

MYANMAR: TOWARDS THE ELECTIONS

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MYANMAR: TOWARDS THE ELECTIONS

EXECUTIVE SUMMARY AND RECOMMENDATIONS

The bizarre prosecution and conviction of opposition leader and Nobel Peace laureate Aung San Suu Kyi for violating her house arrest has returned attention to repression in Myanmar, as preparations were underway for the first national elections in twenty years, now scheduled for 2010. This further undermined what little credibility the exercise may have had, especially when based on a constitution that institutionalises the military's political role. The UN Secretary-General's July visit, which produced no tangible results, added to the gloom. But while the elections will not be free and fair – a number of prominent regime opponents have been arrested and sentenced to prison terms over the last year – the constitution and elections together will fundamentally change the political landscape in a way the government may not be able to control. Senior Generals Than Shwe and Maung Aye may soon step down or move to ceremonial roles, making way for a younger military generation. All stakeholders should be alert to opportunities that may arise to push the new government toward reform and reconciliation.

At first glance, the obstacles to change seem overwhelming. The 2008 constitution entrenches military power by reserving substantial blocs of seats in the national and local legislatures for the army, creating a strong new national defence and security council and vesting extraordinary powers in the commander-in-chief. It prevents Aung San Suu Kyi from standing for president, even if she were not imprisoned. It is extremely difficult to amend. And while not all regulations relating to the administration of the elections have been announced, they are unlikely to offer much room for manoeuvre to opposition parties.

But the elections are significant because the controversial constitution on which they are based involves a complete reconfiguration of the political structure – establishing a presidential system of government with a bicameral legislature as well as fourteen regional governments and assemblies – the most wide-ranging shake-up in a generation. The change will not inevitably be for the better, but it offers an opportunity to influence the future direction of the country. Ultimately, even assuming that the intention of the regime is to consolidate

military rule rather than begin a transition away from it, such processes often lead in unexpected directions.

This report looks at the elections in the context of Myanmar's constitutional history. It examines key provisions of the 2008 constitution and shows how many of the controversial articles were simply taken from its 1947 or 1974 predecessors. Noteworthy new provisions include strict requirements on presidential candidates, the establishment of state/regional legislatures and governments, the reservation of legislative seats for the military, military control of key security ministries, the authority granted to the military to administer its own affairs (in particular military justice) and the creation of a constitutional tribunal.

Criticism of the constitution from groups within Myanmar has focused on military control, ethnic autonomy, qualifications for political office, and the very difficult amendment procedures. The main reaction of the populace to it and the forthcoming elections is indifference, rooted in a belief that nothing much will change. Some of the so-called ceasefire groups – ethnic minorities that have ended their conflicts with the government – are endorsing ethnic political parties that will take part in the polls. These groups take a negative view of the constitution but feel that there may be some limited opening of political space, particularly at the regional level, and that they should position themselves to take advantage of this. There are increased tensions, however, as the regime is pushing these groups to transform into border guard forces partially under the command of the national army.

The National League for Democracy (NLD), winner of the 1990 elections, has said it will only take part if the constitution is changed, and it is given the freedom to organise. Assuming this will not happen, it is not yet clear if it will call for a complete boycott in an attempt to deny the elections legitimacy or urge its supporters to vote for other candidates. A boycott could play into the hands of the military government, since it would not prevent the election from going ahead and would mainly deprive non-government candidates of votes, potentially narrowing the range of voices in future legislatures.

The Myanmar authorities must make the electoral process more credible. Aung San Suu Kyi and all other political prisoners must be released now and allowed to participate fully in the electoral process; politically-motivated arrests must cease. It is also critical that key electoral legislation be promulgated as soon as possible, in a way that allows parties to register without undue restriction, gives space for canvassing activities and ensures transparent counting of votes.

The international community, including Myanmar's ASEAN neighbours, must continue to press for these measures while looking for opportunities that the elections may bring. This will require a pragmatic and nuanced strategy towards the new government at the very time, following a deeply flawed electoral process, when pressure will be greatest for a tough stance. The new Myanmar government, whatever its policies, will not be capable of reversing overnight a culture of impunity and decades of abuses and political restrictions. But following the elections, the international community must be ready to respond to any incremental positive steps in a calibrated and timely fashion. To have any hope of inducing a reform course, it is critical to find ways to communicate unambiguously that a renormalisation of external relations is possible.

RECOMMENDATIONS

To Members of the Association of South East Asian Nations (ASEAN):

1. Make clear to Myanmar authorities that ASEAN member states support the release of political prisoners; enactment of timely and reasonable administrative regulations for registration of political parties; permission for domestic and foreign election monitors to be present throughout the country no less than a month before the scheduled polling date; and a green light for freedom of movement for print and broadcast journalists from ASEAN countries.
2. Consider offering, as and when appropriate, parliamentary exchanges with the newly elected government, assistance in setting up parliamentary committees and other steps that might push the door open a little wider.
3. Outline for Myanmar authorities the steps they would have to take for the elections to be perceived as credible.
4. Build on the positive example set by ASEAN following Cyclone Nargis by acting as a "diplomatic bridge" between Myanmar and the international community – explaining the latter's concerns to Myanmar and vice versa.

To Western Governments:

5. Articulate clear expectations for the electoral process and highlight where it fails to meet international standards.
6. State clearly what the West expects of Myanmar in order for relations to improve; send clear messages before the post-election government is in place that a process of normalising relations is possible; and indicate that positive steps will be met with timely, calibrated responses.
7. Suspend restrictions on high-level bilateral contacts with the new government, along with restrictions on its members' travel, to enable the diplomatic exchanges that will be required in order to communicate the necessary messages.
8. Maintain the targeted financial sanctions against individual leaders, while keeping them under review so that they can be adjusted in light of developments.

To the UN Secretary-General and the relevant agencies of the UN System:

9. Keep an active good offices process, including the personal engagement of the Secretary-General as well as the efforts of his Special Adviser, so as to be in a position to take advantage of any unexpected opportunities that may arise. A multi-level political presence on the ground can be valuable in this respect.
10. Consider providing relevant and appropriate electoral assistance, while abiding by UN standards, including technical discussions with the Myanmar authorities at an early stage on international expectations and experiences from other countries.
11. Begin, through relevant bodies (such as the United Nations Development Programme) and in cooperation with other international institutions (such as the World Bank), activities aimed at strengthening the capacity of civilian institutions of governance. This should be implemented in an incremental manner, based on careful assessments of the space for conducting such activities.

To the Myanmar Government:

12. Release Aung San Suu Kyi and all other political prisoners.
13. Desist from pre-election arrests and prosecution of perceived political opponents or dissidents.

14. Promulgate fair administrative laws and regulations relating to the conduct of the election as soon as possible.
15. Minimise restrictions on the registration of political parties and on canvassing activities and put in place procedures to ensure the transparent counting of votes.
16. Give greater importance to the ethnic dimension of the political situation, including by:
 - a) implementing a nationwide ceasefire and ensuring and facilitating humanitarian access to former conflict areas;
 - b) taking steps to reduce tensions with ethnic political and ceasefire organisations and giving them assurances about their political and military status in the lead-up to the elections; and
 - c) committing to select chief ministers from among the elected representatives of state legislatures.

To Other Stakeholders in Myanmar, including the Political Opposition:

17. Encourage the broadest possible participation in the election process, even if individual parties or organisations choose not to participate.
18. Encourage full participation of the electorate in campaigning and voting.

To Donors, Non-Governmental Organisations and Institutes:

19. Support the provision of in-country civic education to the Myanmar electorate if possible, as well as through exiled media organisations and international Burmese-language radio stations.
20. Support the exposure of new legislators to the workings of other legislatures, particularly those in the region and in other countries that are emerging or have recently emerged from authoritarian rule, in order to build capacity and work towards normalising relations.
21. Be prepared to respond quickly to opportunities to rebuild and/or reform key political and economic institutions, as well as social infrastructure, if or when opportunities arise.
22. Provide humanitarian and development support to ethnic regions, particularly special autonomous areas.

Yangon/Brussels, 20 August 2009

MYANMAR: TOWARDS THE ELECTIONS

I. INTRODUCTION

Few countries have narrowed the political space for their citizens as much as Myanmar, but this makes the search for openings all the more important – and upcoming elections just might provide some, despite all efforts of the country's military rulers to ensure otherwise.

Sometime in 2010, citizens of Myanmar will go to the polls to vote in an election that will not be free, based on a new constitution that was adopted in a referendum held during the May 2008 Cyclone Nargis emergency. Amid allegations of abuse and irregularities, that referendum produced what the government said was a 92 per cent approval rate with a 98 per cent turnout. It was part of the seven-step roadmap to “disciplined” democracy that the military government announced in 2003.

The arrest of Aung San Suu Kyi on 14 May 2009, less than two weeks before her most recent term of house arrest was due to expire, and her subsequent conviction is widely regarded as evidence that the country's military rulers want to ensure that she will play no role in the elections in 2010. There were earlier signs that they could be “clearing the decks” for the elections.¹ In late 2008 and early 2009, scores of prominent dissidents, most arrested in connection with the September 2007 demonstrations, were sentenced to prison terms of up to 65 years.² Other leading opposition figures remain in detention, including Shan Nationalities League for Democracy leader Khun Tun Oo, who is serving a 93-year term. This means that many of the most outspoken opponents of the government will be silenced during the election period. Longstanding restrictions on freedom of speech and assembly are likely to remain in force, severely limiting campaigning.

The new constitution itself has been greeted with deep scepticism or indifference, including among the educated elite, politically engaged members of civil society and

some ethnic leaders. The national convention that drew it up was not representative, since its composition did not reflect the outcome of the 1990 elections, in which Aung San Suu Kyi's National League for Democracy (NLD) party received almost 60 per cent of the vote. Key stakeholders were either excluded or felt compelled to withdraw. Criticism of the convention is banned by a 1996 order that carries a penalty of twenty years' imprisonment. And the decision to go ahead with the referendum just days after the worst natural disaster in Myanmar's history shocked and angered many.

The document is designed to institutionalise a major political role for the military. Very few people in Myanmar show much interest in the content, even fewer have seen or possess a copy of the text, and fewer yet have studied it. This is hardly unusual, though; constitutions are typically complex legal texts, the Myanmar constitution is particularly long and inaccessible, and the government has made little effort to disseminate its contents.³

But the possibility for openings that the constitution provides need to be examined and understood. For all the control that the regime intends to wield over the electoral process and subsequent appointments to key executive and legislative posts, Myanmar will still have a new bicameral national legislature in which representatives from different parties will sit; regional legislatures that allow for more ethnic representation than in the past; and some scope for increased interaction between civilian and military leaders, all in the context of a major generational transition at the top ranks of the military. The constitution may inadvertently provide the tools to open up a little space as the post-Thaw Shwe era grows closer.

This report takes a close look at the constitution and its provisions and at where those openings could lie in the

¹ Crisis Group interviews, Bangkok, February 2009.

² Two individuals received even longer sentences – the monk U Gambira, who was sentenced to 68 years, and Bo Min Yu Ko, member of an underground student organisation, who was sentenced to 104 years.

³ Thailand distributed 19 million copies of its new draft constitution to households across the country in July 2007, but it was widely felt that few people had read the 186-page text before voting took place on 19 August. See “Thai voters ‘approve new charter’”, BBC News, 19 August 2007; and Peter Janssen, “Thailand's 18th constitution a must read”, *Kuwait Times*, 27 July 2007.

post-election period. It does not present a general framework for policy on Myanmar, the subject of a Crisis Group report in January 2008.⁴ It is based on interviews conducted from January to March and in July 2009 in Myanmar, Thailand and China, as well as a detailed study of the authoritative Burmese-language text of the new constitution. Crisis Group spoke to a wide range of people, including representatives of the government, of the ethnic and political opposition in Myanmar and in exile and of ethnic armed groups (both ceasefire and non-ceasefire), as well as members of civil society, foreign diplomats based in or accredited to Myanmar, UN officials and representatives of local and international NGOs. Most of those interviewed asked to remain anonymous, due to the sensitive nature of the subject and potential risks, particularly to those interviewees based in Myanmar.

II. BRIEF CONSTITUTIONAL HISTORY

The 2008 constitution is the third since independence. The text draws heavily on the two previous constitutions and has also been shaped by the military's perception of their flaws. The country's constitutional history, therefore, offers important insights.

The first basic document ("The Constitution of the Union of Burma") was drawn up in 1947 and came into force after independence from the UK the following year. It established a multiparty democratic system, with a bicameral legislature. The head of state was a president, chosen by an electoral college made up of the members of the two chambers of the legislature. The government consisted of a prime minister and ministers, collectively responsible to the lower chamber. Elections under this constitution were held in 1947, 1951, 1956 and 1960.

The most important – and problematic – aspect of the 1947 constitution was its provisions for power sharing between the centre and various ethnic states. These were the result of hasty, fragile and inconsistent compromises with ethnic leaders. The Shan and Kayah states, for example, were given the notional right to secede from the union after a ten-year trial period, while others gave up this possibility in return for concessions or were never offered it. The powers and degree of autonomy delegated to the ethnic states varied considerably or, in the case of the Karen, were unresolved. No special provisions were made for a number of major groups (the Mon, Arakanese, Wa and others). The upshot was that even before independence, several ethnic rebellions had begun to simmer, and post-independence Burma was thrown into chaos.⁵ While ceasefires with a number of groups have diminished these conflicts, they have never been fully resolved.⁶

Following a decade of weak government characterised by political infighting and violence, as well as widespread insurgencies, the military under General Ne Win staged a coup d'état in 1958.⁷ The inadequate power-sharing arrangements in the constitution were a major factor in the multiple insurgencies that had weakened democratic government. However, shortly after the coup, the military issued a scathing criticism of the constitu-

⁴See Crisis Group Asia Report N°144, *Burma/Myanmar: After the Crackdown*, 31 January 2008. Other relevant Crisis Group reporting includes: Asia Report N°161, *Burma/Myanmar After Nargis: Time to Normalise Aid Relations*, 20 October 2008; Asia Briefing N°58, *Myanmar: New Threats to Humanitarian Aid*, 8 December 2006; Asia Briefing N°34, *Myanmar: Update on HIV/AIDS Policy*, 16 December 2004; Asia Report N°82, *Myanmar: Aid to the Border Areas*, 9 September 2004; Asia Report N°78, *Myanmar: Sanctions, Engagement or Another Way Forward?*, 26 April 2004; Asia Report N°52, *Myanmar Backgrounder: Ethnic Minority Politics*, 7 May 2003; Asia Briefing N°21, *Myanmar: The Future of the Armed Forces*, 27 September 2002; Asia Briefing N°15, *Myanmar: The HIV/AIDS Crisis*, 2 April 2002; Asia Report N°32, *Myanmar: The Politics of Humanitarian Aid*, 2 April 2002; Asia Report N°28, *Myanmar: The Military Regime's View of the World*, 7 December 2001; Asia Report N°27, *Myanmar: The Role of Civil Society*, 6 December 2001; and Asia Report N°11, *Burma/Myanmar: How Strong is the Military Regime?*, 21 December 2000.

⁵See Martin Smith, *Burma: Insurgency and the Politics of Ethnicity*, 2nd ed. (London, 1999), chapter 4.

⁶"Burma's Karen flee army offensive", BBC (online), 8 June 2009.

