myanmar. The Arbitration Fees shall be borne by the party against whom the award is made.”



<sup>77</sup> The authors of this article did not have access to all court documents. Nonetheless, in the volumes of documents to which they did have access, there were no objections filed or arguments made by the Singapore Company that requested arbitration in Burma.

<sup>78</sup> ASEAN Arbitration Award at paragraph 8. Myanmar and Singapore are both member countries of ASEAN.

<sup>79</sup> Id. at Paragraph 1.

<sup>80</sup> Id.

<sup>81</sup> Id.; Section X(4) of the ASEAN Agreement for the Promotion and Protection of Investments provides: “If the arbitral tribunal is not formed in the periods specified in paragraph 3 above, then earlier party to the dispute may, in the absence of any other relevant arrangement, request the President of the International Court of Justice to make the required appointments.”

<sup>82</sup> Id. at paragraph 62; see also ASEAN Arbitral Tribunal (ICSID Additional Facility Rules): *Yaung Chi Oo Trading Pte Ltd. v. Government of the Union of Myanmar* (Award), ASEAN Case No. ARB/01/1 (March 31, 2003), <http://www.asil.org/ilib/ilib0608.htm>.

<sup>83</sup> *More Trouble Brewing for Mandalay Beer* at p. 3.

<sup>84</sup> Id.

<sup>85</sup> Burma ranks 162nd out of 163 countries in Transparency International’s Corruption Perceptions Index for 2006, <http://www.infoplease.com/ipa/A0781359.html>.

<sup>86</sup> *Special Company Act (1950)* at Section 6 (emphasis added).

<sup>87</sup> *U Hla Tun, Part II: Highlights, Fact-findings & Legal Aspects- Opinion* at Section 1.2.3.

<sup>88</sup> Id.

<sup>89</sup> Id.

<sup>90</sup> *Memorandum of Association of Myanma Yaung Chi Oo Company Limited* at Section 3.

<sup>91</sup> *The Burma Companies Act (1914)* at Section 2.

<sup>92</sup> Id. at Section (2A)1.

<sup>93</sup> Id. at Section (2B)1b.

<sup>94</sup> Id. at Section 27A (Foreign Companies and Companies Carrying International Trade).

<sup>95</sup> *The Special Companies Act (1950)* at Section 6.

<sup>96</sup> *More Trouble Brewing for Mandalay Beer*.

<sup>97</sup> *Joint Venture Agreement* at Section 1.4.

<sup>98</sup> *More Trouble Brewing for Mandalay Beer*.

<sup>99</sup> [http://en.wikipedia.org/wiki/Market\\_economy](http://en.wikipedia.org/wiki/Market_economy).

<sup>100</sup> Id.    <sup>101</sup> Id.    <sup>102</sup> Id.

<sup>103</sup> *More Trouble Brewing for Mandalay Beer* at 1. The *Irrawaddy* wrote: “In order to cover up their illegal take-over of her company, the generals have opened a lawsuit against her on three counts for compensation of US \$74.3 million and 94.6 million Burmese kyat at Rangoon Divisional Court. Once again, the Burmese generals, who are seeking to attract foreign investment into the country’s paralyzed economy, have shot themselves in the foot. In the eyes of foreign investors, some of whom are wary of entering Burma’s so-called open market, this is just another reason to stay away.



## **Part C: On Criminal Accountability Issue in Burma and Possible Referral of the UN Security Council to the International Criminal Court**

### **(C.1) Extracts From MOU of BLC and GJC for Joint Efforts of Criminal Accountability**

*[Below are excerpts from a Memorandum of Understanding signed on September 25, 2007, between the Burma Lawyers Council and the Global Justice Center to undertake a project that seeks criminal accountability for heinous crimes committed in Burma.]*

#### **MEMORANDUM OF UNDERSTANDING**

**Between the BURMA LAWYERS' COUNCIL and the GLOBAL JUSTICE CENTER**

The Burma Lawyers' Council represents the legal arm of the pro-democracy movement seeking justice, accountability, and the rule of law in Burma. The Global Justice Center is a legal International Non-Governmental Organization, whose expertise is enforcement of international law focusing on emerging democracies and transitional justice fora. The Burma Lawyers' Council and the Global Justice Center by this document enter into a collaborative partnership for the Project to bring Justice for Victims of Heinous Crimes in Burma, as more fully defined below.

This agreement seeks to maximize the legal expertise between the two organizations in order to further the mission described below.

...

#### **I. MISSION STATEMENT AND OBJECTIVES FOR PROJECT**

Together, the Parties enter into this Memorandum of Understanding ("MOU") to mutually enforce the rights under international law of redress and accountability for victims of heinous crimes in Burma; and, in doing so, further systems of global justice, in particular, the International Criminal Court.

The first goal of the Project is a resolution of the UN Security Council to form an international commission of inquiry that will (1) immediately investigate reports of violations of international humanitarian and human rights law in Burma, and (2) determine whether or not acts of genocide or other heinous crimes have occurred and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable. Subsequent goals will be mutually agreed to and documented in writing by the Parties. These goals and the activities to implement them will together be referred to as the Project to Bring Justice for Victims of Heinous Crimes in Burma or the "Project".

...



### III. PRIMARY ACTIVITIES DURING PLANNING PHASE

The primary activities to be conducted by both Parties during the Planning Phase are:

1. Obtaining and verifying evidence of heinous crimes committed in Burma.
2. Drafting and disseminating of a joint position paper describing the legal arguments and strategy and the evidentiary support necessary to obtain the UN Security Council resolution.
3. Drafting a written strategy plan to obtain support for the Project and contacting key individuals and organizations identified by both Parties.

...

### V. ORGANIZATIONAL ROLES

**A.** The role of **BURMA LAWYERS' COUNCIL** during the Planning Phase of the Project is to:

1. Identify and reach out to key groups based in Thailand and Burma (for example, groups from Burma, Members of Parliament, and locally based human rights organizations) and those individuals and organizations outside Thailand and Burma with whom the BLC has a pre-existing relationship.
2. Identify members of the Burma exile community to act as representatives of the Project for lobbying and advocacy efforts within the Southeast Asia region and abroad, including attending meetings at the UN, lobbying governments directly, and other advocacy opportunities that may arise and are agreed upon by both Parties.
3. Obtain and verify the evidence of heinous crimes to be used in the joint GJC and BLC position paper. This evidentiary information will be provided to GJC and will be subject to GJC's approval before publication.
4. Inform GJC of all contacts described in Sections IV(A)(1) and (2) and otherwise assist with the maintenance of the contact-tracking document. This document will be updated on an ongoing basis and reviewed at bi-weekly meetings.