⁷For a detailed discussion of the events, see Mary P. Callahan, *Making Enemies: War and State Building in Burma* (Ithaca, 2003), chapter 7.

tion that focused on the rights and freedoms enshrined in the text “allowing every adult citizen [to be] equally free to express his views and desires upon all subjects in whatever way he wishes”, but which it feared were being used to promote sedition.⁸

After eighteen months, the military “caretaker government” organised elections in 1960 that returned power to civilian hands. But civilian rule did not last long. Against the backdrop of renewed political infighting in Rangoon, continued insurgency in the countryside and concerns that Shan State, in particular, might exercise its right to secession, the military seized power again in 1962. This time there would be no return to civilian rule. A “Revolutionary Council” was established to run the country, under the leadership of General Ne Win. The 1947 constitution was abrogated and all legislative, executive and judicial power placed in Ne Win’s hands. Radical economic and social policies were instituted with the aim of creating a socialist state isolated from outside influences. A political party (the Burma Socialist Programme Party, BSPP) and mass peasant and worker organisations were created to promote socialist ideology.

The Revolutionary Council attempted to address the perceived failures of the democratic period by banning political parties (except the BSPP), taking control of all media, publishers and printers and curtailing civil liberties. It addressed its fears over the unity of the state by abolishing the ethnic councils set up under the 1947 constitution, thereby dissolving local governments and bringing all areas of the country under centralised and uniform administrative control. Ethnic rights were framed in terms of equality of all minorities within a unitary state.

In 1969, Ne Win announced that a new constitution would be drafted, with popular participation, to return power to the people. The guidelines were laid down in 1971, and the commission appointed by the BSPP to fulfil this task requested inputs and held many meetings around the country. A first draft text was then produced and further consultations held. The “popular consultations” were used to justify controversial provisions, such as the unitary nature of the state. After approval of the second draft text by the BSPP, a census was conducted, the first since 1931, to draw up voting lists, and a national referendum was held in January 1974, with a reported turnout of over 95 per cent and a reported 90.19 per cent voting in favour.⁹

The 1974 constitution (“The constitution of the Socialist Republic of the Union of Burma”) established a socialist one-party state. There was in effect no separation of powers. The legislature was a unicameral People’s Assembly (Pyithu Hluttaw). This legislature elected a small group of its members to a Council of State, who in turn elected the president from among themselves. Executive power was in the hands of the president and the Council of State. The administrative structure of the country was revised, with the formation of seven Burman-majority divisions and seven ethnically designated states, recognising ethnic diversity in a symbolic way, while granting no actual autonomy. The state was unitary, as the text underlined in several places.¹⁰

Following the adoption of this constitution, elections were held the same year, with candidates drawn almost exclusively from the BSPP, which had been transformed from a small cadre party into a mass organisation. Ne Win, who had already given up his military position, became president; many of the other military officers who made up the Revolutionary Council were appointed, as civilians, to the Council of State. Subsequent elections were held in 1978, 1981 and 1985. The electorate was not presented with alternative candidates, and the one candidate on offer was almost always from the BSPP. These were Soviet-style elections, “not presented as a possible redistribution of power, but as an affirmation of the existing power”.¹¹ Ne Win relinquished the presidency in 1981 but remained chairman of the BSPP.

In 1987, continuing economic decline and increasing hardship led to student protests, the trigger being the government’s decision to demonetise much of the currency without warning or compensation by invalidating bank notes of certain denominations. The following year saw a near total collapse of law and order, with demonstrations across the country, violence increasing, and many state institutions ceasing to function. Ne Win stunned the nation by announcing his resignation as BSPP chairman in July, but this only increased popular demands for fundamental reform, something the BSPP seemed incapable of conceiving, much less implementing.

A nationwide strike on 8 August 1988 brought huge crowds onto the streets, but efforts by the administration to control the situation failed, and the use of indiscriminate violence by the security forces led to thousands of deaths. On 18 September, the army seized power, swiftly and violently cleared demonstrators from the

⁸ Quotes from a paper by the army’s directorate of education and psychological warfare entitled “Some Reflections on Our Constitution”, 17 October 1958, cited in Callahan, op. cit., p. 189.
⁹ For detailed discussion, see Robert H. Taylor, *The State in Myanmar* (London, 2009), chapter 5. (This is an extended version of *The State in Burma*, published in 1987.)

¹⁰ Some commentators have noted an apparent inconsistency between the unitary nature of the state and the use of the term “Union”. However, the Burmese word for union, *pyidaungsu*, is neutral between unitary and federal connotations.

¹¹ Taylor, op. cit., p. 328.

streets and established the State Law and Order Restoration Council (SLORC), a group of military officers under the leadership of General Saw Maung, to rule the country. The BSPP was dissolved, the 1974 constitution was abrogated, and it was announced that multiparty elections (a promise made by the BSPP in its dying days) would go ahead.¹²

A “Political Parties Registration Law” was promulgated on 27 September 1988. Many doubted that the military would honour its pledge to reintroduce a multiparty political system. Nevertheless, the prospect of elections galvanised political activity, and 235 parties registered with the election commission. The National League for Democracy (NLD), led by many of the most prominent anti-government figures of 1988 and with the charismatic Aung San Suu Kyi as general secretary, quickly became the best organised and most popular. The BSPP reformed as the National Unity Party (NUP). A number of veteran politicians and other prominent individuals established parties, including U Nu, the pre-1962 prime minister. Many ethnically or regionally based parties were also formed.¹³

A “Pyithu Hluttaw [People’s Assembly] Election Law”, promulgated on 31 May 1989, defined constituencies, persons entitled to vote and stand for election, procedures for the preparation of the electoral roll, procedures for voting and the counting of votes and the duties and powers of the election commission. The elections were held on 27 May 1990 in a climate that was far from free. The SLORC continued to rule through martial law, basic freedoms were restricted, and there were few possibilities for parties opposed to the regime to campaign. Many of the leaders of the NLD, which had become increasingly vocal in its criticisms of the SLORC, were arrested in July 1989, as was U Nu.

Under these conditions, many doubted the outcome of the elections could reflect the will of the electorate. Expecting the vote to be rigged, there were calls by opposition groups in exile for the NLD to boycott.¹⁴ The exiled Democratic Alliance of Burma (an umbrella of ethnic insurgent organisations and political groups formed by those who had fled the violence of 1988) prepared to announce a “provisional government” once the election fraud became clear. Virtually all diplomats reportedly

felt that a victory by the NUP was a foregone conclusion, particularly given the levels of intimidation.¹⁵

However, as the elections approached, and repression of opposition parties and intensive campaigning by the NUP failed to stem support for the opposition, the SLORC appeared to develop doubts about an acceptable outcome. SLORC Secretary-1 Major General Khin Nyunt stated on 12 April 1990 that the winning party would have to form a government, but that “only if a firm constitution can be drawn up ... will the government be a strong one”, and the military “will continue to carry out the responsibilities of the State while the constitution is being drafted ... even after the elections ... till a strong government has been formed”.¹⁶

On election day, 93 political parties participated, including the NLD and U Nu’s (both of whose leaders were in detention).¹⁷ Voting was reported to be fair, and there was apparently no manipulation of the count, probably in part due to the election law requiring that votes be counted in each constituency in the presence of the candidates (or their agents). The result stunned everyone. With a turnout of more than 72 per cent, the NLD received almost 60 per cent of the vote and won over 80 per cent of the seats in the legislature. The NUP won only 21 per cent of the vote, which, given the first-past-the-post electoral system, translated into a mere 2 per cent of the seats. In line with its pre-election warnings, the military declared on 27 July 1990, two months after the vote, that “the representatives elected by the people are those who have the responsibility to draw up the constitution of the future democratic State” and that the military would continue in power in the interim.¹⁸ Senior NLD figures, including Aung San Suu Kyi, remained under house arrest.¹⁹

¹² For a description of the events of 1988, see Smith, op. cit., chapter 1.

¹³ See Tin Maung Maung Than, *State Dominance in Myanmar*, Institute of Southeast Asian Studies (2006), chapter 9.

¹⁴ Crisis Group interview, individual active in the exiled opposition at that time, Bangkok, February 2009. See also S. Blaustein, “Burma’s surreal police state”, *The Nation* (Thailand), 30 April 1990.

¹⁵ Smith, op. cit., p. 414.

¹⁶ *Working People’s Daily*, 13 April 1990. Quote from Burma Press Summaries, April 1990, p. 10, available at <http://myanmarlibrary.org/docs3/BPS90-04.pdf>.

¹⁷ The remaining 142 parties had either dissolved before the election or had been de-registered by the Election Commission on various grounds, such as contacts with insurgent groups, boycotting or failing to contest the elections, or failure to contest the minimum three constituencies. See Tin Maung Maung Than, op. cit., chapter 9.

¹⁸ SLORC Declaration no. 1/90 of 27 July 1990, published in *Working People’s Daily*, 29 July 1990.

¹⁹ She was released only in 1995, under strict movement restrictions, and was then detained again in 2000 on the charge of attempting to violate these. She was released unconditionally in 2002, but arrested a year later, following an attack on her convoy, and returned to house arrest.

A long and halting process to draft a new constitution began on 9 January 1993, with the opening session of the “national convention” selected by the SLORC.²⁰ It culminated after fifteen years – including many recesses and a long adjournment – in a draft constitution finalised on 19 February 2008. The national convention included, contrary to the initial indications, only a small minority of elected representatives from the 1990 election, but rather was composed overwhelmingly of a diverse collection of delegates appointed or approved by the SLORC.²¹ The process was tightly controlled, with guidelines for the constitution laid down by the SLORC and freedom of debate severely constrained. The NLD was expelled when it withdrew in protest in 1995 and took no further part in the proceedings. In 1997, the SLORC restyled itself the State Peace and Development Council (SPDC). Some military and government positions were reshuffled, but the leadership remained the same, including the chairman, General Than Shwe (who had taken over leadership of the SLORC in 1992).

In 2003, the government announced a seven-step roadmap to “disciplined democracy” that included the completion of the national convention process, the drafting of a new constitution and the holding of elections. No timeframe was given. Many observers considered that the roadmap was a public relations effort and that the regime was not committed to moving ahead with the process. The very slow progress in implementing the first few steps seemed to confirm this assessment. However, senior members of the government always insisted there was a real commitment, and the delays may have reflected the complexity of implementing the required changes, rather than a lack of will.²² The commitment, however, likely had more to do with “discipline” than “democracy” – that is, the aim was to institutionalise the political role of the army and ensure the political and economic security of the current top leaders.

In February 2008, it was announced that a referendum on the draft constitution would be held in three months, with elections following in 2010. As noted above, the document was voted on even as parts of the country were in the midst of the humanitarian emergency created by Cyclone Nargis. The reported overwhelming voter turnout and approval – higher even than in the

1974 referendum – were thus symbolic of the lack of credibility of the whole process. There were many allegations of irregularities as well.²³

²⁰ The national convention was first announced on 24 April 1992 in SLORC Declaration 11/92, which stated that it would be convened “within six months”.

²¹ Elected representatives from the 1990 poll made up 107 of the 702 delegates (15 per cent) during the first sitting from 1993-1996. Subsequently, without the participation of the NLD, this number was reduced further.

²² For more discussion of the roadmap process, see Crisis Group Report, *Burma/Myanmar: After the Crackdown*, op. cit.

²³ See, for example, “Reject constitutional referendum”, Human Rights Watch, 16 May 2008.

III. THE 2008 CONSTITUTION

The 2008 constitution emerged from two decades of political developments that bear striking similarities to the period 1958-1974. In 1988, as in 1958, the military took power in a coup during a time of turmoil that it saw as threatening the unity of the state. Initial attempts to return power to civilian hands through elections organised by the military (in 1960 and 1990) failed, because the generals were not satisfied with the outcome.²⁴ In 1990, as in 1962, the military pledged that it would only hold state power temporarily. In each case, it began developing mass organisations to promote its political aims and embarked on a lengthy constitution-drafting process to address perceived deficiencies in the previous constitution and institutionalise a “civilianised” form of military rule before new elections took place.

Twenty years after taking power from the crumbling BSPP administration, the SPDC has now made explicit its plans for transition to a multiparty “disciplined democracy”. It has announced that the 2008 constitution will come into force on the day the Union Assembly (Pyidaungsu Hluttaw) chosen in the 2010 elections is convened.

The new constitution and the announced elections have been greeted in many quarters with great scepticism. After 50 years of military rule, in one form or another, many in Myanmar are understandably pessimistic that they will translate into real change. This pessimism is reinforced by the military’s insistence that it “be able to participate in the national political leadership role of the state”, as reflected in key provisions of the new constitution.

Nevertheless, as in 1988-1990, the prospect of elections has been a catalyst for much political activity. Although the law governing registration of political parties and the election law have yet to be promulgated, a number of veteran politicians and other prominent individuals have begun preparing to establish new parties, and there are indications that the authorities are doing the same. Several individuals have indicated that they are considering stand-

ing as independent candidates.²⁵ The ten parties from the 1990 elections that remain legally registered, including the NLD, are considering their position, with some (including the Shan Nationalities League for Democracy) having already declared that they will not take part.²⁶

The new constitution and elections may result in a scenario similar to that of 1974 – that is, the establishment of new institutions that create a civilian façade for continued military rule, rather than real political change – or they may put in place a framework under which the military might feel confident enough to begin a process of gradually sharing power with elected civilian politicians. In either case, understanding the text is important, since the 2008 constitution will play an important role in shaping the post-2010 political landscape.²⁷

A. KEY PROVISIONS

The 2008 constitution is a long and detailed document. It contains 457 sections and runs to 194 pages.²⁸ In places the language is ambiguous or unclear, making interpre-

²⁵ Crisis Group interviews, Yangon and Bangkok, January-February 2009. See also Nem Davies, “Independent candidates establish network to contest 2010 elections”, *Mizzima*, 3 March 2009.

²⁶ Of the 93 parties that contested the 1990 elections, it is known that at least fifteen subsequently disbanded, five were de-registered for “treasonous activity”, 56 were de-registered for failure to have an organisational structure or grassroots membership, and the registrations of five parties became void on the basis of a failure to have a minimum five-member central executive committee. The parties that remain registered according to Election Commission notifications and the official New Light of Myanmar are: National Unity Party (NUP), National League for Democracy (NLD), Shan Nationalities League for Democracy (SNLD), Kokang Democracy and Unity Party, Union Karen League, Union Pa-O National Organisation, Mro or Khami National Solidarity Organisation, Shan State Kokang Democratic Party, Wa National Development Party and Lahu National Development Party. See Tin Maung Maung Than, op. cit.

²⁷ At the same time, it is important not to overstate the significance of the text. Whether the post-election period will see the military more entrenched in its political role or gradually withdrawing from it may not depend on the constitution, or even on the military’s intentions. Experience from many countries shows that embarking on any process of constitutional change can lead to unintended results.

²⁸ All references in this report are to the official bilingual (English and Burmese) “Constitution of the Republic of the Union of Myanmar (2008)”, Ministry of Information, September 2008. (The Burmese and English texts are on facing pages, so there are the same number of pages for each.) Given that the English version is only a translation of the original document, where it has been translated poorly, Crisis Group has relied on its own translation of the Burmese language original.

²⁴ In 1960, power was transferred in line with the results of the election, whereas in 1990 the military did not implement the election results. The historical parallel was drawn explicitly by SLORC officials, with one reported as saying: “Look at the problems after the caretaker administration of 1958-60. Things did not work out then, and the army had to take power again in 1962. This time we do not want a repeat of any of those mistakes”. See Smith, op. cit., p. 416.

tation difficult – although some of the confusion is a result of translation issues. The discussion in this report is based on a detailed review of the English and Burmese texts (only the Burmese text is authoritative).

The key features are as follows (see also the diagram in Appendix B):

The structure of the state is similar to the present.

There will be seven ethnic states and seven regions (the new term for what are currently known as “divisions”). The capital, Nay Pyi Taw, is designated a union territory under the direct administration of the president. Within certain regions and states are six newly-designated self-administered areas (a “division” for the Wa, and “zones” for the Naga, Danu, Pa-O, Pa Laung and Kokang groups).

The constitution establishes a presidential system of governance with a bicameral legislature (the Pyidaungsu Hluttaw).

This is similar to the original 1947 constitution. It also establishes fourteen regional legislative bodies with fairly limited powers. There will thus be three concurrent votes in 2010: one for each of the two chambers of the union (national) legislature, and one for the region/state legislatures. A quarter of the seats in all legislatures are reserved for military personnel appointed by the commander-in-chief. (The commander-in-chief is selected by the National Defence and Security Council; see below.)

The government of each region and state will be headed by a chief minister,

appointed by the president from among the representatives to the legislature of that region or state. There will also be “leading bodies” for each of the six self-administered areas, which exercise limited legislative and executive powers in those areas.

The president is elected by an electoral college,

made up of all members of the union legislature. They will choose the president from three nominees by secret vote. One nominee is chosen by the elected representatives of the upper house, one by the elected representatives of the lower house and one by the military appointees of both houses. The two unsuccessful nominees become vice presidents.

The president is both head of state and head of government, but not head of the military.

The president is responsible for appointing ministers, other than the ministers for defence, home affairs and border affairs, who are chosen by the commander-in-chief. Legislative oversight of ministerial appointments is virtually non-existent.

The constitution sets out eligibility requirements for various positions.

Legislative representatives must have lived in Myanmar for the preceding ten years (except

for authorised official stays in foreign countries); must not be serving a prison term; must not owe allegiance to a foreign government, be a foreign subject/citizen or be entitled to equivalent rights and privileges; must not receive (or be a member of an organisation that receives) direct or indirect support from a foreign government, or foreign religious or other organisation; must not be a member of a religious order; and must not be a member of the civil service. The eligibility requirements for government ministers are similar.

In addition, the president and vice presidents must be well-acquainted with the affairs of the union (including political, administrative, economic and military); have lived in Myanmar for the preceding twenty years (except for authorised official absences); and must not have a parent, spouse, child or child-in-law who owes allegiance to a foreign power, is a foreign citizen or subject or enjoys equivalent rights and privileges.

The constitution establishes a powerful national defence and security council.

This council is chaired by the president, but the military has a majority: six of the eleven members consist of the commander-in-chief and his appointees. The commander-in-chief is not subject to legislative oversight and is chosen by the national defence and security council. The Constitution does not set out how decisions are made by the council. Another important body chaired by the president is the financial commission, which vets national and regional budgets, among other duties.

The highest judicial body is the Supreme Court.

However, the Supreme Court does not have jurisdiction over military justice, which is handled by a system of courts martial, in which the commander-in-chief has the power of final decision. Constitutional matters are also not within the jurisdiction of the Supreme Court. They are handled by a separate constitutional tribunal, whose members are chosen by the president and the speakers of the bicameral legislature and are appointed only for the five-year term of the legislature (unlike Supreme Court judges who hold office until the age of 70).

The constitution contains a fairly extensive bill of rights.

However, many of these rights are subject to existing laws – several of which severely limit them – and may be suspended during a state of emergency. Many rights are also guaranteed only for citizens.

The president may declare a state of emergency, in consultation with the national defence and security council, that confers broad powers on the commander-in-chief.

Three emergency scenarios are contemplated. (1) If administrative functions cannot be carried out in a region or state (or other area), the president may declare a local state of emergency and take over executive and

legislative power in that area. (2) If there is an emergency endangering the lives, shelter and property of the public in a region or state (or other area), the president may declare a state of emergency, allowing local administrative bodies to obtain the assistance of the military in carrying out their duties. The president may, if necessary, confer executive and judicial powers on the commander-in-chief. (3) If an emergency threatens the integrity of the Union or loss of sovereignty, the president may declare a countrywide state of emergency for one year, in which case legislative, executive and judicial powers are transferred to the commander-in-chief to speedily resolve the situation.

There is a fairly restrictive constitutional amendment procedure. Amendments require a three-quarters majority in the union legislature. For many of the more significant sections of the constitution, a national referendum is also required, with at least 50 per cent of eligible voters voting in favour of the amendment.

The constitution gives the military the right to administer and adjudicate all its own affairs and provides immunity for the SLORC and the SPDC, their members and any member of the government for any act done in the execution of their duties.

B. HISTORICAL INFLUENCES

Comparing the 2008 constitution with those of 1947 and 1974 shows that many of its provisions are not new. It is true that the main concern of the authorities in drafting the constitution was to secure a central place for the military in the political order – they have been explicit about this. But many of these provisions appeared in almost identical form in the 1974 or 1947 constitutions.

In many respects, the text of the constitution thus appears to owe more to adherence to precedent than Machiavellian drafting. It is also perhaps relevant that the late Dr Maung Maung – a prominent and controversial intellectual and legal scholar who was an official in the Ne Win/BSPP administration and briefly served as president in 1988 – may have had a role in shaping the text. He was a leading authority on the 1947 constitution and wrote widely on constitutionalism in Myanmar.²⁹ According to a well-connected Myanmar individual, Dr Maung Maung was provided with a government office following the SLORC coup in 1988 and tasked with develop-

ing the “backbone” of a new constitution.³⁰ If this is true, it is perhaps not surprising that the text draws heavily on previous constitutions, including on the following points:

The legislature. The bicameral legislature provided for in the 2008 constitution is similar to that established under the 1947 constitution.³¹ In both cases, the lower chamber has approximately twice as many members as the upper chamber.³² (The 1974 constitution established a unicameral legislature.) The state/region legislatures and the leading bodies of self-administered areas are new in the 2008 constitution. Neither the 1947 constitution nor the 2008 constitution gives the president a veto over legislation.

Election of the president. The provisions in the 2008 constitution for a presidential electoral college consisting of all members of the bicameral legislature resemble those in the 1947 constitution. Both constitutions provide the same five-year term of office.

Qualifications and restrictions on presidential candidates. The 1947 constitution required presidential candidates to be citizens, both of whose parents were born in Myanmar, and included other restrictions that are also found in the 2008 constitution, including on persons having allegiance to a foreign power or being subjects or citizens of a foreign country or entitled to the rights and privileges of same, as well as restrictions on anyone serving a prison term for a criminal offence.³³

Amendment procedures. The restrictive provisions on amending the 2008 constitution have been carried over, unchanged, from the 1974 constitution.³⁴ (The 1947 constitution required a two-thirds majority in the bicameral legislature and had no requirement for a referendum.)

Restrictions on the political participation of members of religious orders. The prohibition on members of religious orders voting or standing for election has been seen by some commentators as an attempt to disenfranchise an influential group (Buddhist monks), many of whom are strongly opposed to the military regime. However, this provision was included in the 1947 constitution at the request of the leaders of the Buddhist clergy – to keep religion untainted by politics, rather than the reverse – and was repeated in the 1974 constitution as

²⁹ A number of Dr Maung Maung's articles on the subject can be found in a recent collection of his writings edited by R. Taylor, *Dr. Maung Maung*, Institute of Southeast Asian Studies (2008).

³⁰ Crisis Group interviews, Bangkok and Yangon, January 2009.

³¹ Chapter VI, Parts II and III.

³² This is stipulated in the 1947 constitution, Section 83(2).

³³ Sections 74(i) and 74(vii)(2).

³⁴ Article 194(a), (b).

well as the 1989 election law.³⁵ Independence leader Aung San also expressed the view that monks should have no political role, saying “if we mix religion and politics, then we offend the spirit of religion itself”.³⁶

Bill of rights. Both the 2008 and the 1974 constitutions contain a reasonably extensive bill of rights (as did the 1947 constitution). Both permit these rights to be restricted by law for security reasons and, in the case of the 1974 constitution, to protect “the essence of the socialist system”.

Frequency of legislative sessions. Some commentators have expressed concern at the provision that the legislatures need only hold sessions once every twelve months, raising the prospect of a body that meets infrequently and for short periods (as the National People’s Congress in China does, for example), and which, therefore, may be of limited relevance for day-to-day matters of government. This raises genuine grounds for concern. However, the 1947 constitution – which governed the post-independence democratic period – contained an identical provision.³⁷ (The 1974 constitution required that regular sessions be convened at least twice a year, with a maximum of eight months between sessions.)

Noteworthy features of the 2008 constitution that do not have any precedent in previous constitutions include:

- ❑ the strict requirements on presidential candidates, in particular twenty years’ residency and the prohibition on spouses, children and children-in-law being subjects or citizens of a foreign country or entitled to enjoy the rights or privileges of same;
- ❑ the system for nominating presidential/vice presidential candidates;
- ❑ the establishment of state/regional legislatures and governments, as well as self-administered areas and their leading bodies;
- ❑ the reservation of legislative seats for the military and military control of key security ministries;
- ❑ the establishment of a powerful national defence and security council (the 1974 constitution provided for

a similar body, but its composition and powers were not defined in the constitution itself);³⁸

- ❑ the authority granted to the military to administer its own affairs, in particular military justice;
- ❑ broad provisions relating to states of emergency (the 1974 constitution also provided somewhat broad powers);³⁹ and
- ❑ the constitutional tribunal.

The aim of a number of these new elements appears to be, as the constitution declares in its “basic principles”, to give the military a leading political role.

C. CRITICISM

Most of the criticism of the constitution has focused on four areas: the role of the military, ethnic autonomy, qualifications for and exclusions from political office and amendment procedure.

The role of the military.⁴⁰ The military will wield considerable political power, including through its 25 per cent bloc of legislative seats, its right to nominate one of the three presidential candidates, its control of key security ministries and the powers given to the commander-in-chief. It will be free to administer its own affairs and under a state of emergency would have broad executive and legislative (and even judicial) authority. The centrality of the military in the future life of the nation is symbolised by the inclusion of a specific chapter titled “The Tatmadaw” (Defence Services), for which there is no precedent in either the 1974 or 1947 constitutions (although most of the specific provisions in the chapter are similar to those in previous constitutions). Concern has also been expressed about the immunity given to regime and government officials for actions taken since 1988 (that is, the SLORC and SPDC periods, when no constitution was in force).

Ethnic autonomy. It has been widely noted that the constitution provides only very limited ethnic autonomy.⁴¹ The establishment of a “genuine federal union” has been a longstanding demand of many ethnic people.⁴² But

³⁵ Section 76(4) of the 1947 constitution; Article 178(a) of the 1974 constitution; and Sections 7(a) and 10(a) of the 1989 election law.

³⁶ See Gustaaf Houtman, *Mental Culture in Burmese Crisis Politics*, Research Institute for Languages and Cultures of Asia and Africa (ILCAA), Tokyo University of Foreign Studies (Tokyo, 1999), chapter 12.

³⁷ Section 66.

³⁸ Article 54(b).

³⁹ Articles 76-78.

⁴⁰ See, for example, “New Myanmar constitution gives military leading role”, Reuters, 19 February 2008; and “Burma’s army digs in”, *Bangkok Post*, 1 May 2008.

⁴¹ See, for example, Aung Htoo, “Constitution and the ethnic nationalities”, *Democratic Voice of Burma*, 27 January 2009.

⁴² See Smith, op. cit. These aspirations are reflected in the draft federal constitution drawn up by the Ethnic Nationalities Council, available at www.enburma.org/fcdcc/fcdcc_draft.htm.

the constitution makes only very limited concessions in this direction, and the state remains in practice a unitary one.

Qualifications and exclusions. Considerable attention has focused on the restrictions in the constitution on eligibility for key positions, particularly the exclusion of Aung San Suu Kyi from the presidency (on the grounds that her sons are citizens of a foreign country) and, some claim, other positions.⁴³ Exiles will also be excluded from the presidency, cabinet and legislative seats, on the basis of provisions that require minimum periods of residency in Myanmar. Many domestic activists and opposition politicians are in detention and will, therefore, be excluded on that basis, although former political prisoners are not automatically barred. Members of religious orders are also excluded from standing as candidates or voting in the elections, which has been seen as discriminatory.⁴⁴

Amendment procedure. Finally, some commentators have expressed concern that the strict amendment procedures will “lock in” negative provisions and make a positive evolution in the constitutional framework impossible (since the 25 per cent of military seats in the legislature is sufficient to block amendments). A Burmese analyst based in Thailand stated that “if we cannot modify the constitution, democratisation in Burma cannot grow”.⁴⁵

There is no consensus on the relative importance of these flaws. Many opposition activists point to the military’s 25 per cent of legislative seats as a key element.⁴⁶ Others feel this would be acceptable if the amendment procedure were more flexible.⁴⁷ The restrictions on Aung San Suu Kyi standing for president are widely seen as deliberate and unacceptable, but some point out that the likelihood of her being nominated was anyway extremely low in present circumstances and that she might not as-

pire to such a position in any case.⁴⁸ Most ethnic representatives consider that they have obtained very little of substance in the constitution, but a number feel that the principle of state legislatures is important, even if they are only vested with extremely limited powers.⁴⁹ Although there is widespread concern at the restrictive nature of the amendment procedures, some note that constitutions can be abrogated, replaced or amended, despite drafters’ best efforts to set them in stone.⁵⁰

As noted above, the most common reaction to the constitution in Myanmar is indifference, reflecting a high level of political disillusionment. Many reject the constitutional process outright on the basis of general concerns about the process and content. This is the view of certain prominent political activists within the country, as well as many in exile. The Irrawaddy, a leading exile media organisation, noted prior to the May 2008 referendum that few of the people it spoke to expressed any interest in the actual content of the constitution: “In the absence of public debate on the constitution, most discussion among exiles and dissidents has focused on ways to effectively turn the referendum against the junta”.⁵¹

Some have adopted a more pragmatic approach, in particular a number of the ethnic ceasefire groups, as well as those (both Burman and ethnic) who are independent of the mainstream political opposition. This is not because they accept the constitution or even feel it will offer much in the way of opportunities. Rather, as a prominent Yangon-based analyst put it, “for those of us inside the country, the new constitution is a given – whether we like it or not”.⁵² An exiled ethnic nationality analyst said, “maybe things will open a crack after the elections, and we can then try to widen that crack, which is better than nothing. But if we’re not in the process, we can’t widen the crack”.⁵³ It is harder for the NLD, the Shan Nationalities League for Democracy and other ethnic parties to adopt this approach, as they have largely based their legitimacy and political programs on the 1990 election results.

There are several popular misperceptions about the constitution. Some arose because commentators looked at the “detailed basic principles” approved by the national convention, rather than the constitution itself.⁵⁴ While

⁴³ See, for example, Marwaan Macan-Markar, “Political reforms sans Suu Kyi”, Inter Press Service, 28 November 2008; and Ian MacKinnon, “Burma draft constitution bars Suu Kyi”, *The Guardian* (UK), 1 April 2008.

⁴⁴ See, for example “Myanmar: constitutional referendum flouts human rights”, press release, Amnesty International, 9 May 2008.

⁴⁵ See Kyaw Zwa Moe, “Constitutional Conundrum”, *The Irrawaddy*, April 2008.

⁴⁶ Crisis Group interviews, Yangon and Bangkok, January-February 2009; see also reference in Moe, “Constitutional Conundrum”, op. cit.

⁴⁷ Crisis Group interview, representative of the National Coalition Government of the Union of Burma (NCGUB), Bangkok, January 2009.

⁴⁸ Crisis Group interviews, Bangkok, Yangon and Yunnan, January-February 2009.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Moe, “Constitutional Conundrum”, op. cit.