**B.** The role of the **GLOBAL JUSTICE CENTER** during the Planning Phase of the Project is to:

1. Develop the legal arguments and strategy sections in the GJC and BLC joint position paper. These sections will be subject to BLC's approval before publication.
2. Develop and maintain the initial outreach strategy document to be updated on an ongoing basis and to be reviewed at bi-weekly meetings.
3. Identify and reach out to key groups and individuals based outside of Thailand and Burma (for example, Members of the UN Security Council, members of congress, and human rights organizations).



4. Maintain a complete contact-tracking document of all key actors. This document is to be updated on an ongoing basis and to be reviewed at bi-weekly meetings.

\* \* \* \* \*



**(C.2) International Lawyers Call for Criminal Accountability for Myanmar Regime**



September 27, 2007

Contact: Janet Benshoof, Esq.  
 Tel: 212-725-6530 x203  
 Cell: 917-601-6200  
 Email: [jbenshoof@globaljusticecenter.net](mailto:jbenshoof@globaljusticecenter.net)



FOR IMMEDIATE RELEASE

Contact: U Aung Htoo  
 Cell: 66 (0) 81 533 0605  
 Website: [www.blc-burma.org](http://www.blc-burma.org)  
 E.mail: [blcsan@ksc.th.com](mailto:blcsan@ksc.th.com)

**INTERNATIONAL LAWYERS CALL FOR CRIMINAL ACCOUNTABILITY FOR MYANMAR REGIME**

The Burma Lawyers' Council and the Global Justice Center urge the United Nations Security Council to take all actions necessary to stop the murders of innocent people in Burma and hold the military junta commanders criminally accountable. This includes authorizing peacekeeping forces and creating an independent commission of inquiry to investigate on-going crimes. Violence is a tool of the military junta, the State Peace and Development Council (SPDC), to retain control over the people of Burma who are prisoners, not citizens. The latest massacre in Burma must be the last, no more impunity for criminal actions such as the massacre of student protestors in 1988 and of supporters of pro-democracy leader Daw Aung San Sui Kyi in 2003 in Depayin. It is the obligation of the international community to stop the junta from using murder, torture, and rape as tools to maintain power. The Security Council has an obligation to act under its Chapter VII mandate to maintain international peace and security as well as UNSCR 1674 on the Responsibility to Protect, UNSCR 1325 on Women, Peace and Security, and the Genocide Convention.

Crimes perpetrated by the Burmese military leaders should not be buried under the rubric of human rights violations, but called what they are: war crimes, crimes against humanity and potentially even genocide. The perpetrators listed below should be held criminally accountable by the international community.

**Commanders who are responsible under international criminal law for ordering the recent heinous crimes against peaceful protestors in Burma include:**

- o **Than Shwe, Chairman, State Peace and Development Council and Commander-in-Chief, Tatmadaw**
- o **General Kyaw San, Minister of Information**
- o **Colonel Tint San (Infantry No. 16)**
- o **Major Ye Zaw Zaw (Infantry No. 16)**

###

For further information contact:

Janet Benshoof, President, Global Justice Center, 212-725-6530 x202.

U Aung Htoo, General Secretary, Burma Lawyers' Council, 66-(0) 81-533-0605

*Human Rights Through The Rule Of Law*

12 East 33rd Street Suite 1200 • New York, NY 10016 • P 212.725.6530 • F 212.725.6536 •

[www.globaljusticecenter.net](http://www.globaljusticecenter.net)



**(C.3) "BLC's Position on Mr. Ibrahim Gambari's October 5, 2007 Briefing to the UN Security Council"**

STATEMENT ON MR. IBRAHIM GAMBARI'S OCTOBER 5, 2007 BRIEFING  
TO THE UN SECURITY COUNCIL

(October 10, 2007)

The Burma Lawyers' Council (BLC) would first like to express on behalf of the people of Burma their sincere gratitude for Mr. Gambari, Special Advisor to the Secretary-General, and the United Nations' efforts to recognize and achieve the Burmese peoples' aspirations for an end to a tyrannical rule by a murderous and illegitimate regime. The BLC agrees with Mr. Gambari's conclusion in his briefing that "[a]dvancing the causes of all-inclusive national reconciliation, democratization, and full respect for human rights will require *sustained engagement by the United Nations, including through the Secretary-General's good offices, with active support of Myanmar's neighbors, ASEAN countries and the international community, including a united Security Council.*" (emphasis added). Furthermore, the BLC strongly concurs with the comments of Mr. Zalmay Khalilzad, the U.S. Ambassador to the U.N., on Mr. Gambari's briefing: "It is time for the Council to do more than simply listen to a briefing".

Secondly, the BLC would like to express its agreement with Mr. Gambari's nine key messages to the Burmese military junta:

- (1) Putting an end to night raids and arrests during curfew;
- (2) Lifting the curfew;
- (3) Releasing all those arrested during the demonstrations;
- (4) Allowing access to clinics for those wounded during the demonstrations;
- (5) Withdrawing military forces from the streets;
- (6) Ensuring respect for human rights and the rule of law during law enforcement;
- (7) Complying with international standards;
- (8) Allowing the ICRC to access detained persons and assist in tracing missing persons; and
- (9) Putting an immediate end to raids on monasteries.

Additionally, the BLC supports Mr. Gambari's insistence that the military junta progress in key areas such as:

- (a) The release of all political prisoners, including those arrested in the course of the recent demonstrations;
- (b) The promotion of an all-inclusive national reconciliation process;
- (c) Full cooperation with and better access for humanitarian organizations;
- (d) The cessation of hostilities in conflict areas, including Kayin State ; and
- (e) Continued cooperation with the ILO.



While the BLC recognizes Mr. Gambari's tenuous position in utilizing subtle diplomacy through engagement with the military junta, the BLC cannot help but express on behalf of the Burmese people disappointment with the absence in Mr. Gambari's briefing of a condemnation of the junta's willingness to commit crimes with manifest impunity. Secretary-General Ban Ki-moon's comments on the visit were accurate: "You cannot call it a success." The courage of the Burmese demonstrators and Buddhist Monks, who risked life and limb for the principles of freedom with full knowledge of the danger, will be marked in the annals of human history as one of humankind's finest hours and deserves a more resolute response on the part of the contemporary international community.