⁵² Crisis Group interview, Yangon, February 2009.

⁵³ Crisis Group interview, Chiang Mai, January 2009.

⁵⁴ This happened because, first, the principles were available long before the constitution (they were published in the state newspapers, and elsewhere, as the national convention finished

the committee that drafted the constitution kept close to the principles, there were some important changes.

For example, it is commonly claimed that Aung San Suu Kyi is excluded not only from the presidency but also from political office more generally and that this is due to her marriage to a foreigner (the late British academic Michael Aris).⁵⁵ In fact, this is not certain from the constitution. According to Section 59(f), one of the qualifications for the position of president (or vice president) is that the person or “one of the parents, the spouse, one of the legitimate children or their spouses not owe allegiance to a foreign power, not be subject of a foreign power or citizen of a foreign country”. She is, therefore, clearly disqualified because her two sons are British citizens;⁵⁶ but, since her husband is no longer alive, she would not seem to be debarred on grounds of marriage.⁵⁷ No restriction related to children or marriage applies to other positions, such as member of the legislature or government minister, so her marriage would not disqualify her from holding these posts – but certain

its deliberations on each chapter, with many of the most important chapters completed even before the 1996 adjournment). And, secondly, the constitution was initially available only in Burmese, whereas the principles were available in English. Many non-Myanmar observers based commentaries on the principles even after the constitution had been published and adopted in the May 2008 referendum (for example, “Vote To Nowhere”, Human Rights Watch, May 2008; and “The 2008 Myanmar Constitution: Analysis and Assessment,” Yash Ghai, ms., December 2008).

⁵⁵ See, for example, Dominic Faulder, “Framing the Future”, *The Irrawaddy*, April 2008; Carole Reckinger, “Where Next for Burma?”, *New Statesman*, 8 April 2008; and Larry Jagan, “The UN’s ‘showboat’ mission to Burma”, *Bangkok Post*, 18 February 2009.

⁵⁶ Section 59(f) appears to be framed specifically to exclude Aung San Suu Kyi, since political exiles would be excluded by the twenty-year residency requirement, while few domestic opposition politicians would fall foul of section 59(f). The one other prominent figure who may be excluded by this provision is former military intelligence chief Khin Nyunt, whose son is married to a Singaporean. This is probably why Khin Nyunt disowned his son in an advertisement in *The New Light of Myanmar* on 25 February 1998, a time when he may have had presidential ambitions, and the restriction in section 59(f) was already known. See “Burmese general, wife disown son”, Associated Press, 26 February 1998.

⁵⁷ Some commentators have suggested that her former marriage would bar her on the basis that she is “entitled to enjoy the rights and privileges of a subject ... or a citizen of a foreign country”. However, it would not appear that she is automatically entitled to such rights in the UK, particularly after the death of her husband. For discussion, see Derek Tonkin, “Burmese Perspectives”, 14 February 2008, available at www.networkmyanmar.org.

other vague provisions could conceivably be used,⁵⁸ and the question will be moot if she remains under house arrest until after the election.

Another misperception is that everyone who has been convicted of a crime is excluded from office – including not only current political prisoners, but also the large number of former political prisoners. This interpretation has been widely repeated. However, the constitution (Section 121a) is clear that it is only people currently serving prison sentences following conviction by a court who are automatically disqualified; any ambiguity in the English version is clarified by the authoritative Burmese text, which is unambiguous on this point. An identical provision was contained in the 1989 election law.⁵⁹

A final misperception arises from the convoluted formulation describing the military's legislative seats. The bloc of seats reserved for the military in the union legislature is stipulated by number of seats (110 of 440 seats in the lower chamber, and 56 of 224 in the upper chamber), making up 25 per cent of the total. However, in the provisions dealing with region and state legislatures the formulation is different, since the number of seats varies, depending on the number of townships and the number of additional minority representatives. Section 161d states that the number of legislative seats reserved for the military shall equal “one third of the total number of [elected] representatives” (i.e. one military seat for every three elected seats). This gives the military 25 per cent of seats, the same proportion as at the union level. The way in which this is formulated has, however, led many commentators to conclude, wrongly, that the military is assigned one third of seats at the region/state level.

D. WHAT STANDARD OF JUDGMENT SHOULD BE USED?

Judged against international best practice for liberal democratic charters, or against the aspirations of the people of Myanmar, the constitution clearly falls far short. This is hardly surprising: the process was orchestrated

⁵⁸ She was debarred under Section 10(h) of the 1989 Pyithu Hluttaw election law from standing as a candidate in 1990, inter alia on the basis of alleged links with persons or organisations “in armed revolt against the State”. The evidence cited by the authorities related to the arrest of an alleged terrorist in her compound in May 1989 (discussed in Tonkin, op. cit.).

⁵⁹ However, under the 1991 amendments to the 1989 Pyithu Hluttaw election law, the election commission has some discretion to debar persons previously convicted of certain offences, including high treason, from standing for election.

by a military that has in effect been in power for half a century. But since this constitution as written will almost inevitably come into force, the most important question is how to maximise the chances that the framework can be used to promote a positive evolution in the political situation, despite the restrictions it imposes.

One way of thinking about the constitution is in the context of a transition from full military rule. From this perspective, some of the more objectionable provisions (such as the reserved 25 per cent of legislative seats and the establishment of a powerful national defence and security council) can be seen as moving *away* from the military's current absolute political dominance.

The leading role of the military in the new constitutional order means that change cannot come without at least some of the generals being on board. But the reality is that the military is today the only institution in Myanmar with actual power. No constitutional or political framework could exist that did not have its confidence. A transition away from military rule can only happen if that institution does not feel that its fundamental interests are threatened. Moreover, given that the generals have essentially been in power for 50 years, it will take time to build up strong and effective civilian institutions; any transition will be gradual. It will also require soldiers and civilian politicians to work together.

While there is little sign that the current military leadership is ready for this, the constitution establishes shared political spaces – the legislatures and perhaps the cabinet – where cooperation could be fostered. The generational transition within the military may mean the emergence of new leaders who may be more ready to cooperate. This will also require civilian politicians who are ready to cooperate. And it will require convincing the new military leaders that a more constructive relationship with the international community is possible. If they believe that whatever steps they take will be rejected and that civilian political forces will always resist cooperating, the current deadlock will continue.

One criticism raised in this context is that the constitution seems to rule out gradual evolution. However, this overestimates three aspects of the constitution:

□ Its *rigidity*. Despite the overall length of the text, much is condensed, lacks important details and, in places, is ambiguous. This gives plenty of scope to adapt the interpretation of the constitution if the political context changes (but also, in the current environment, for constitutionally-mandated repressive measures). For example, there is a provision that many of the guaranteed rights are “subject to existing laws” that are currently more restrictive. A constitutional tribunal is established to interpret the provisions of the

constitution, deciding disputes with existing laws and vetting future legislation, regulations and other executive acts. There is an inherent contradiction here that will have to be resolved at some point. Whether legislation is used to constrain the bill of rights, or whether the constitution is used to challenge legislation incompatible with those rights will ultimately depend on the political environment. (The 1974 constitution contained a similar bill of rights, while the BSPP administration was notorious for its violation of rights.)

- Its *significance*. Many commentators seem to assume that the military and new government will feel bound by and will rigorously apply the constitution. This overstates both the legal competence and procedural rigidity of the military. A more realistic assessment would suggest that, whatever happens in 2010, and whatever the letter of the constitution, the military will continue to wield significant power. It will be able to ignore or override constitutional provisions that it finds inconvenient (as it does with laws now) or even abrogate the constitution (as it did in 1962 and 1988). Obtaining concessions from the military on paper is no guarantee that they will be respected in practice.⁶⁰
- Its *permanence*. The restrictive provisions for amending the constitution have been widely taken to mean that the country will be stuck with a flawed constitution indefinitely.⁶¹ However, circumstances and constitutions can change rapidly – as they have in neighbouring Thailand, for example, which has had eighteen constitutions since the end of absolute monarchy in 1932.⁶² And a constitution can evolve in line with the political and legal environment, despite a rigid amendment procedure, for example through reinterpretations of constitutional provisions by a competent court.

⁶⁰ A Yangon-based analyst proposed a relevant hypothesis. Suppose that the constitution had included a provision stating that military coups were prohibited. What would be the reaction? The person suggested that this would be seen as an irrelevant or cynical provision, as it would certainly not be a significant deterrent to potential coup-makers. Crisis Group interview, Bangkok, February 2009.

⁶¹ The restrictive provisions on amending the constitution have been carried over, unchanged, from the 1974 constitution. See Section III.B above.

⁶² See “Thailand after the coup”, *Strategic Comments*, vol. 12, no. 9, International Institute for Strategic Studies, November 2006; and Kevin Hewison, “Constitutions, regimes and power in Thailand”, *Democratization*, vol. 14, no. 5 (2007), pp. 928-945.

IV. THE 2010 ELECTIONS

The government has said that elections will take place in 2010, without providing an exact date. The information minister told the UN Secretary-General's special adviser on Myanmar, Ibrahim Gambari, the following during his visit to Myanmar in February 2009: "We have already been taking all necessary measures concerning the formation of the 2010 election commission and enacting of the election laws and political parties laws. We will issue announcements concerning the matters at the right time. The laws will offer a broad range of rights to set up political parties, conduct canvassing campaigns and stand for the election".⁶³ The prospect of elections in the next year has prompted all stakeholders in Myanmar to consider their stances. These are reviewed below.

A. PREPARATIONS BY THE MYANMAR AUTHORITIES

Laws and regulations on the elections and registration of political parties have not yet been promulgated. Some have suggested that the government is delaying until shortly before the election, as part of an "ambush strategy" intended to give opposition parties and individuals as little time as possible to prepare.⁶⁴ For the 1990 elections, the political party registration law (a skeletal text supplemented subsequently by detailed procedural rules) was promulgated twenty months before the elections, and the election law twelve months before. If the same timeframe was to be followed this time, the political party law should have been promulgated in April and the election law in December 2009 respectively, to meet a 2010 timeframe. Both laws are yet to be released. The longer this key legislation is delayed, the more plausible the argument that an "ambush" strategy is being considered. Much depends on when in 2010 the authorities plan to hold the elections. It seems likely they wish to have certain preparations in place, including candidate lists for their preferred party or parties, before issuing the electoral laws.

Most observers have felt that the elections will probably be held no later than May 2010, before the annual monsoon rains complicate logistics.⁶⁵ Although there

have been increasing reports of informal preparations by the authorities, there appears to be no great sense of urgency. There are various possible explanations for this. One is that the elections will not take place for some time yet – late in 2010, perhaps. Another is that the authorities do not intend to make elaborate plans, carrying the vote out in a "rough-and-ready" way, like the constitutional referendum in May 2008. Although there are no indications of this, it is conceivable that the elections could even be cancelled, either because of some unforeseen event (such as political unrest or the death of a key decision-maker), or because Than Shwe decides at the last minute to back out. He was clear in his speech on Armed Forces Day (March 2009) that the elections would take place in 2010.⁶⁶

Because the legislation has not yet emerged, there is considerable uncertainty about how many and what type of political parties will contest the elections. In particular, it is not clear what approach the authorities will take to establishing or supporting their own political parties. It has long been speculated that the Union Solidarity and Development Association (USDA), a government-supported mass membership organisation, would transform itself into a political party. Current indications, however, are that it will not, but that its formidable financial and human resources will be deployed, and that it may set up one or more "spin-off" parties.⁶⁷ Members of the Association have reportedly been approaching prominent individuals at the township level to determine their willingness to be candidates.⁶⁸

not unprecedented. The 1981 one-party elections were held in October. Diplomats in Yangon have noted that, notwithstanding the comments of the information minister, there appeared to be very little official activity in the second half of 2008, following the referendum. They were aware of no meetings of official committees, no apparent rush to prepare electoral rolls and no intensive preparations and canvassing by government-aligned parties (which would presumably be the main focus at this point if the "ambush" strategy were correct). The household registration list is being gradually updated. This list is based on an official document held, in principle, by each household in the country (or, at least, all households in areas under government control), which names each member of the household, together with some key biographical data, including those living outside Myanmar (information that may be relevant for absentee/overseas voting).

⁶⁶ See *The New Light of Myanmar*, 28 March 2009.

⁶⁷ The USDA has a vast network of offices (more than 15,000) across the country, is well funded, and has a stated membership of 24 million, around 40 per cent of the population. See its official website at www.usda.org.mm.

⁶⁸ Crisis Group interviews, Yangon and Bangkok, January and February 2009. See also Wai Moe, "Junta queries candidates for 2010 election", *The Irrawaddy*, 16 February 2009.

⁶³ Comments by the information minister to Gambari, reported in *The New Light of Myanmar*, 4 February 2009, p. 9.

⁶⁴ Crisis Group interviews, Bangkok and Yangon, February-March 2009.

⁶⁵ The first half of the year is the traditional election season in Myanmar; the 1990 election was held in May, as was the 2008 constitutional referendum, but end-of-year elections are

There is another, more sinister, type of preparation, however. During late 2008 and early 2009, scores of prominent dissidents, most arrested in connection with the September 2007 demonstrations, were sentenced to lengthy prison terms, in one case 104 years.⁶⁹ Many observers have seen this as the government “clearing the decks” for the elections.⁷⁰ Not only do these prison terms mean that many of the most vocal and strident opponents of the government will be silenced during the election period, but the harsh sentences also send a strong signal that opposition to the political process will not be tolerated. This is similar to what happened in the lead-up to the 1990 elections.

Many individuals within the government appear to be taking the process seriously and to be concerned about how to preserve their power, status and financial security. The extensive institutional reorganisation that will take place post-election, combined with a lack of information about how this will be carried out, is creating pressure on individuals within the system to position themselves for the future, but also a great deal of uncertainty about how best to do so. Some ministers have been cooperating more actively with organisations providing humanitarian assistance, particularly after Cyclone Nargis, and this may reflect political ambition and the need to project a more positive public image. A number of important assets have been recently acquired by the army or businesses with army links (including the operation of Yangon airport terminal, the ground-handling rights and control of the “London” cigarette company), perhaps reflecting uncertainty about the future availability of economic rents.⁷¹

B. PREPARATIONS BY ETHNIC CEASEFIRE GROUPS

Ethnic ceasefire groups feel that they have few options. At the time of the ceasefires, they considered that continued fighting was unsustainable. They agreed to ceasefires in the hope – and with promises from the authorities – that they would have a voice in the political process and that peace would bring development. Fifteen to twenty years later, most groups feel that they have little to show. The end of armed conflict has brought a peace dividend to the population in their areas, but some abuses

continue, and the expected development has not materialised.⁷²

Ethnic concerns and aspirations now have greater political legitimacy – prior to the ceasefires, ethnic organisations were portrayed by the authorities as drug smugglers or terrorists. But this has not translated into real influence on the political process, and the authorities have made clear that final political settlements are a matter for the future elected government. A leader of a ceasefire organisation noted: “Not one of the concerns that we raised in the national convention was reflected in the constitution. Most of our people have a very negative view of it. But it is possible that the situation will improve gradually after 2010. We will resubmit our proposals to the new government. In any case, the ethnic issue can’t be solved by a constitution; it requires dialogue and mutual understanding”.⁷³

Several of the major ceasefire groups that have retained their arms – including the Kachin Independence Organisation, the Shan State Army (North) and the New Mon State Party – have adopted broadly similar strategies. They are not happy with the constitutional process and will retain their status as armed ethnic organisations. They will, therefore, not become political parties and will not themselves contest the elections. Top regime officials had told both the Kachin Independence Organisation and the Shan State Army (North) that they should discuss conditions for giving up their arms only once the new government is in place. They were assured that the authorities would not take their arms in the interim (and it was on this basis that the Kachin Independence Organisation agreed to participate in the constitutional referendum in 2008). However, these groups had already been feeling uncomfortable, given that the constitution appears to prohibit them from retaining arms in Section 338: “all the armed forces in the Union shall be under the command of the Defence Services”.⁷⁴

This discomfort proved well-founded. In April 2009, the regime issued a new instruction, detailing how ceasefire groups should transform their armed units into “Border Guard Forces” under the partial command of the Myanmar military.⁷⁵ According to the instruction, each such unit would be made up of 326 personnel. Of these, 30 would be from the Myanmar army, including one of

⁶⁹ See fn. 2 above.

⁷⁰ Crisis Group interviews, Bangkok, February 2009.

⁷¹ Crisis Group interviews, Yangon and Bangkok, January-February 2009. See also “Generals still rule Myanmar with firm grip”, *International Herald Tribune*, 26 September 2008.

⁷² For a detailed discussion of the situation in ceasefire areas, see Mary P. Callahan, “Political Authority in Burma’s Ethnic Minority States”, *Policy Studies*, 31. East-West Center (Washington, DC), 2007.

⁷³ Crisis Group interview, Yunnan, February 2009.

⁷⁴ Crisis Group interviews, Bangkok and Yunnan, January-February 2009.

⁷⁵ The instruction, dated 28 April 2009, is on file with Crisis Group.

the three majors (in charge of “administration”; the other two majors, the commander and deputy commander, would be from the ceasefire group). It was indicated that all members of the force would draw regular army salaries from the date they commenced training. The authorities stated that this transition process should begin immediately.

This development is of considerable concern to ceasefire groups, for obvious reasons. If implemented, it would greatly reduce their autonomy and would represent a major concession in return for which they are being offered no political quid pro quo by the regime. None of the major ceasefire groups – with the exception of the Democratic Kayin Buddhist Army – appear ready to accept, but they have adopted different strategies.⁷⁶ The Kachin Independence Organisation is discussing the scheme with the regime, has expressed concern about some aspects (including the “border” designation) and has indicated that it must have extensive consultations with its communities before it can give a final response and that any such transformation would be long and complicated.

Similarly, the United Wa State Army is still in negotiations and has not given a definitive response. The New Democratic Army-Kachin has indicated to the regime that in principle it accepts the scheme but can agree only to the change of name and insignia, and that for various reasons (including language problems – they do not speak Burmese), they consider its other aspects impractical and in need of further discussion. The Kokang armed group has adopted essentially the same position in its negotiations. The National Democratic Alliance Army (Mongla region) has indicated to the regime that it does not accept the scheme.⁷⁷

While most ceasefire organisations will not themselves take part in the elections, they will not oppose, and will even encourage, the establishment of political parties by others in their communities. This is also the position adopted by the Ethnic Nationalities Council, an organisation representing ceasefire, non-ceasefire and political organisations from Myanmar’s seven ethnic states. The council issued a statement following its August 2008 conference indicating that because of “crucial defects”, it could not endorse the elections, but it would support the decision of ceasefire organisations should

they decide to form or support political parties to contest them.⁷⁸

The Kachin have the best elaborated strategy. The main armed groups in Kachin State (the Kachin Independence Organisation and the New Democratic Army-Kachin), together with Kachin religious and civil society organisations, have agreed to support the Kachin State Progressive Party, which is to be established to represent the interests of all peoples in the future state legislature. The party will be separate from the armed groups, and members who wish to take positions in it will have to first resign from the armed group. Some senior leaders of the armed groups may do so, and the party may be led by Dr Tu Ja, vice chairman of the Kachin Independence Organisation.

The state-based, rather than ethnic-based, approach is an interesting one, intended to prevent a proliferation of parties in a state with several different minorities that would reduce the chances for success under the first-past-the-post voting system. It remains to be seen, however, whether a Kachin-dominated party can gain the support of voters from other minorities, particularly the large Shan population, which has had difficult relations with the Kachin.⁷⁹

Most ethnic organisations are focusing their attention on the regions/states rather than the national level. They feel that they have a better chance of success at this level, because the military is more interested in the national political arena, their constituents are generally from the ethnic states, and they are more comfortable operating at this level. However, this focus could lead to political parochialism, with ethnic issues confined to the local political arena, rather than being part of the national political discourse. The Karen, with significant constituencies in several areas outside Karen State proper, would in principle be well-placed to have a voice at the national level, but the strands of Karen society seem very divided.⁸⁰ The first-past-the-post voting system increases the chances of Burman dominance at the national level.

⁷⁸ “The SPDC’s 2010 General Elections”, Statement of the Fifth Ethnic Nationalities Conference, 26-28 August 2008.

⁷⁹ Crisis Group interviews, Yangon, Bangkok, Chiang Mai and Yunnan, January and February 2009.

⁸⁰ Crisis Groups interviews, Yangon, Bangkok and Chiang Mai, January and February 2009. The Karen have had a significant voice at national level in the past (although the Karen National Union was never part of the political mainstream). Under the 1947 constitution (Section 180), 22 seats were reserved for the Karen in the lower legislative chamber, and a council and ministerial post were established to represent their interests across the country. Areas with significant Karen populations include Ayeyarwady Division, Tanintharyi Division, Bago Division and Mon State.

⁷⁶ The Democratic Kayin Buddhist Army has reportedly already agreed to the proposal, but the terms under which it did so are not clear. See Saw Yan Naing, “DKBA starts Border Guard recruitment”, *The Irrawaddy*, 2 June 2009.

⁷⁷ Information in this paragraph from Crisis Group interviews with representatives of a number of ceasefire groups, July 2009.

This was clearly demonstrated in 1990, when the NLD obtained 392 seats (81 per cent), and all ethnic parties combined obtained only 70 (14 per cent) – despite ethnic people comprising up to 40 per cent of the population.

Ceasefire organisations feel that the authorities want to control the process tightly, including by stacking the legislatures with trusted individuals. But the authorities also need a minimum level of legitimacy, which will require a significant number of ethnic representatives in the ethnic state legislatures, including some from independent ethnic parties. With power concentrated at the union level, the authorities may allow greater political space at the state/region level – and may find it harder to control outcomes.⁸¹ At a minimum, this means that most legislative representatives in the states will be ethnic, as probably will be many of the (non-security) ministers in state governments. For this reason, many ethnic leaders believe that even though the devolved powers will be very limited, it will be possible to promote ethnic languages in schools, open private ethnic schools, establish ethnic-language media outlets and promote ethnic culture and identity more broadly. That would be only limited progress for ethnic aspirations, but it would not be insignificant, since there is little space for such activities today.

Ethnic organisations that have not agreed to ceasefires and continue their insurgencies against the Myanmar government have tended, like many exiled political actors, to reject the process outright. The Karen National Union has strongly criticised the constitution, referring to it as “a reactionary throwback to the country’s age of imperialism”, and has given no indication of a formal strategy with regard to the elections.⁸² Some prominent Karen individuals, both in Yangon and on the Thai border, have expressed concern at this stance, noting that the Karen National Union boycotted the 1947 elections and has never been part of the political mainstream since. One

said, “the Karen were a footnote at the Panglong Conference [of 1947], and we must not be a footnote again”.⁸³

Such organisations could adopt an approach similar to that of the ceasefire groups, rejecting the process, but at the same time developing strategies to take advantage of the situation. This appears to be the direction that the major armed groups are moving towards.⁸⁴

C. PREPARATIONS BY OPPOSITION GROUPS

The opposition political parties from the 1990 elections face a dilemma. It is hard for them to adopt the pragmatic approach of criticising the process, while at the same time taking advantage of possible opportunities. They understand that engaging in any way risks forfeiting the legitimacy gained in 1990 – on which their subsequent political programs have been almost exclusively based. At the same time, they are keenly aware that if they fail to participate in the elections, their parties may be de-registered by the election commission. This was the rule in 1989;⁸⁵ whether it will be this time depends on the new legislation. For this reason, the NLD, while strongly critical of the process and insisting that the constitution should be amended, has stopped short of an official decision to boycott. It is likely to defer a decision until after the relevant legislation has been promulgated, when the risks should be clearer.⁸⁶

In the meantime, an active debate continues within the NLD leadership regarding the position it should adopt on the 2010 elections. There are strong voices in favour of continuing to take a principled stance (rejecting the constitution and any participation in new elections) and other voices urging a more pragmatic approach. The party held a two-day meeting to discuss these issues at the end of April 2009, bringing together the leadership and representatives from each state and division.

The meeting issued the “Shwegondaing Declaration”, stating that if the authorities go ahead with their plans to hold the election, the NLD would participate “only after gravely considering [it] as a special case and after studying the coming Party Registration Act and the laws relating to the elections”, and only if three condi-

⁸¹ During the referendum, the Wa region on the Chinese border, controlled by the militarily most powerful of the ceasefire groups, was one of the very few regions to report a majority of “no” votes (33 per cent voted “yes”, 54 per cent “no”, and 11 per cent abstained or cast invalid ballots). The turnout was also very low, around 33 per cent across all Wa-controlled areas. Data provided by Tom Kramer on the basis of an official Wa publication and discussions with Wa officials. For more detailed discussion of the Wa political agenda and their relations with the Myanmar government, see Tom Kramer, “The United Wa State Party”, East-West Center, 2007.

⁸² See Saw Yan Naing, “Junta must withdraw constitution: KNU”, *The Irrawaddy*, 24 October 2008.

⁸³ Crisis Group interviews, Yangon, Bangkok and Chiang Mai, January-February 2009.

⁸⁴ *Ibid.*

⁸⁵ Amendments to the Election Rules requiring that registered parties contest the election “without fail” were announced at the 67th SLORC Press Conference, 1 December 1989, and reported in the *Working People’s Daily*.

⁸⁶ Crisis Group interview, Yangon, March 2009. This position was subsequently made public in the NLD’s “Shwegondaing Declaration”, dated 29 April 2009.

tions were met: (1) the release of all political prisoners, including NLD leaders; (2) amendment of some non-democratic provisions of the constitution; and (3) the holding of inclusive, free and fair elections under international supervision. While these conditions do not represent a significant shift, the declaration is an important signal that the party has not taken a fixed position and is ready to consider the conditions under which it would participate in the elections. (The United Nationalities Alliance, a coalition of twelve ethnic political parties that contested the 1990 elections, announced in February 2009 that it would not contest the 2010 elections.⁸⁷)

Participation may be easier for parties that fared less well in 1990 and were not aligned with the NLD. Individuals associated with such parties, including the Graduates and Old Students Democratic Association and the Democracy Party, are considering combining forces or joining one of the new parties being organised. The National Unity Party – formerly aligned with the BSPP – is also apparently making preparations to contest the elections; it has for some time distanced itself from the regime and its policies.⁸⁸

A number of political initiatives are underway at the national level. Veteran politician Shwe Ohn, now in his late 80s, has announced that he and a number of colleagues are preparing to form the “Union Democratic Alliance”, which would stand on a platform of federalism and democracy.⁸⁹ Two splinter groups that avoid confrontation with the regime – the “88 Generation Students (Union of Myanmar)”, led by former student activist Aye Lwin, and the “Wunthanu (Patriotic) National League for Democracy” – will likely participate in some way.⁹⁰ In a somewhat bizarre development, a former military commander in the Communist Party of Burma, Kyaw

Myint, currently living in exile, announced the formation in Canada of the “United Democratic Party” to contest the elections.⁹¹

Some observers have suggested that former ministers Lt. General Kyaw Ba and Lt. General Tun Kyi (sacked in 1997 as ministers for tourism and commerce, respectively) are preparing to launch a party. Businessmen with close links to the regime may be planning to start political parties, either at the prompting of the authorities, or on their own initiative.⁹² There is even speculation that Sandar Win (daughter of the late Ne Win), who was recently released from house arrest, may have political aspirations, possibly with the encouragement of the regime.

Since the law on registration of political parties has not yet been promulgated, these initiatives remain informal, contributing to the uncertainty. Some people see the hand of the regime at work, and suspect that the intention is to marginalise the NLD by every possible means. Still, it is unsurprising that the prospect of the first elections in twenty years is leading to the emergence of new political actors.

At the region/state level, a number of new ethnic political initiatives are underway, in addition to the Kachin State party already mentioned. Prominent figures in the Karen community in Yangon, including some senior Karen ex-military or police officers, are working to create a political platform to serve as an umbrella for candidates in areas with significant Karen populations, either for the region/state or union legislatures (although the initial focus seems to be on the region/state level). This initiative is separate from the Union Karen League, which retains its registration from 1990 and continues to have some support in certain Karen areas. Consultations are also taking place within and between Shan communities, and several parties are likely to be established in different regions; some independent Shan candidates are also likely to stand.⁹³

There has been little public discussion about the sources of funding for these initiatives. In some cases, parties may have sponsors distinct from the key political actors.

⁸⁷ “Special Announcement on National Reconciliation and Democratisation in Burma/Myanmar, Rejecting the Regime’s 2010 Election”, United Nationalities Alliance, Yangon, 20 February 2009. Only two of the twelve parties remain registered: the Shan Nationalities League for Democracy and the Kokang Democracy and Unity Party.

⁸⁸ Crisis Group interviews, Yangon and Bangkok, January and February 2009.

⁸⁹ Crisis Group interview, Bangkok, February 2009. See also Min Lwin, “Veteran Shan leaders plan new political party”, *The Irrawaddy*, 29 January 2009; and Nem Davies, “Veteran Shan politician preparing to contest 2010 election”, *Mizzima*, 30 January 2009.

⁹⁰ See “Pro-junta group announces formation of political parties”, *Mizzima*, 6 January 2009; and Wai Moe, “USDA expected to form proxy parties for 2010 election”, *The Irrawaddy*, 14 August 2008. The 88 Generation Students (Union of Myanmar) is not to be confused with the staunchly anti-regime “88 Generation Network”, most of the leaders of which (including Min Ko Naing) were given long prison sentences in late 2008.

⁹¹ See “Statement on the reconstitution of the Central Executive Committee” (in Burmese), United Democratic Party of Myanmar, Vancouver, 29 January 2009. See also Wai Moe, “UDP leader involved in drugs, money laundering, says ex-agent”, *The Irrawaddy*, 23 February 2009. There has been much rumour and speculation about the membership of this party, most of it apparently unreliable.

⁹² Crisis Group interviews, Chiang Mai and Bangkok, January-February 2009. See also Wai Moe, “Junta queries candidates for 2010 election”, *The Irrawaddy*, 16 February 2009.

⁹³ Crisis Group interviews, Yangon, Bangkok and Chiang Mai, January-February 2009.

For example, a number of ethnic parties are being backed financially by local businesses, raising the prospect of conflicts of interest and corruption. Such issues will become increasingly important as previous opportunities for rent-seeking and cronyism dry up. (These opportunities are closely tied to networks of patronage that will be altered in major and unpredictable ways as a result of the post-election changes in senior officials and the reconfiguration of power structures.)