The BLC, as an organization made up of Burmese and international lawyers, has analyzed Mr. Gambari's briefing from a legal perspective and produced the following critique. The international communities' failure to confront the Burmese military junta over past atrocities, i.e., the 2003 Depayin Massacre, along with the current circumstances, continues to embolden the illegitimate regime and support its ability to commit crimes against humanity, war crimes, and genocide with impunity. The BLC's analysis concludes that a lack of consequences and criminal accountability for the atrocities committed by the junta in full view of the international community reduces any incentive for the illegitimate regime to make progress towards genuine national reconciliation and emboldens the regime to commit further crimes while additionally giving encouragement to other oppressive regimes around the world. Specifically, not one sentence in Mr. Gambari's briefing alludes to violations of Burmese domestic law or the fundamental norms of international human rights law that have been committed by the junta in the present or past. Nor does Mr. Gambari's briefing contain even the slightest suggestion that there are consequences and criminal accountability for those responsible for what surely amounts to *prime facie* cases of crimes against humanity. Without any consequences for their past crimes and current criminal acts in crushing the peaceful September demonstrations, what incentive can those who have showed their willingness to shed the blood of innocent women, children, and monks have in reconciling with those who they may simply make disappear? The international community has a responsibility beyond simply returning democracy to the peoples of Burma – it must also uphold the mandates of the international rule of law and prohibitions against crimes against humanity and ensure that those who commit these crimes with impunity are brought to justice for humankind's sake.

To begin, the BLC disagrees with Mr. Gambari that the demonstrations are merely the result of "deep and widespread discontent about socio-economic conditions in the country". Rather, the roots of the crisis are a combination of the Burmese government's failure to build the foundations for a genuine open market economy, the lack of a transparent and accountable societal structure (magnified by the non-existence



of genuine civil society organizations), a disregard for the rule of law and the outright refusal to implement a democratic government.

**No genuine open market economy.** Despite the SPDC's superficial efforts to create a free market with new laws and tax breaks, the economy in Burma continues to be dominated by the government and riddled with corruption. Fair competition and restraint from excessive governmental interference, key components of a market economy, do not exist in Burma .

**No transparency and accountability.** The SPDC's decision-making process continues to be shrouded in secrecy. No one has the right to request information, for instance, about how the government is spending the country's money or what the salaries and perks are of high ranking military officials. The absence of genuine civil society organizations makes this problem worse because there is no one to criticize or even monitor the government's lack of transparency and accountability. As a result, the economic conditions of the country have deteriorated as the government steadily misuses the nation's treasury and is accountable to no one.

**No rule of law.** The judiciary in Burma is completely controlled by the regime. There is no independent judiciary to adjudicate citizens' complaints and lawsuits against the government. With a judiciary that is not independent, the prevalence of unjust laws and the regime's illegal practices, the result is a complete lack of the rule of law. The rule of law is also essential for the achievement of a market economy. Without the rule of law there will be no independent civil society organizations to act as a check against government abuse and thus the regime will continue to mismanage the country's budget and take the economy into further crisis.

**No democratic governance.** The lack of democracy is another important factor that has lead to the current economic crisis. In a democracy, the government is accountable to the people. The executive's acts are watched closely by an independent legislature and the judiciary. In a democracy, strong civil society organizations constantly monitor the government and report their findings to an independent media and directly to the people. In Burma , there are no checks and balances. There is no independent media. The SPDC runs the country unhindered by institutional structures that protect the interests of the people. In such a political environment, the SPDC has committed great abuses which have led to the dire economic circumstances that triggered the demonstrations.

As previously stated, the international communities' failure to respond to the crimes against humanity committed by the Burmese junta in the 2003 Depayin Massacre, which was painstakingly documented in the report produced by the Ad Hoc Commission of the Depayin Massacre, was a green light for the junta to brutally crush the September demonstrations with no concern of criminal accountability. Likewise, without any



indication of criminal accountability or consequences for their current criminal actions, the Burmese junta will only be further emboldened to commit other crimes against humanity, war crimes, and genocide with no fear of future repercussions.

It is the BLC's position, as well as that of many other commentators, that this lack of will to hold the illegitimate regime in Burma accountable for their crimes comes from the false dichotomy that one may not have both criminal accountability and active engagement with the regime. However, this is a false dichotomy, as exemplified by the case of Sudan. In January 2005, an international commission of inquiry appointed by the UN recommended that the UN Security Council refer the situation in Darfur to the ICC - the only means by which the Court could assume jurisdiction in this instance. The main argument against this action prior to the referral to the ICC was that the referral would discourage national reconciliation and the acceptance of an international peacekeeping force by the government in Khartoum; however, both of these arguments have been proven to be flat wrong.

Thus, we find in the case of Sudan that there is no dichotomy between active engagement with the principal parties and seeking accountability for the crimes committed by one or more of those principals. Likewise, we find in the example of Sudan the same international players in the Security Council, i.e. China and the United States, that had previously shown both distrust of the ICC and a willingness to shield perpetrators of crimes from justice. As Jared Genser, Esq., stated in his October 5th article for the Boston Globe: "This will be an uphill struggle, given China's seat at the table. Beijing's backing gives the junta little reason to change its behavior. So far, Beijing has refused to publicly condemn the military-led government. But pressure on China has worked before. A campaign to end China's military sales to Darfur has yielded important results. Beijing only needs to signal to the Burmese junta that the price for continuing to defend its actions is too high".

On June 16, 2006, the BLC's General Secretary, U Aung Htoo, Esq., in an open letter to the Secretary General of the United Nations laid out a detailed case for how the 2003 Depayin Massacre could be referred to the ICC by the U.N. Security Council pursuant to Article 13(b) of the Rome Statute by means of a Security Resolution under Chapter VII, as had been done in the case of Darfur. Again, the BLC reaffirms that the 2003 Depayin Massacre along with the recent bloody crackdown against the peaceful demonstrations and the junta's other past crimes should be referred to ICC by the U.N. Security Council. As stated by Zalmay Khalilzad, the U.S. Ambassador to the U.N., the crisis in Burma is clearly having effects beyond its borders because it is closely tied to the flight of refugees, the growth in the trafficking of drugs and people and the spread of infectious diseases. As Mr. Gambari correctly stated in his briefing, the junta "also needs to know the world needs a peaceful, prosperous and democratic Myanmar that



can contribute to the development of the region and play a useful role in the international community”.

In his briefing, Mr. Gambari states, “I have been informed by the Government that, as of today, a total of 2,095 persons arrested in the course of demonstrations have been released, including 728 monks, and that more releases will follow”. The BLC is concerned that Mr. Gambari will erroneously rely on the numbers and information provided by illegitimate regime that has proven itself untrustworthy time and time again. The BLC urges the international community to demand an independent and international investigation of the events leading up to and the violent crackdown on the peaceful demonstrations of ordinary Burmese citizens and Buddhist monks to discover the true numbers of deaths, injuries, disappearances and arrests.