D. THE PARTICIPATION ISSUE

A crucial distinction needs to be made on the issue of participation in the elections. One question is whether particular organisations or political parties stand or not. The other is whether those that do not also urge their constituents to boycott the vote.⁹⁴ The first is obviously a political decision for each party or organisation – though a lack of participation by key opposition parties would strengthen the regime's hand and make it more likely that the legislatures will be stacked with its preferred candidates. A boycott involves quite separate strategic considerations. Pro-boycott advocates argue that participation would further legitimise military rule.⁹⁵ But if politically aware sectors of the electorate stay away, this could further reduce the chances of candidates not aligned with the regime.⁹⁶

An option available to the NLD, should it decide not to take part in the elections in order to preserve the principle of its 1990 victory or for other reasons, would be to establish or support another party, rather like the strategy of some ethnic ceasefire groups discussed above. In any case, whether or not they decide to participate, there are strong arguments for all political stakeholders to urge the electorate to vote for the best candidates on offer.⁹⁷

⁹⁴ This is a distinction that the Ethnic Nationalities Council was careful to draw in the statement from its Fifth Conference. See fn. 78 above.

⁹⁵ Moe, "Constitutional Conundrum", *op. cit.*

⁹⁶ It may be that voters will be forced to participate, in which case it would seem preferable for them to vote for the best candidate on offer, rather than cast a spoiled ballot. See also Ethnic Nationalities Conference statement, fn. 78 above.

⁹⁷ Myanmar has a long history of election boycotts, particularly in the 1920s.

V. PRELIMINARY QUESTIONS

It is impossible to predict with any detail or certainty the outcome of the current political process. This is partly because the details of the regime's plan remain unclear – even, apparently, within the system. Senior General Than Shwe himself may still be undecided on certain aspects. It is uncertain how successful the regime will be in implementing what is for it an extremely difficult and risky process. Much will depend on the answers to a few key questions:

1. How much scope remains to influence the process before the elections?

Probably not very much. It seems inconceivable that the regime would at this stage amend the text of the constitution itself, but clarification could be sought – and negotiations may be possible – on some of its ambiguities, in particular on issues of ethnic representation (see question 5 below). The constitution also makes reference to implementing legislation that has yet to be promulgated. The form of these laws could be very important – particularly those dealing with the functioning of the different legislatures and detailed procedures for the election of the president and vice presidents.

There are also opportunities for influencing the process through the legislation governing the election process (laws on the registration of political parties, the conduct of the elections and related administrative rules) that likewise have yet to be promulgated and will be important in clarifying key unresolved questions, including:

- Will parties still registered from 1990 have to re-form and re-register?
- Will taking part in the elections be a condition for registration of parties, and will there be a minimum number of constituencies that must be contested?
- Will the requirement that votes be counted at each polling booth in the presence of candidates or their agents be retained from the 1989 Election Law?
- What restrictions will be imposed on canvassing and access to state media?⁹⁸

⁹⁸ In the run-up to the 1990 elections, political parties were permitted a single broadcast of a fifteen-minute political statement on state radio and a ten-minute statement on state television, which had to pass strict censorship. See Smith, *op. cit.*, p. 412.

2. How certain is the timeframe?

It seems clear that the authorities are determined to see the roadmap process through on their terms, and there is no reason to believe that they do not intend to hold elections in 2010 as stated. Nevertheless, there may be unforeseen delays that push the elections beyond 2010, and the regime's determination to proceed may weaken as the decision point approaches, particularly as it tends to be risk averse. Political unrest or the death of a key decision-maker could also upset its plans.

3. To what extent will the outcome be manipulated?

The process leading up to the elections will not be in any sense free. It is harder to predict the extent to which the result will be manipulated. The implausible results of the 2008 constitutional referendum do not give much reassurance. However, it should be recalled that in 1990, there appear to have been no major irregularities in the counting of the vote – at least to the extent that the NLD, which seemed to have the most popular support, was recognised as having received a majority. This may have reflected miscalculations by the authorities about the level of support it enjoyed, but perhaps also the difficulty of manipulating the count, particularly since the election law required transparent tabulation at each polling station. This time, the authorities may not be so confident about the electorate, but the difficulty of manipulating the count will remain. Manipulation may be further complicated if there are several regime-endorsed parties, possibly representing the interests of different individuals or groups, each vying for the maximum possible seats. Thus, a fair count cannot be ruled out.⁹⁹

It is also not clear to what extent the authorities would allow election observation or whether the conditions will exist for such observation to be meaningful. The government was not receptive to international observation of the 2008 referendum.¹⁰⁰ However, there are indications that it may not have completely ruled out allowing

some form of observation of the 2010 elections.¹⁰¹ While this still seems unlikely, if international electoral observation does prove possible, the challenge for the institutions concerned will be to carefully evaluate if there is sufficient space available for meaningful observation, rather than merely lending legitimacy to the process. Any such evaluation will have to be based on the conditions prevailing at the time, including the content of the electoral laws and discussions with the authorities on modalities. It will be important in particular to underline to the authorities that electoral observation is about the entire process, including the lead-up to the vote, not just the polling day.

4. Who will fill the 75 per cent of non-military seats in the legislatures?

The continued detention of several key opposition figures and the harsh sentences handed down to political activists in recent months indicate that the authorities will curtail the activities of groups seen as hostile. They will no doubt want to prevent them from occupying many legislative seats and will also want to obtain a significant bloc for the parties that they themselves establish or sponsor. But there will likely be a third category: individuals or parties who are not standing on an overt anti-regime platform, but who are not aligned with the regime either. The question is how much political space will be available to this third category, and how much popular support it can expect. It may be that the authorities intend to manipulate the process in such a way that their nominees dominate the legislatures. But such an approach would not give even minimal legitimacy to the process, and whether it could be achieved in practice is also open to question, since the regime may not be able to marginalise hostile parties, as the 1990 results demonstrated.

The role of moderate political forces could, therefore, be critical in determining the quality and independence of the legislatures.¹⁰² A threshold of one quarter of the seats in the lower and upper legislatures (166 in total) is particularly significant. This is the minimum bloc required to call a special session of the legislature (especially important if it otherwise meets rarely), to block constitutional amendments and to act as a balance to the mili-

⁹⁹This is what was said in *The New York Times* about the 1990 elections, just prior to the vote: "While the military promises that the multiparty elections, the first in 30 years, will be free and fair, heralding a return to civilian rule, diplomats there regard them as a particularly unconvincing variety of Burmese puppet show. Scheduled for May 27, 20 months after the Burmese military killed at least 3,000 demonstrators for democracy, the elections are intended to perpetuate military control". Steven Erlanger, "The Burmese are going to vote; the army tells them to", 1 April 1990.

¹⁰⁰See, for example, the comments by the "Commission for Holding Referendum" to Ibrahim Gambari, reported in *The New Light of Myanmar*, 9 March 2008.

¹⁰¹See, for example, Anucha Charoenpo, "Kasit [Piromya, Thai foreign minister] gets invitation to pay a visit to Burma", *Bangkok Post*, 1 March 2009. Crisis Group interviews, Yangon, March 2009, also suggested that the Myanmar authorities may not have completely ruled out the possibility of international observers.

¹⁰²This point is also made in Min Zaw Oo, "Strategic outlook of 2010 and the role of moderates in Burma conflict", *Mizzima*, 29 January 2009.

tary-appointed bloc. One third of the seats in either legislature would be sufficient to block impeachment proceedings.

5. How diverse will ethnic representation be at the region/state level?

There is huge ethnic diversity in Myanmar, even within the ethnic states. It remains to be seen whether this will be reflected in region/state legislatures. Six of the major ethnic groups that do not have their own state have been assigned self-administered areas. There is a provision in the new constitution (Section 161) that ethnic nationality populations that have more than about 57,000 people in any region/state are entitled to one representative in the relevant legislature.¹⁰³ Given that there are 135 officially recognised ethnic nationalities, the number of such representatives is potentially large, if this provision is strictly applied.

However, there has been no detailed ethnic census for decades, and other official ethnicity data (such as from national registration cards or household lists) is incomplete and unsystematic. It is thus unclear on what basis an ethnic population would demonstrate that it met the criteria, or how the representative would be chosen and by whom. This could be a “sleeping provision”, not widely implemented other than for a few key populations, such as the Karen of Ayeyarwady, Bago and Tanintharyi Divisions and Mon State. Ethnic leaders should seek clarification and advocate for its implementation.

Another uncertainty concerns the selection of the chief minister for each region/state. The constitution (Section 261) requires the president to select the candidate for chief minister from the members of the region/state legislature, including both elected representatives and military appointees. The chief minister of an ethnic state may, therefore, not be of that ethnicity, or even from that state (since the president could select a chief minister from among the military-appointed legislators, who are not required to have a link with the state in question). But nothing in the constitution would prevent a separate agreement clarifying that the chief minister should be selected from the elected representatives and should have certain links to the state.

There are also minority populations that are not officially recognised as ethnic nationalities and will, therefore, not benefit from the provisions for specific ethnic representation. These include the populations of Chinese and

Indian origin (many but not all of whom have national registration documents) and several Muslim populations of different origin. The Muslim population of northern Rakhine State, known as Rohingyas, are not only denied ethnic or minority status but are mostly also denied citizenship (despite the fact that most have lived in Myanmar for many generations) and have suffered serious abuses.¹⁰⁴ Nevertheless, they were generally able to vote in 1990, and two Rohingya political parties were registered, one of which won four seats.¹⁰⁵ They were also included on the voting rolls for the May 2008 referendum, on the basis of their temporary (non-citizen) registration cards.¹⁰⁶ The situation for 2010 will not be clear until the election law is published.

This is part of a broader issue: even in those populations that qualify for citizenship, there are many who have never received official registration documents and are, therefore, likely to be excluded from the electoral rolls. This includes populations in remote or insecure ethnic areas that do not fall under the civilian administration of the state (for example, areas of ongoing conflict, as well as some ceasefire areas). The numbers involved could be significant.¹⁰⁷

6. Who will occupy key posts?

The political environment following the elections will be significantly determined by the people occupying the key posts – particularly the president and commander-in-chief, in whose hands executive power is in effect to be concentrated. It is likely that the first president will be a retired senior military officer.¹⁰⁸ There is much speculation as to who this will be, but it will depend to

¹⁰⁴ The exodus of hundreds of Rohingyas from Myanmar and Bangladesh in late 2008 and early 2009 drew renewed attention to their plight.

¹⁰⁵ See “The Rohingya Muslims: Ending a Cycle of Exodus?”, Human Rights Watch/Asia, September 1996, appendix A. As discussed in this report, a small proportion of Rohingyas have managed to obtain citizenship. Neither of the two Rohingya parties from 1990 is still registered.

¹⁰⁶ See “The Referendum Law for the Approval of the Draft Constitution of the Republic of the Union of Myanmar, 2008” (SPDC Law No 1/2008), Section 11(a).

¹⁰⁷ For example, a senior ethnic representative estimated that there could be 800,000 people in Kachin State who were not covered by any household list and who would, therefore, be unlikely to be included on any electoral roll; given similar situations in other states, he suggested that the figure for the whole country could be as high as three million. Crisis Group interview, Yunnan, February 2009. There is no sign that a comprehensive census that could identify such unregistered populations will be conducted prior to the elections.

¹⁰⁸ The constitution prohibits the president from concurrently holding a military – or other – position.

¹⁰³ The population threshold for minority representation is stated in Section 161 as 0.1 per cent of the population of the country as a whole, which is currently equivalent to about 57,000 people. See Appendix C, para. 6, below.

some extent on the make-up of the union legislature following the elections.¹⁰⁹ It is also unclear who will be commander-in-chief: a number of the most senior military officers are already over the mandatory retirement age of 60 and so may retire. The choice is also linked to the choice of presidential/vice presidential candidates, since the military candidate will have to resign from his service position, removing a key figure from the competition for the job of military chief.

The composition of the government will also be important, since it will determine in large part the prospects for socio-economic reform and better social service delivery. This will be even more true if, as some fear, the union legislature meets irregularly and for short periods. The government will not be elected, but instead will consist – in addition to the president and vice presidents – of an attorney general and several ministers, all appointed by the president. With the military controlling the national defence and security council and the key security ministries, it may feel confident enough to allow non-security ministries to be run by people chosen primarily for their technical skills rather than their loyalty.

7. What will happen to Generals Than Shwe and Maung Aye?

One of the biggest unanswered questions is what will happen to the current top leaders after the elections. Given their age and rumoured poor health, the roadmap appears to be as much a generational transition as a political one.¹¹⁰ This transition presents risks for these two generals. There is almost no precedent for an orderly transfer of power in Myanmar's post-colonial history. The fate of former leaders – including Ne Win, who retained some influence after his resignation in 1988 but was arrested together with his family in 2002 – must weigh on Than Shwe's mind.

He will seek to preserve his security and interests, as well as those of his family and business partners, and his op-

tions include retaining a formal position of power, ensuring that someone loyal to him takes over – or both. It is very unlikely that he would want to become president or retain his current position of commander-in-chief. As president, he would be both head of state and head of government, obliging him to travel abroad on a regular basis, as well as meet many visiting delegations – something he dislikes.¹¹¹ Under the new constitution, the president must defer to the commander-in-chief (directly or through the national defence and security council) on a number of important issues, something that Than Shwe would be unlikely to accept. In fact, the constitutional division of power between the president and commander-in-chief seems precisely designed to prevent the emergence of a single all-powerful figure.

Nor is it likely that Than Shwe would wish to remain commander-in-chief, not least since the constitution stipulates that “the president of the Republic of the Union of Myanmar takes precedence over all other persons throughout the Republic” (Section 58). Even if the commander-in-chief is in many respects more powerful than the president, it is hard to imagine that Than Shwe would accept a situation where another person had formal precedence over him.

Some well-informed observers in Myanmar suggest that he will instead arrogate for himself an extra-constitutional position that would allow him to retain his status as “supremo” – a sort of “father of the nation” figure.¹¹² Alternatively, the constitution provides the armed forces independent authority to administer its affairs, offering the (fully constitutional) possibility that he could be appointed to a (probably ceremonial) position above the commander-in-chief – “Patron of the Defence Services” or some such title.¹¹³ Whatever Than Shwe's intentions, there would seem to be no place for Maung Aye after the elections, since there can presumably be only one “supremo”. It is unclear whether he is comfortable with such a scenario, or, if not, whether he is in a position to do anything about it.

¹⁰⁹ The names most frequently mentioned are General Thura Shwe Mahn (current joint chief of staff), the third most-powerful member of the regime after Generals Than Shwe and Maung Aye, and long tipped as Than Shwe's possible successor; and Major General Htay Oo (agriculture minister), who, in addition to his cabinet portfolio, is also secretary general of the USDA mass organisation. Other possibilities include Lt. General Myint Swe of the defence ministry and Aung Thuang, minister for industry-1. See Wai Moe, “Two names tipped for Burma's post-2010 presidency”, *The Irrawaddy*, 15 October 2008.

¹¹⁰ Than Shwe is thought to be 76; Maung Aye is 71. There have been persistent rumours that they are in poor health, but little is known for sure.

¹¹¹ This is thought to be one reason why he created the position of prime minister in 2003.

¹¹² “*Naing-ngan taw a-kyi a-ke*” in Burmese – which is how he is already sometimes referred to in the state media.

¹¹³ Crisis Group interviews, Yangon and Bangkok, January-February 2009.

VI. THREE SCENARIOS

Taking into account the considerations discussed above, three main post-election scenarios emerge: continuation of the status quo, gradual transition away from military rule and radical failure. The transition scenario, however slow and uncertain progress may be, offers the best hope for positive change.

A. STATUS QUO

Many people, including the NLD but also others, see few prospects for change as a result of the elections. A well-informed Western diplomat based in Yangon expressed the view that the elections “would disappoint even our low expectations”.¹¹⁴ A Yangon-based intellectual who is not politically aligned said he believed that Than Shwe would never give up power, and the elections would be “purely cosmetic”, sentiments that are widely shared in Myanmar.¹¹⁵ It is hard to ignore such views. Moreover, there is a clear precedent for a constitutional process failing to bring about real change. The 1974 constitution and elections, which were supposed to end the Revolutionary Council’s military rule, saw the return of many of the same officers, without their uniforms but with little else changed.