Unfortunately, the junta has learned from the bloody Depayin Massacre of 2003 how to conceal its crimes and fabricate alternative narratives to the real events on the ground. Even as this statement is being produced the regime is learning from its latest criminal acts and in the future the regime will act quicker to shut down mediums such as the internet so that they may further conceal their murderous crimes from the outside world. Thus, the BLC calls on the international community, where Mr. Gambari’s briefing fails to do so, to demand an independent and international investigation of the regime’s crackdown of the justified demonstrations and to hold those who committed criminal acts responsible for their crimes.

In conclusion, Mr. Gambari’s briefing fails to confront the impunity of the illegitimate regime that has committed horrendous crimes before the very eyes of the world and in doing so only emboldens this tyrannical regime to continue their crimes against humanity, war crimes, and genocide. The absence of any challenge to this horrific impunity serves to further impede any possibility of a genuine national reconciliation by removing any incentive to make progress towards reconciliation and to encourage the brutal regime to simply crush its critics. Thus, the BLC calls for an independent and international investigation of the current situation in Burma and past atrocities such as the 2003 Depayin Massacre. Additionally, the BLC calls for the international community to hold the regime’s leaders criminally accountable before the ICC pursuant to Article 13(b) of the Rome Statute by a Security Resolution under Chapter VII, as was done in the case of Darfur .

As the Preamble to the Rome Statute states: “Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity... [affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”]. Thus, it is the stated goal of the statute



establishing the ICC to end the impunity that is so indignantly manifested in the brazen criminal acts of the Burmese military junta, as exemplified in the regime's bloody crackdown on the peaceful demonstrations of September 2007. It makes a mockery of such a lofty institution as the ICC to stand idly by while crimes against humanity, war crimes, and genocide are perpetrated with complete impunity in its shadow.

\* \* \* \* \*



**(C.4) BLC's Participation in ICC Meeting for criminal accountability issue**

November 26, 2007

FOR IMMEDIATE RELEASE

**Consultation on the International Criminal Court and  
The Rule of Law: Burma and Thailand**

The Burma Lawyers' Council (BLC) is pleased to announce the successful completion of a Consultation on the International Criminal Court and the Rule of Law in Burma and Thailand, held on November 22 - 23 at the SASA International House of Chulalongkorn University in Bangkok, Thailand.

The Consultation was organized by the BLC and the Union for Civil Liberty (UCL), and supported by the Coalition for the International Criminal Court - Asia (CICC-Asia) and the International Federation for Human Rights (FIDH).

The first day of the Consultation featured presentations and discussions on:

- Introduction to the ICC: Basic principles and victims' rights; the ICC today; and the principle of universal jurisdiction (Mr. Osman Hummada, Human Rights Expert, and Ms. Delphine Carlens, Program Officer, International Justice Desk, FIDH)
- Frequently asked questions about the Rome Statute (Mr. Harry Roque, Jr., ICC Counsel)
- The mandate of the International Committee of the Red Cross in relation to the ICC (Mr. Teerapat Asavasungsidhi, Legal Adviser, ICRC)
- The status of the ratification and implementation of the Rome Statute in Asia (Ms. Evelyn Balais-Serrano, Coordinator for CICC - Asia)
- An overview of the situation in Thailand (Mr. Sarawut Pratoomraj, ICC Coordinator, UCL)
- An overview of the situation in Burma (Mr. Aung Htoo, General Secretary, and Mr. Stewart Manley, Staff Attorney, BLC)

On the second day, one group of participants held discussions regarding the ICC's role in Burma and how international mechanisms of justice can be used to bring criminal accountability to the perpetrators of crimes against humanity, war crimes and genocide. The other group of participants attended meetings with the Head of the Legal and Treaties Department, Ministry of Foreign Affairs, Thailand and the Permanent Secretary, Ministry of Justice, Thailand, to lobby for ratification by the Thai government of the Rome Statute of the ICC.

Representatives of a wide variety of local, regional and international civil society organizations and other NGO's participated in the Consultation.

\* \* \* \* \*



## (C.5) BLC's Efforts for the attention of the UN Security Council and the International Criminal Court on Criminal Accountability Issue of Burma

### CRIMINAL ACCOUNTABILITY FOR HEINOUS CRIMES IN BURMA



1. A Consultation on the International Criminal Court and the Rule of Law: Burma and Thailand, was held on November 22-23 at the SASA International House in Bangkok, Thailand. Organized by the Burma Lawyers' Council (BLC) and the Union for Civil Liberty (UCL), the Consultation featured presentations by organizations and individuals such as the International Federation of Human Rights, Mr. Harry Roque,

Jr., International Criminal Court Counsel, Mr. Teerapat Asavasungsidhi, Legal Adviser of the International Committee of the Red Cross, Ms. Evelyn Balais-Serrano, Coordinator for Coalition for the International Criminal Court – Asia, Mr. Sarawut Pratoomraj, ICC Coordinator of the UCL, as well as Mr. Aung Htoo, General Secretary, and Mr. Stewart Manley, Staff Attorney, of the BLC.

2. The Consultation included focused discussions on the serious crimes perpetrated by the SPDC and how to obtain justice for the victims. The recent violent crackdown in September 2007 of peaceful demonstrators, including thousands of Buddhist monks, was a vivid reminder of why the State Peace and Development Council (SPDC), the military government that has ruled Burma since 1988, is notorious worldwide for suppression of political opposition groups and violations of human rights.

3. There is overwhelming evidence that these crimes have been committed for decades and are still being committed with impunity, despite regular international condemnation. They include crimes against humanity such as torture, rape, enslavement, murder, imprisonment in violation of international law, and forcible transfer of population, all committed as part of a widespread and systematic attack against the civilian population of the country. To illustrate, in February 2006 a representative from Human Rights Watch stated that torture continues in Burma and is a policy instrument. The U.S. Department of State reported that, in 2006, "Persons forced into portering or other labor faced extremely difficult conditions, beatings, rape, lack of food, lack of clean water, and mistreatment that at times resulted in death." The Karen Human Rights Group has added that "the fear of potential rape serves the military as a tool for intimidation and control of women and entire communities." There is also evidence of war crimes and possibly genocide.

4. These acts go far beyond a repudiation of democracy; they are criminal violations of international humanitarian and human rights law, including grave breaches



of the Geneva Conventions, and squarely fit within the jurisdiction of international justice mechanisms, such as the International Criminal Court.

5. With the establishment of the International Criminal Court, there is a growing consensus that no safe harbor should exist for perpetrators of heinous crimes. National courts in Burma are incapable and unwilling to prosecute the perpetrators of these serious crimes; thus, a remedy is not available domestically. A statement by Paulo Sergio Pinheiro, the United Nations Special Rapporteur on the Situation of Human Rights



in Burma, illustrates this condition: “The judicial system, far from affording individuals basic standards of justice, is employed by the Government as an instrument of repression to silence dissent.” Moreover, it is the best interest of justice to provide the victims of these crimes with a venue to hold the perpetrators responsible for their actions.