The same thing could happen this time, but there are reasons to think that the current process could be different. First, unlike 1974, there will likely be a generational transition after the elections. This does not necessarily imply change for the better, but it could present an important opportunity. Secondly, unlike the 1974 constitution, which provided for one-party rule, the current constitution envisages multiple parties. While the regime will almost certainly attempt to control the political space, the multipolar political landscape could allow for representation of divergent interests. Thirdly, the domestic and international context is very unlike that of 35 years ago. Developments in information technology and media create quite different popular expectations; civil society is more developed and politically aware; and the regional context has also changed, though, as previous years have demonstrated, none of this is necessarily enough to prevent a determined regime from surviving.

B. GRADUAL TRANSITION

A second scenario is a gradual transition away from military rule in its current form. This may be the intention of some in the military, but the scenario does not depend on such an assumption: a transition can happen despite the wishes of the leadership, rather than because of them. The process the regime has embarked on, even if meant purely as a façade for continued military rule, is a complex and difficult one. It may lead in unforeseen directions. The generals may believe they can control political proxies, crony businessmen, military colleagues and ethnic factions that have chosen to surrender, but in a new context these groups might quickly develop independent agendas. What may be intended to merely create the impression of diversity can over time develop into something real.

Transition away from military rule in its current form does not necessarily imply transition towards liberal democracy. It is easier, at least initially, to imagine a transition of a different sort, perhaps to more technocratic governance – something that is urgently required to start seriously addressing the grave social and economic issues facing the country. Such a shift would require senior officials to be chosen for their competence and a senior leadership bold enough to sacrifice corrupt practices for economic growth. The wholesale reorganisation of power structures, and therefore systems of patronage, will provide the opportunity for such a shift; whether it will be seized is another question. Some provisions in the constitution may also provide opportunities, such as the requirement for legislative scrutiny of the national budget which, however limited, will at least require greater transparency.¹¹⁶ There is also the possibility for a constitutionally-mandated economic advisory group.¹¹⁷

A gradual transition in ethnic relations is also possible. For more than 60 years, ethnic rights and autonomy have been pursued through armed conflict, partly as a result of the divisions of the colonial and post-independence contexts and partly because there has been little opportunity to address them peacefully. The new constitution does so little on ethnic concerns that it may amplify existing tensions. But, by creating opportunities for political representation of ethnic nationalities, it may provide forums in which their issues can be legitimately raised and solutions explored. This is the hope – but certainly not the expectation – of those ceasefire groups and eth-

¹¹⁴ Crisis Group interview, Bangkok, January 2009.

¹¹⁵ Crisis Group interviews, Bangkok and Yangon, February-March 2009.

¹¹⁶ The Myanmar government no longer publishes comprehensive national budgets; at a minimum, this would have to change under the new constitution (Section 103). It is not clear that this applies to the military budget, however.

¹¹⁷ See Section 230(e).

nic organisations that feel that they have no option but to participate in the process.

Transition will be neither automatic nor immediate. It may require time for new dynamics to take hold and longer yet for any impact to be felt. Indeed, it may only be by the second round of elections, around 2015, that the “rules of the game” – and thus the opportunities and risks – will be clearer. Some political actors have indicated that they may wait until then before deciding how best to participate in the process, suggesting that the political landscape will continue to evolve.¹¹⁸

C. CHAOS AND CRISIS

A third possible scenario is one of radical failure. This does not mean that the regime fails to go through with the process (in which case, the status quo scenario applies by default). Rather, it assumes that the regime is unable to peacefully keep control of the process that it has initiated. Because existing networks of patronage and loyalty are so complex, establishing stable new political structures is a difficult task that could easily lead to unforeseen instability. Even if the intention behind the process is to entrench military rule, it cannot be taken for granted that the authorities will be capable of achieving this smoothly. The political process has the potential to give rise to multiple sources of tension, both within and outside the regime.

Internally, any major process of reorganisation implies winners and losers, and the losers may not accept their fate. In particular, General Maung Aye is likely to be sidelined, which will affect not only his political power, but also the future security and economic prospects of himself, his family and their network of business associates. There will be multiple contenders for key positions, and this, combined with the uncertainty about how decisions will be made and who will find favour, may create significant tensions. Disagreements may also arise in the course of any attempts to control the outcome of the elections. Even if members of the regime agree that the NLD should be sidelined, they will not necessarily agree about the division of legislative seats among themselves and their allies.

External to the regime, many stakeholders reject the process, and some of these may seek to undermine it. This raises the prospect of civil unrest, increased insurgency by non-ceasefire groups, terrorist-type actions or even the (unlikely) possibility of renewed fighting by some ceasefire groups. In ethnic areas, there is a real risk of “failed

local regions” or the emergence of violent criminal economies which would undermine efforts towards political and governance reform and greater autonomy.

The economic crisis could also be relevant. Myanmar is being hit hard by the global economic downturn, with the impact felt at all levels. Government revenues are shrinking because of the sharp decline in commodity prices, particularly of energy (the largest source of revenue is from the sale of natural gas to Thailand), and in exports. Reports suggest that the business community is already suffering from reduced export volumes and the collapse of prices in several products, including jade and beans/pulses. Agricultural output, particularly of rice, is projected to fall as a result of the current very low farm-gate prices and lack of credit, meaning that many farmers may decide not to cultivate all their land or apply expensive fertilisers.

The informal economy and the general population are likely to be severely impacted by reduced remittances from the more than two million overseas workers, as well as the added strain of supporting those who lose their jobs and return to Myanmar. Industrial zones in Yangon are suffering, and 50,000 garment jobs have been lost, with a further 100,000 at risk.¹¹⁹ In a context of already severe poverty and fragile social safety nets, civil unrest cannot be ruled out. The army has demonstrated, most recently in September 2007, that it is ready to respond brutally to such unrest.

Economic crisis, security concerns or civil unrest could all lead to a broader political crisis or be reasons for the regime to postpone the elections. But neither a continuation of the current political deadlock nor an unpredictable political crisis would seem to offer much hope for an improvement in the situation. Rather, they would likely make things worse.

¹¹⁸ Crisis Group interviews, Yangon, Bangkok and Chiang Mai, January-February 2009.

¹¹⁹ Crisis Group interviews, Myanmar economists and business people, Yangon and Bangkok, January-March 2009.

VII. STANCE OF THE INTERNATIONAL COMMUNITY

The arrest and subsequent conviction of Aung San Suu Kyi not only set back efforts that had been underway in several countries to rethink their Myanmar policy, but it also hardened the line of many in the international community, particularly Western governments, on the constitutional process and 2010 elections. There was scepticism about that process and the elections even before the arrest. The U.S. State Department stated shortly before the referendum that the draft constitution provided little hope for real change and left major power in the hands of the military.¹²⁰ The House of Representatives of the U.S. Congress adopted a resolution on 6 May 2008 “condemning the Burmese regime’s undemocratic draft constitution and scheduled referendum”.¹²¹

The UK’s junior foreign office minister, Bill Rammell, stated on 22 October 2008 that the “new constitution and elections planned for 2010 [are] designed to entrench military rule behind a façade of civilian government” and noted that the process had excluded the opposition and meaningful participation by the ethnic groups.¹²² In February 2009, the French permanent representative to the UN told the press that “it’s very clear that as long as there is no consensus in the society of Burma to accept the political process leading to elections, we don’t think those elections should take place”.¹²³

Aung San Suu Kyi’s arrest and conviction reinforced those positions. “If they stay on the track they’re on, their elections in 2010 will be totally illegitimate and without any meaning in the international community”, U.S. Secretary of State Hillary Clinton said in a Congressional hearing in May 2009.¹²⁴ Javier Solana, head of foreign policy for the European Union, was even more pointed: “It’s not the moment to lower sanctions; it’s the moment in any case to increase them”.¹²⁵

Countries in the region generally adopted a less condemnatory approach, although an unusually direct statement from ASEAN, through its chair, Thailand, drew a sharp response from Myanmar. The statement called for Aung San Suu Kyi’s release and warned that “the honour and the credibility of the Government of the Union of Myanmar are at stake”.¹²⁶

In February 2009, China took the position that the elections and the new constitution would bring greater stability and a government that would have more legitimacy.¹²⁷ After Aung San Suu Kyi’s arrest, it reiterated that the “internal affairs of Myanmar should be left to its own people to decide” and said that as a neighbour, “we hope relevant parties in Myanmar could realise reconciliation, stability and development through dialogue”.¹²⁸ Tokyo’s permanent representative to the UN told the press in February 2009 that “Japan very much hopes that the 2010 general election will be an inclusive one, open to all political actors, including the opposition. ... from the NLD’s point of view, probably it’s not good enough – why don’t you go back to 1990? That’s a slightly different view from us”.¹²⁹ After the arrest, Japan’s foreign ministry said it viewed the situation with deep concern and hoped that democratisation could be promoted with the participation of all parties concerned.”

The UN Secretary-General has repeatedly called on the Myanmar authorities to make the constitutional process “inclusive, participatory and transparent”,¹³⁰ and the Security Council issued a presidential statement on 2 May 2008 underlining “the need for the Government of Myanmar to establish the conditions and create an atmosphere conducive to an inclusive and credible process, including the full participation of all political actors and respect for fundamental political freedoms”.¹³¹ The Secretary-General visited Myanmar in July 2009, meeting twice with General Than Shwe and also with ethnic ceasefire groups and political parties, including the NLD.¹³²

¹²⁰ See David Gollust, “US finds serious flaws in Burma’s draft constitution”, Voice of America, 10 April 2008.

¹²¹ 110th Congress, Bill Number H.Con.Res.317, adopted by 413-1 votes on 6 May 2008.

¹²² See House of Commons Hansard Written Answers for 22 October 2008.

¹²³ See “Burma – Stakeout by the Permanent Representative of France”, Permanent Mission of France at the UN, New York, 20 February 2009. Available at www.franceonu.org/spip.php?article3628.

¹²⁴ “Suu Kyi’s trial shows elections flawed, Clinton says”, Bloomberg News, 21 May 2009, www.bloomberg.com/apps/news?pid=20601089&sid=aCGWqq6WmARw.

¹²⁵ Tim Johnston, “Trial may further isolate Burma”, *The Washington Post* News Service, 26 May 2009.

¹²⁶ ASEAN Chairman’s statement, 19 May 2009.

¹²⁷ Crisis Group interview, Chinese academic with detailed knowledge of official views, Yunnan, February 2009.

¹²⁸ Foreign Ministry Spokesperson Ma Zhaoxu’s regular press conference, 19 May 2009.

¹²⁹ See “Media Stakeout: Informal comments to the Media by the President of the Security Council and Permanent Representative of Japan, H.E. Mr. Yukio Takasu, on the situation in Myanmar”, UN Webcast, 20 February 2009, available at www.un.org/webcast/stakeout.html.

¹³⁰ See, for example, “Myanmar: upcoming referendum must be inclusive, transparent – Ban Ki-Moon”, UN News Centre, 11 February 2008.

¹³¹ UN doc. S/PRST/2008/13, 2 May 2008.

¹³² The NLD expressed concern that the authorities only permitted it to have a very short meeting with the Secretary-

His request to talk with Aung San Suu Kyi was denied, however.¹³³ In a speech on 4 July in Yangon to an audience of government and UN officials, diplomats and NGO representatives, he expressed “deep disappointment” at that but said it should not be seen as the only benchmark for success or failure of the visit.

In the wake of this visit, UK Prime Minister Gordon Brown indicated that further sanctions were “on the international agenda”.¹³⁴ However, following the verdict and two days of internal debate, the UN Security Council issued a press statement expressing only “serious concern” over the sentencing and softened pleas to all parties for “dialogue” and “inclusive national reconciliation”.¹³⁵ The European Union then imposed travel bans and asset freezes on the judges involved in the trial.¹³⁶

The NLD, as well as opposition groups in exile, have been very sensitive to any hint that Western governments or the UN might engage in any way with the process, particularly the elections – including criticising calls for the vote to be held in an acceptable manner, on the basis that such calls are not compatible with their position of rejecting the elections. For example, a senior member of the NLD indicated shortly before a visit to Myanmar in February 2009 by the UN Secretary-General’s special adviser, Ibrahim Gambari, that he “would be welcome to discuss the problems with the constitution adopted by the military regime in 2008”, but the NLD would not talk to him about the planned 2010 elections.¹³⁷ The party later issued a statement in which it criticised Gambari for a statement allegedly encouraging the Myanmar government to hold the elections in 2010 in a manner that would be acceptable to the international community.¹³⁸

Looking forward, there should continue to be the closest international scrutiny of and vigorous protest about violations of human rights in Myanmar, not only by Western governments but by the country’s Asian neighbours. But at the same time, the search for more effective policies toward the Myanmar government should continue. Western governments should continue to state clearly what they expect of Myanmar in order for relations to improve, starting with the release of political prisoners. Lifting the ban on high-level contacts, even at a time of maximum outrage at the regime over the treatment of Aung San Suu Kyi, would at least allow these messages to be conveyed directly and, following the elections, would make possible the frank and direct contacts with the new leaders that will be required if there is to be any chance to convince them to move in a different direction from their predecessors.

The ASEAN democracies, such as Indonesia, have a particularly useful role to play in outlining to the Myanmar government the steps it would have to take for the 2010 elections to be perceived as credible. They should also seek permission for election monitors to operate throughout the country and access for print and broadcast journalists from ASEAN countries.

The UN should keep an active good offices process alive, including the personal engagement of the Secretary-General, and, in cooperation with relevant organisations like the World Bank, begin activities aimed at strengthening the capacity of civilian government institutions. It should also engage the Myanmar authorities in a discussion of international standards for the conduct of elections.

Donors, NGOs and institutes active around the world in elections and political development should consider supporting the provision of in-country civic education to the Myanmar electorate if possible, as well as through exiled media organisations and international Burmese-language radio stations. Post-election, in order to build capacity and work towards normalising relations, this should evolve to assisting with the exposure of new legislators to the workings of other legislatures, particularly those in the region and in other countries that are emerging or have recently emerged from authoritarian rule. They should be prepared to respond quickly to opportunities to rebuild and/or reform key political and economic institutions, as well as social infrastructure, if or when opportunities arise. They should also provide humanitarian and development support to ethnic regions, particularly special autonomous areas.

Myanmar’s many ills are rooted in poor government policy, massive and longstanding under-investment in social services, chronically weak institutions, highly limited rule of law, brutal repression and a climate of impunity.

General. See Saw Yan Naing, “Meeting with Ban ‘unsatisfactory’: NLD”, *The Irrawaddy*, 8 July 2009.

¹³³ However, U.S. Senator Jim Webb was allowed to meet with her in a state guest house on 16 August 2009.

¹³⁴ “UK threatens new Burma sanctions”, BBC News, 4 July 2009.

¹³⁵ “Security Council Press Statement on Myanmar” UNSC SC/9731, 13 August 2009.

¹³⁶ Toby Vogel, “EU tightens Myanmar sanctions”, *European Voice*, 17 August 2009

¹³⁷ See “Win Tin rejects election talks with UN envoy”, *Democratic Voice of Burma*, 2 May 2009.

¹³⁸ See NLD Special Statement 4/02/09 dated 19 February 2009. On 20 February, in comments to the press following his briefing to the Security Council, Gambari said there had been no change in his or the UN’s position: “We’re not advocating elections in 2010 or any time. It is up to the Government and people of Myanmar to decide but we continue to advocate conditions that are conducive to free and fair elections when they do take place”.