6. **The first step of the Project on Criminal Accountability for Heinous Crimes in Burma is to seek the establishment of an Independent Commission of Inquiry, by either the Security Council or the UN Secretary General’s Office, to investigate the commission in Burma of the most serious of crimes of concern to the international community as a whole, which threaten the peace, security and well being of the world.** We believe that the results of an investigation by such a Commission of Inquiry will lead to a UN Security Council resolution referring the heinous crimes in Burma to the International Criminal Court.

7. Various Security Council resolutions acknowledge that state sponsored heinous crimes can constitute a threat to global peace and security. Protection of women and children during conflict is underscored by the unanimous passage of Security Council Resolution 1325 on women, peace and security, which buttresses the “Responsibility to Protect” Doctrine, under Security Council Resolution 1674. The Genocide Convention, to which Burma is a party, requires prosecution of perpetrators and the Security Council can be seized under Article 8 for enforcement. In addition, Burma has been in a state of internal armed conflict for over forty years, devoting nearly half of its budget to maintain a standing army; thus the crimes inflicted on civilians are also clear violations of the Geneva Conventions.

8. Over the last two decades there has been a growing consensus, not only that lawless states are a threat to security, but also that the world community has a moral and legal duty to protect people held prisoners by their own leaders. Setting up an international criminal investigation is not a political decision, but rather a legal obligation enforcing the most fundamental of rights of the people of Burma.



9. The BLC urges that:

- Human rights and humanitarian organizations, concerned individuals, and all others who believe in the protection of innocent victims and the accountability of perpetrators of serious crimes include criminal accountability in their discussions of the situation in Burma.
- The UN Security Council act under its Chapter 7 powers to end the impunity accorded the SPDC.
- All nation governments, including Burma, cooperate with this inquiry and be part of a constructive engagement with justice.

\* \* \* \* \*



## Part D: On the Rule of Law and Justice

### (D.1) Demand that the *SPDC* Take Immediate Action Against Security Forces for *SHOOTING PEACEFULLY DEMONSTRATING MONKS*.

#### STATEMENT DEMANDING THAT THE SPDC TAKE IMMEDIATE ACTION AGAINST SECURITY FORCES FOR SHOOTING PEACEFULLY DEMONSTRATING MONKS

(September 6, 2007)

1. Throughout the past few weeks, the people of Burma have been demonstrating against the recent increase in commodity prices. The SPDC has violently suppressed the demonstrations through the use of its civilian criminals from the Union Solidarity and Development Association (USDA) and the Swan-Ar Shin Association. When people face difficulties to show up on the street, in replace of them, hundreds of monks have also taken to the streets and demanded the reduction of commodity prices.
2. Considered together, the Burma Police Act, the Penal Code and the Code of Criminal Procedure make clear that the people of Burma have the right to peacefully assemble. Section 31(2) of the Police Act provides the police the power to require demonstrators to obtain a license. The authorities must grant these licenses without delay. The licenses are to describe rules and restrictions to prevent a breach of peace or disturbances to the vehicles in the road. Peaceful demonstrators must, under the law, abide by such rules established by the police. The police force may stop any procession or public assemblies and take action only when the procession breaches the peace, if uncontrolled, or the demonstrators have otherwise violated the terms of the license. If the SPDC wants to show that it respects the rule of law, it should handle peaceful processions in accordance with the Police Act and the Code of Criminal Procu.
3. In practice, the SPDC does not comply with the existing laws to facilitate the peaceful processions of people. Instead, on September 5, 2007, the SPDC dispersed a group of 500 peacefully demonstrating monks in Pakokku, by shooting. Unbelievably, this act of violence was committed against monks, who the majority of Burmans worships and reveres. Then, the SPDC clearly violated the current law repeatedly.
4. According to Section 127 of the Code of Criminal Procedure, “Any magistrate or officer in charge of a police-station [or police-officer not below the rank of sub-inspector] may command any unlawful assembly, or any assembly of five or more persons likely to cause a disturbance of the public peace, to disperse; and it shall thereupon be the duty of the members of such assembly to disperse accordingly.”
5. Merely assembling five people does not in itself violate Section 127 of the Code of Criminal Procedure. So long as the assembly is neither unlawful nor likely to cause a disturbance, the authorities cannot disperse it. Section 141 of the Penal Code provides that, “An assembly of five or more persons is designated an ‘unlawful assembly’ if the common object of the persons composing that assembly is –  
First.—To overawe by criminal force, or show of criminal force, the Union Parliament or the Government, or any public servant in the exercise of the lawful power of such public servant; or



Second.—To resist the execution of any law, or of any legal process; or

Third.—To commit any mischief or criminal trespass, or other offence; or

Fourth.—By means of criminal force, or shown of criminal force, to any person to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

Fifth.—By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.”

6. The peaceful processions of the monks did not use or show criminal force, as is prohibited by Section 141 (First). In fact, these monks had neither the intent to commit nor did they commit a crime – thus, they were not an “unlawful assembly”. Nonetheless, the SPDC determined that they were an unlawful assembly. However, even after such a declaration, the SPDC must disperse the assembly properly, without immediately resorting to violence. Section 130(2) of the Code of Criminal Procedure provides that officers dispersing a demonstration must “use as little force, and do as little injury to person and property, as may be consistent with dispersing the assembly and arresting and detaining such persons.” The SPDC, by electing to shoot at the monks, instead used unreasonable and disproportionate force to disperse the peaceful demonstration, thus violating the laws.

7. In seeking justice and the rule of law in Burma, the Burma Lawyers’ Council condemns the above-mentioned SPDC acts and demands that:

- a. The SPDC publicly take action against responsible security or army officers who ordered the shooting of the peacefully demonstrating monks.
- b. The SPDC publicly announce that their security and army officers have committed crimes against the monks and publicly apologize.
- c. To show that they respect human rights on the basis of the Rule of Law, the SPDC must give licenses to the public and the monks to conduct their peaceful demonstrations and marches in accordance with the current rules contained in the Police Act.

\* \* \* \* \*



**(D.2) The Burma Lawyers' Council's Call for Justice for the Burmese Military Junta's Violent Crackdown of the Peaceful Civilian and Monk Demonstrations**

THE BURMA LAWYERS' COUNCIL'S CALL FOR JUSTICE ON BEHALF OF THE PEOPLE OF  
BURMA FOR THE BURMESE MILITARY JUNTA'S  
VIOLENT CRACKDOWN OF THE PEACEFUL CIVILIAN AND  
MONK DEMONSTRATIONS

BY: LEGAL ANALYSIS SECTION  
(5-10-2007)

By late September, the streets of Burmese towns and cities had swelled with popular mass demonstrations expressing the Burmese people's desire for democracy and basic human rights. These peaceful demonstrations were a legitimate expression of the Burmese people's frustrations with the lack of political and civil freedoms in their nation and increasing hardships that ordinary Burmese people face in their daily lives. Specifically, the sudden and unannounced gas price hike had compounded the financial miseries of the Burmese population that already suffers with one of lowest economic standards of living in the developing world. The military junta's decision to unilaterally raise gas prices not only left millions unable even to simply travel to their jobs but also caused the costs of nearly all goods to suddenly soar. As the Foreign Minister of Malaysia stated before the United Nations, these demonstrations were a "justified" response to decades of abuse at the hands of an unelected military dictatorship.

From the legal perspective, these demonstrations were conducted within the bounds of the law. They clearly are not Offences Against the Public Tranquility, as delineated under Chapter VII of the Burma Penal Code. Chapter VII, Subsection 141 states:

An assembly of five or more persons is designated an "unlawful assembly", if the common object of the persons composing that assembly is—

First—To overawe by criminal force, or show of criminal force, the Union Parliament or the Government, or any public servant in the exercise of the lawful power of such public servant; or

Second—To resist the execution of law, or of any legal process; or

Third—To commit any mischief or criminal trespass, or other; or

Fourth—By means of criminal force, or show of criminal force, to any person to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

Fifth—By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit what he is legally entitled to do.

Clearly, peaceful demonstrations of ordinary Burmese citizens and Buddhist monks expressing their desires for basic human fairness cannot be described as a criminal force or show of criminal force. These people came together in the streets of



Burma to simply request what is their natural right: freedom. The demonstrators did not resist any legitimate execution of law nor did they intend to deprive any other citizen of right or property. Rather, these demonstrations were simply the natural reaction to injustice; namely, to not be silent and show courage in the face of evil.

It is apparent that the mass demonstrations in which ordinary Burmese citizens and Buddhist monks participated were justified and not “unlawful assemblies” under Burmese law. However, for the sake of argument, even if these demonstrations were “unlawful assemblies” under Burmese Law and the military junta was legally authorized to disperse the demonstrators, their actions still cannot be deemed lawful. Pursuant to Chapter IX of the Burmese Code of Criminal Procedure, Subsections 127 – 128, the authorities “may command any unlawful assembly, or any assembly of five or more persons likely to cause a disturbance of the public peace, to disperse; and it shall thereupon be the duty of the members of such assembly to disperse accordingly”. Subsection 128 states that if the “assembly does not disperse or it, without being so commanded, it [sic] conducts itself in such a manner as to show a determination not to disperse” the authorities “may proceed to disperse such assembly by force” and Subsection 129 states the authorities “may cause [the assembly] to be dispersed by military force”.

Firstly, it must be recognized that the demonstrators were unarmed civilians and Buddhist monks who did not in any way present a “like[lihood] to cause a disturbance to public peace”. In fact, they represented the public peace: the monks calmly repeated prayers while the civilians linked hands to protect the monks. If anyone caused a disturbance to the public peace, it was the military regime. Furthermore, Subsection 130 adds that “[e]very such officer shall obey such [order to disperse the assembly] in such manner as he thinks fit, but in so doing shall use as little force, and do as little injury to person, and property as may be consistent with dispersing the assembly”. On September 28, 2007 the New Light of Myanmar reported that nine demonstrators had died during the military’s dispersal of the demonstrations; however, on October 1, 2007 the Democratic Voice of Burma (DVB) had a much more reliable and higher number of over 100 dead and over 2,000 arrests. Thus, it is clear in light of the peaceful demonstrations participated in by ordinary Burmese citizens and Buddhist monks that the military’s methods in dispersing the demonstrators were disproportionate and not consistent with the legal mandate of Subsection 130 “**to do as little injury as may be consistent with dispersing the assembly**”. This point is made all the more vivid by the horrific scene that was viewed all over the world of the unarmed Japanese journalist, Mr. Kenji Nagai, being murdered by a soldier dispersing the crowds. The use of live ammunition against unarmed civilians and Buddhist monks can in no way be deemed proportionate or justified. Rather, the conduct of the military regime in crushing a peaceful and justifiable demonstration, which was not an “unlawful assembly” under Burmese law, must be called what it really is: simply another crime against humanity perpetrated with complete impunity by an illegitimate military dictatorship.

The British Broadcasting Corporation (BBC), the DVB, and the Associated Press (AP), among other international media outlets, have widely cited foreign ministers in Burma for the high numbers of casualties sustained by the peaceful demonstrators during the violent military crackdown. The deaths of these demonstrators, which the military junta openly concedes, are neither justified nor legal under Burmese law or



international law norms. While the high death toll has been widely reported and openly acknowledged, the Junta has conspired to conceal the evidence of these deaths by immediately cremating the remains of the fallen peaceful demonstrators. This act of concealment and destruction of the protestors' bodies violates Chapter XI, Subsection 201, of the Burmese Penal Code:

“Whoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the commission of that offence to disappear, with the intention of screening the offender from legal punishment... shall, if the offence with [sic] he knows or believes to been committed is punishable with death, be punished with imprisonment... and shall also be liable to fine”.

Additionally, Subsection 212 states:

“Whenever an offence has been committed, whoever harbours or conceals a person whom he knows or has reason to believe to be the offender, with the intention of screening him from punishment... shall, if the offence is punishable with death, be punished with imprisonment... and shall also be liable to fine.”

Thus, not only has the junta committed crimes by destroying evidence of murder, but it also deprived the grieving families of the basic and traditional rite of properly mourning their dead.

Burmese law requires that the deaths caused by the junta's violent crackdown of the peaceful protests be investigated and, where wrongdoing is found, that the offenders be prosecuted. The Burma Code of Criminal Procedure, Chapter XIV, Subsection 176, states:

When any person dies while in the custody of the police, and, unless a first information report has been recorded.... the nearest Magistrate empowered to hold inquests shall hold an inquiry into the cause of death, in addition to the investigation held by the police-officer, and in conducting such inquiry he shall have all the powers which he would have in holding an inquiry into an offense. The Magistrate holding such an inquiry shall record the evidence taken by him in connection therewith in the manner hereinafter prescribed for summons cases, and shall come to a finding as to the cause of death.

As previously cited the DVB has reported that over 2,000 demonstrators have been arrested and detained, however none of these arrests or detentions have been made in accordance with Burmese law or any norm of international law. Pursuant to Burmese Criminal Procedure Law, for an arrest to be lawful, the arresting officer must first obtain an arrest warrant. Under Burmese Criminal Procedure Law Chapter V, Subsection 54, an arresting officer may make a warrant-less arrest as delineated:



54. (1) Any police-officer may, without an order from a Magistrate and without a warrant, arrest-

First, any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion of his having been concerned...

In regards to the arrest of the peaceful demonstrators, there was no reasonable suspicion that these demonstrators had committed cognizable criminal offenses nor was there any credible information that these demonstrators had partaken in criminal acts. Thus, the arrests of these peaceful demonstrators cannot be deemed lawful and it was instead the junta's conduct that was illegal under Burmese law. Additionally, Chapter V of Burmese Criminal Procedure Law, Subsections 60 - 62, state:

60. A police-officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions herein contained as to bail, take or send the person arrested before the officer in the charge of a police-station.

61. No police-officer, shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to [the police-station, and from there to the Magistrate's Court].

62. Officers in charge of police-stations shall report to the District Magistrate, or, if he so directs, to the Sub-divisional Magistrate, the cases of all persons arrested without warrant within the limits of their respective stations, whether such persons have been admitted to bail or otherwise.

Thus, in detaining demonstrators without warrants and not bringing the detainees before the Magistrates, the junta has ignored the basic tenets of the Rule of Law and violated Burmese law and every norm of international law at every turn. Simply, the junta's actions in arresting and detaining the peaceful demonstrators cannot be described as, in the words of the Burmese Foreign Minister, "exercised in the utmost discretion" but rather are the actions of criminal thugs.

It has been widely reported in the international media that the military has raided monasteries, searched and beaten Buddhist monks, as well as detained the monks in the monasteries like prisoners. The military's action in attacking monasteries violates Burmese Penal Code Chapter XV of Offenses Relating to Religion Subsection 295, which states:



Whoever destroys, damages or defiles any place of worship, or any object held sacred by any class or persons with the intention of thereby insulting the religion of any class of person or with the knowledge that any class of persons is likely to consider such destruction, damage or defilement as an insult to their religion, shall be punished with imprisonment... or with fine, or with both.

Pursuant to Burmese Criminal Procedure Law Chapter VII B.-Search Warrants, a search warrant is required to search the premises and belongings of those accused of criminal offenses. Firstly, one must ask what crimes these Buddhist monks have been accused of that would even permit the issuance of a warrant to search the monasteries. Secondly, it is clear that the searches of these monasteries were conducted unlawfully because they were conducted without the issuance of any search warrant. Rather, these searches were criminal trespasses on behalf of the military and clearly demonstrate the junta's utter lack of reverence for the religion it espouses to serve.

In conclusion, the acts perpetrated against the peaceful demonstrations in which ordinary Burmese civilians and Buddhist monks participated were simply crimes and unjustifiable in any manner. The demonstrations were the spontaneous result of a people's exhaustion with suffering under the oppression of a cruel illegitimate regime and were completely justified. These peaceful demonstrations cannot be described as "unlawful assemblies" and therefore the junta's crushing of these legitimate protests must be deemed crimes against humanity and condemned by all nations who uphold justice.

The Burma Lawyers' Council, on behalf of the people of Burma, demands:

- That the international community along with democratic groups of Burma conduct an international and independent investigation of the Burmese military junta's violent crackdown of the peaceful demonstrations.
- That those found to have committed criminal acts against Burmese civilians and Buddhist monks and those responsible for ordering these actions be held to account for their crimes consistent with Burmese law and international law.
- That those who have been found to have perpetrated these criminal acts compensate the victims and the families of the victims.
- That all political prisoners in Burma be released immediately.
- That true and genuine reconciliation processes begin in Burma immediately.
- That those responsible for past crimes against humanity, war crimes, and genocide in Burma be brought to justice and their impunity ended.
- That those who have been found to have perpetrated these past criminal acts compensate the victims and the families of the victims.
- That the people of Burma be permitted to live free of oppression and be able to choose democracy.

\* \* \* \* \*



**(D.3) Request for ILO's Intervention in Burma for Violations of ILO Principles by the Ruling Military Regime.**

September 3, 2007

Mr. Kari Tapiola  
Executive Director  
International Labor Organization  
4 route des Morillons  
CH-1211 Genève 22  
Switzerland

Via E-Mail (ednorm@ilo.org)

Subject: Request for ILO Intervention in Burma for Violations of ILO Principles by the Ruling Military Regime

Dear Mr. Tapiola:

Warm greetings from the Burma Lawyers' Council. On behalf of the BLC as well as the oppressed Burmese people, I would like to express my gratitude to you and the ILO for your previous and current contributions to promote the labor rights of the people in Burma. Please find below information on additional violations of labor rights by the SPDC.

1. It has come to the attention of the Burma Lawyers' Council (BLC) that a large number of civil service and military personnel in Burma have recently tried, unsuccessfully, to resign from their positions. The State Peace and Development Committee (SPDC) has required them to continue working against their will. The BLC has also learned that, in response to the ongoing protests around the country, the SPDC has been forcing teachers to act as security guards in schools to monitor the protests. The BLC views these practices by the SPDC as forced labor that violates the "Fundamental Principles and Rights at Work" of the International Labour Organization (ILO) and the ILO Forced Labour Convention of 1930.

2. In February 2007, the ILO concluded an "Understanding" with the SPDC designed to provide "a mechanism to enable victims of forced labor to seek redress."<sup>1</sup> The Understanding provides alleged victims full freedom to submit complaints to the ILO Liaison Officer in Rangoon. The Liaison Officer then makes a confidential preliminary assessment as to whether a case involves forced labor so that such cases can be investigated by the SPDC authorities and appropriate action taken against the perpetrators. The Understanding incorporates guarantees that no retaliatory action will be taken against complainants.

3. The BLC is deeply concerned that the SPDC will not honor the protections in the ILO Understanding, particularly for government personnel who resign from their



posts. The SPDC has a history of intimidating citizens to discourage complaints. Government employees are particularly susceptible to intimidation because they know firsthand how the SPDC operates. The Understanding also poses practical difficulties; the Liaison Officer is located in Rangoon, far from workers in rural areas who are likely to be exploited. Moreover, the Understanding authorizes the SPDC, rather than a neutral body, to investigate alleged cases of forced labor. The BLC questions whether the SPDC is capable of investigating and punishing a perpetrator of forced labor when the perpetrator is the SPDC itself. Finally, the BLC anticipates that the SPDC will argue that refusing to accept a resignation is not forced labor. This letter aims to clarify that such action is indeed a type of forced labor.

4. While the ability of civil servants to resign depends on the terms of their contracts, all employees whose contracts have come to an end or who are otherwise resigning in compliance with applicable law must not be forced to continue to work. The BLC recognizes that the refusal to accept a job resignation is not a traditional form of forced labor. Nonetheless, it clearly fits the ILO definition, which provides that forced labor is “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.”<sup>2</sup> First, the fear of the SPDC constitutes the “menace of penalty.” The SPDC is a brutal military regime that has a long history of harshly punishing anyone who disagrees with its policies or disobeys an order. Second, individuals who submit notices of resignation are clearly not offering themselves voluntarily when they are forced to continue to work.<sup>3</sup>

5. In a 2004 letter to the United Nations, the SPDC claimed that the Burmese military is a completely voluntary force.<sup>4</sup> There is clear evidence that this declaration is false.<sup>5</sup> Nonetheless, if the SPDC claims that all soldiers are voluntary, it must permit them to resign. Forcing a soldier to continue to serve after resignation would, in addition to violating international labor standards, contradict the SPDC’s own statement to the UN.

6. Similarly, the SPDC is engaging in forced labor when it requires teachers, against their will, to monitor school premises, often even at night, in order to alert authorities about peaceful political activities. When they were originally hired, these teachers agreed to educate their fellow citizens, not act as spies. Moreover, they are being forced to participate in the violation of a fundamental human right, namely that of freedom of expression.

7. The abolition of forced labor as defined and codified in the 1930 ILO Convention has risen to the status of *jus cogens* over the past century.<sup>6</sup> The SPDC has an obligation not only to the people of Burma but also to the international community to uphold its commitment to take all measures to stop forced labor.

8. The BLC respectfully requests the ILO to acknowledge that refusal by the SPDC to accept lawful resignations and forcing educators to act as security guard informants is forced labor, and to make clear to the SPDC that such practices are unacceptable and inhumane. There needs to be a fair and transparent procedure by



which military personnel, civil servants, and teachers can report these violations to an objective organization without fear of retaliation. The investigation of complaints should be performed by a body with no ties to the SPDC.

\* \* \* \* \*

---

**(Endnotes)**

<sup>1</sup> ILO Press Release, February 26, 2007, [http://www.ilo.org/global/About\\_the\\_ILO/Media\\_and\\_public\\_information/Press\\_releases/lang—en/WCMS\\_081868/index.htm](http://www.ilo.org/global/About_the_ILO/Media_and_public_information/Press_releases/lang—en/WCMS_081868/index.htm).

<sup>2</sup> International Labour Organization, “Rules of the Game: A Brief Introduction to International Labour Standards,” p. 28 (2005).

<sup>3</sup> Although the ILO definition makes exceptions for “compulsory military service” and “normal civic obligations”, the instances at issue here do not fall into either of those categories. According to the SPDC, there is no compulsory military service in Burma; furthermore, civil servants whose primary job is government work are not performing “normal civic obligations.”

<sup>4</sup> Child Soldiers Global Report 2004, [http://www.child-soldiers.org/document\\_get.php?id=860](http://www.child-soldiers.org/document_get.php?id=860). The letter provided: “The Myanmar Armed Forces is an all volunteer force and those entering the military do so of their own free will. There is neither a draft system nor forced conscription by the Government of Myanmar. Forced conscription in any form is strictly prohibited throughout the country.”

<sup>5</sup> See, e.g., Yeni, “Running Scared”, March 2006, <http://www.irrawaddy.org/aviewer.asp?a=5535&z=102>.

<sup>6</sup> General Survey on the Eradication of Forced Labour, <http://www.ilo.org/public/english/standards/relm/ilc/ilc96/pdf/rep-iii-1b.pdf>. “Jus cogens” is a principle of international law that is based on values fundamental to the international community and that cannot be set aside.

---



**(D.4) Burma Justice Committee of UK present petitions to the UN**

The **Burma Justice Committee** will be launched today in the House of Lords. The Committee has been formed against the backdrop of continuing human rights abuses within Burma, as the military junta continues to repress anyone who questions their regime. Following the recent uprisings in protest at the doubling of fuel prices, many have been killed, imprisoned, and beaten by representatives of the junta.

The **Burma Justice Committee** will work for the restoration of the rule of law within Burma, and will fight against the violation of the human rights of innocent citizens. Comprised of lawyers, parliamentarians and other representatives, the Committee has today presented petitions to the United Nations' Working Group on Arbitrary Detention, on behalf of [three] Burmese currently detained by the Junta.

Chairman of the Bar-elect, Tim Dutton QC, said:

*“Legal help is vital to those who are being made to suffer at the hands of the military forces and their henchmen in Burma. There has been a spontaneous response from lawyers from around the world to the initiative which has led to the creation of the **Burma Justice Committee**. The Committee will be able to draw on a wide range of legal expertise with experienced barristers and other lawyers in a range of disciplines to assist victims and their families, who have been imprisoned, tortured, and denied their rights. The Committee will examine all available steps which can be taken by way of legal redress against the perpetrators”*

Lord Alton of Liverpool said:

*“At this crucial moment in Burma's history it is more important than ever that the ruling military junta realise that the free world cares passionately about how dissident voices are treated. The role which international lawyers can offer in promoting justice, free speech and democracy is highly important, and I am delighted to be able to host the meeting which gives voice to those concerned”.*

\* \* \* \* \*



# **Burma Lawyers' Council**

**EVERYONE IS EQUAL BEFORE THE LAW.**

Wisdom is power to transform the society into  
a just, free, peaceful and developed one.

## **MISSION STATEMENT**

“By vigorously opposing all unjust and oppressive laws, and by helping restore the principle of the Rule of Law, the Burma Lawyers Council aims to contribute to the transformation of Burma where all the citizens enjoy the equal protection of law under the democratic federal constitution which will guarantee fundamentals of human rights.”

## **THE STATUS OF ORGANIZATION**

The Burma Lawyers' Council is an independent organization which was formed in a liberated area of Burma in 1994. It is neither aligned nor is it under the authority of any political organization. Individual lawyers and legal academics have joined together of their own free will to form this organization.

## **OBJECTIVES OF THE BLC**

- Promote and assist in the educating, implementing, restoring and improving basic human rights, democratic rights, and the rule of law in Burma;
- Assist in drafting and implementing a constitution for Burma, and in associated matters of legal education; and
- Participate and cooperate in the emergence of a Civil Society in Burma.

**BURMA LAWYERS' COUNCIL**

P.O Box 144 Mae Sod, Tak, 63110 Thailand

Email: [blcsan@ksc.th.com](mailto:blcsan@ksc.th.com), Website: [www.blc-burma.org](http://www.blc-burma.org)

---