Regardless of what constitution is in force, progress on these issues will only be possible if there is sufficient political will and capacity. Both are lacking at present. But if the opportunity arises, it is crucial that donors and international and non-governmental organisations rise to the huge capacity-building challenge across all sectors.

VIII. CONCLUSION

The 2008 constitution is the flawed product of a flawed process. The political situation is not likely to improve before the elections, and it may even deteriorate. The international community must take a principled stand in response. But it is vital that criticism does not equal disengagement, in order not to miss what may be an important opportunity to influence the direction of change.

The Myanmar political opposition must also carefully consider how to balance its anger over the process and the failure of the regime to implement the results of the 1990 elections with the risks of opting out of the elections entirely. There is no contradiction in condemning the process while at the same time attempting to take the best strategic advantage of it.

The Myanmar government has a responsibility to live up to the commitments that it has made to its people to bring about a transition to a “peaceful, modern and developed nation” (to use the phrase it favours). Persecuting those with dissenting political views and holding rigged elections are not the way to achieve this, nor are continuing rights violations in the context of military operations in border areas and the denial of ethnic aspirations more generally.

Ultimately, it is the people of Myanmar who pay the biggest price for the political deadlock. The political changes ahead may bring opportunities to ease that deadlock. It is important that stakeholders position themselves accordingly.

Yangon/Brussels, 20 August 2009

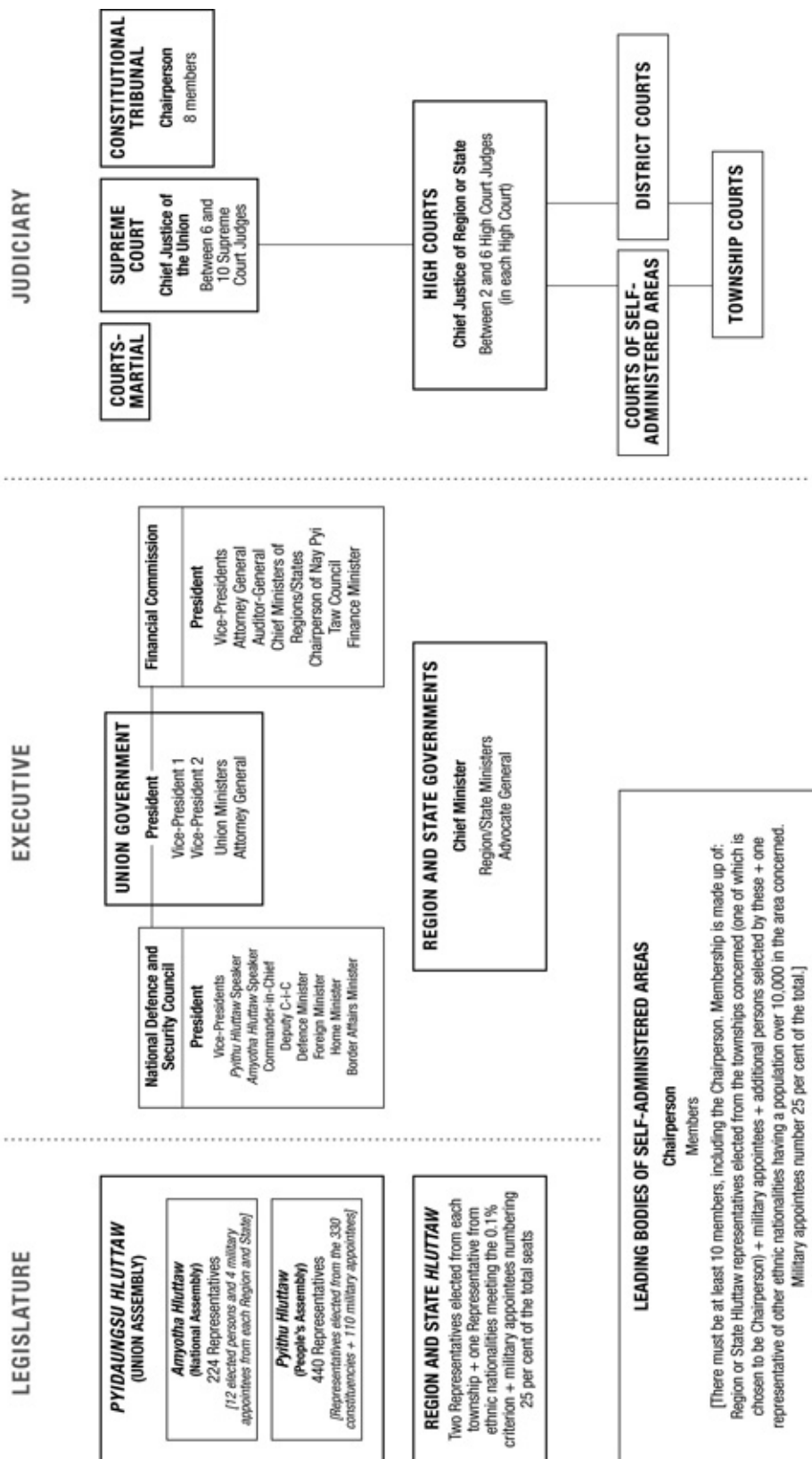
APPENDIX A

MAP OF MYANMAR



APPENDIX B

OVERVIEW OF KEY STRUCTURES AND INSTITUTIONS ESTABLISHED
 BY THE CONSTITUTION



This diagram has been prepared by Crisis Group, and has no formal status.

APPENDIX C

SUMMARY OF THE CONSTITUTION

Contents of this appendix

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A. Legislature

1. The Republic of the Union of Myanmar is made up, as it is now, of seven Regions (the new term for what are currently known as ‘divisions’) and seven States [§49].¹³⁹ In addition, Nay Pyi Taw is newly designated as a “Union Territory”, under the direct administration of the president [§50].¹⁴⁰ Within the Regions and States are six new Self-Administered Areas – that is, five Self-Administered Zones and the (larger) Wa Self-Administered Division in Shan State [§56].¹⁴¹

2. The top legislative body is the Pyidaungsu Hluttaw (Union Assembly), made up of two chambers [§74]:

- The Amyotha Hluttaw (National Assembly) consists of 224 representatives, 168 of whom are elected, twelve per Region or State (including one from each Self-Administered Area), as well as 56 military personnel (four per Region or State) nominated by the commander-in-chief [§141].
- The Pyithu Hluttaw (People’s Assembly) consists of 440 representatives, 330 of whom are elected, one per constituency, as well as 110 military personnel nominated by the commander-in-chief [§109].¹⁴²

Military appointees therefore make up 25 per cent of each house, and of the Pyidaungsu Hluttaw as a whole.

3. Hluttaw representatives must possess certain qualifications [§§120, 122, 152-153] relating to:

- age (they must be at least 25 in the case of Pyithu Hluttaw representatives, and 30 in the case of Amyotha Hluttaw representatives);
- citizenship (they must be citizens as must both of their parents);
- residence (they must have resided in Myanmar for the preceding ten years, except for authorised official stays in foreign countries); and
- meet such other qualifications provided for in the Election Law.

Certain persons are not entitled to be elected as Hluttaw representatives [§121]:

- persons serving a prison term;
- persons previously disqualified, persons who have committed an offence under the Election Law, and undischarged insolvents;
- persons of unsound mind;
- persons owing allegiance to a foreign government;
- foreign subjects/citizens or those entitled to the rights and privileges of same;
- those who obtain and utilise or who are members of an organisation that obtains and utilises direct or indirect support from a government, religious organisation or other organisation of a foreign country;
- those who abet or who are members of an organisation that abets “the act of inciting, giving speech, conversing or issuing [a] declaration to vote or not to vote based on religion for political purpose”;
- members of religious orders;
- civil service personnel, with the exception of those appointed (rather than elected) to Hluttaw; and

¹³⁹References in square brackets in this appendix are to the numbered sections of the 2008 constitution.

¹⁴⁰Nay Pyi Taw is currently made up of three townships (Nay Pyi Taw Tatkon, Nay Pyi Taw Lewe and Nay Pyi Taw Pynmana) in Mandalay Division/Region.

¹⁴¹The five zones are the Naga Self-Administered Zone in Sagaing Region, and the Danu, Pa-O, Pa Laung, and Kokang Self-Administered Zones in Shan State.

¹⁴²Constituencies approximately correspond to townships (there are currently 325 townships) [§109(a)].

– those who obtain and utilise or who are members of an organisation that obtains and utilises certain forms of support from the State.

4. The Pyithu Hluttaw and the Amyotha Hluttaw each elect from among their representatives a Speaker and a Deputy Speaker [§111, §143]. These also function, in rotation, as the Speaker and Deputy Speaker of the Pyidaungsu Hluttaw (for 30 months each, starting with the Speaker and Deputy Speaker of the Amyotha Hluttaw) [§76]. The constitution provides that Hluttaw representatives have certain privileges and immunities [§§92-94, 133-135, 155].

5. All Hluttaw have a term of five years from the day of the first session of the Pyithu Hluttaw [§§119, 151, 168]. Regular sessions of the three Hluttaw take place at least every twelve months [§§79, 126, 155]. The Speaker of the Pyidaungsu Hluttaw must also convene special or emergency sessions at the request of the president, on his/her own initiative [§§82-83], or at the request of at least one-quarter of the representatives [§84].

6. Each Region and State also has a Hluttaw (thus, fourteen in total). These Hluttaw consist of [§161]:

- two representatives elected from each township in the Region or State concerned;
- one representative elected from each “national race” (ethnic nationality) having a population in that Region or State of at least 0.1 per cent of the population of the Union (except those nationalities that already have a Self-Administered Area in that Region or State, or who are the main nationality in that Region or State),¹⁴³ and
- military personnel nominated by the commander-in-chief, making up 25 per cent of the total number.¹⁴⁴

7. A number of provisions that apply to Hluttaw at the national level also apply mutatis mutandis to Region and State Hluttaw, including provisions relating to privileges and immunities of representatives [§§185-187], their qualifications and grounds for disqualification [§169-

170], election of a Speaker and Deputy Speaker [§163], intervals between regular sessions [§174] and the convening of special and emergency sessions [§§177-179].

8. The Union has the right to enact laws related to matters in the Union legislative list [§96], as well as residual powers to enact laws on matters not listed in any legislative list [§98].¹⁴⁵ Region or State governments have the right to enact laws related to matters listed in the Region or State legislative list [§188]. The constitution provides for laws enacted at a higher level to pre-empt inconsistent laws enacted at a lower level, according to the following hierarchy: constitution > Pyidaungsu Hluttaw law > Region/State Hluttaw law > Self-Administered Area law [§198]. Many of the areas in the Union legislative list are also in the Region or State legislative list (except defence and security, foreign affairs, economy, and judicial matters, which are the exclusive responsibility of the Union), and hence the Regions and States have no exclusive power over these matters – laws enacted by the Union will prevail.¹⁴⁶

B. Executive

9. The president is the head of state, and “takes precedence over all other persons” [§58]. The president is elected by an electoral college made up of all representatives of the Pyidaungsu Hluttaw (Union Assembly), divided into three groups: elected members of the Amyotha Hluttaw (National Assembly), elected members of the Pyithu Hluttaw (People’s Assembly), and military appointees to these two assemblies. Each of these three groups elects a vice president (who can be a Hluttaw representative or someone else), and the electoral college then elects by vote one of these vice presidents as president [§60]. The president and vice presidents are elected for a term of five years and are limited to a maximum of two terms [§61].

10. The president and vice presidents shall not be representatives of any Hluttaw or hold civil service posts and are deemed to have resigned or retired from any such posts on election. They shall not hold any other office or position, nor take part in party-political activities [§§62-64].¹⁴⁷

¹⁴³ The population of Myanmar in 2007 was around 57 million (Myanmar Ministry of Health Country Profile, www.moh.gov.mm/file/Country%20Profile.pdf), so that the 0.1 per cent criterion would correspond to a population of around 57,000. There are 135 officially recognised “national races”, including the majority Burmans.

¹⁴⁴ Some commentators have misread the constitution as providing that military personnel make up one-third of the Region and State Hluttaw. The text states [§161(d)] that the number of military appointees is “one-third of the total number of Hluttaw representatives elected ...” – that is, for each three elected representatives there is one military appointee, or one quarter of the total number.

¹⁴⁵ The constitution includes three “legislative lists” setting out the matters that fall within the legislative power of the Union, Region/State and leading bodies, respectively [Schedules One to Three].

¹⁴⁶ “Economic sector” is listed on both Schedules One and Two, but in Schedule Two it is stipulated that this must be “in accord with law enacted by the Union”.

¹⁴⁷ Unlike in the case of Hluttaw representatives, no exception for military personnel is provided for, so the president and vice presidents cannot concurrently serve in the military.

11. The president and vice presidents must possess the following qualifications, over and above the qualifications required of Hluttaw representatives (see above) [§59]:

- be loyal to the Union and its citizens;
- be at least 45 years of age;
- be well acquainted with the affairs of the Union such as political, administrative, economic and military;
- have resided in Myanmar for the preceding twenty years (except authorised official stays in foreign countries);
- “shall he himself, one of the parents, the spouse, one of the legitimate children or their spouses not owe allegiance to a foreign power, not be subject of a foreign power or citizen of a foreign country. They shall not be persons entitled to enjoy the rights and privileges of a subject of a foreign government or citizen of a foreign country”.¹⁴⁸

12. The president and vice presidents may only be removed from office by impeachment or through voluntary resignation. Grounds for impeachment are high treason, breach of constitution, misconduct, disqualification and inefficient discharge of duties. Impeachment must be initiated by at least one quarter of the representatives of either Hluttaw of the Pyidaungsu Hluttaw and must be supported by at least two thirds of the representatives of that Hluttaw. The other Hluttaw shall form a body to investigate the charge, and if following the investigation at least two thirds of the representatives of this Hluttaw resolve that the charge has been substantiated, the impeached president or vice president shall be removed from office [§§71-72]. Except for these provisions relating to impeachment, the president is not answerable to any Hluttaw or court for acts performed in the exercise of his/her duties [§215].

13. The Union government is made up of the president, vice presidents, Union ministers and the Attorney General [§200]. (No provision is made for a position of prime minister.) The president has fourteen days to sign bills or return them to the Pyidaungsu Hluttaw with comments; those comments may be accepted or rejected, and in either case the bill then becomes law within seven days [§§105, 106]. During the interval between Pyidaungsu Hluttaw sessions, the president may also promulgate ordinances on urgent administrative matters (except Union budget matters), which must be submitted for approval to a session of the Pyidaungsu Hluttaw within 60 days (if necessary by summoning a special session) [§212; see also §104].

14. There is an eleven-member National Defence and Security Council, led by the president and including the vice presidents, the Speakers of the Pyithu Hluttaw and Amyotha Hluttaw, the commander-in-chief and his deputy, and the ministers for defence, foreign affairs, home affairs and border affairs [§201]. The council proposes and approves the nominee for the position of commander-in-chief, whom the president then appoints [§342]. With the approval of the council, the military has the authority to administer “the participation of the entire people in the security and defence of the Union” and to lead the people’s militia strategy [§340].

15. There is a Financial Commission, chaired by the president and also including the vice presidents, the Attorney General, the Auditor General, the chief ministers of the Regions and States, the Nay Pyi Taw Council chairperson and the minister for finance [§229]. Each vice president is responsible for vetting budgets, before they are submitted to the Financial Commission – one vice president for budgets of ministries and the other vice president for budgets of States and Regions. The Financial Commission submits to the Pyidaungsu Hluttaw its recommendation for the Union budget and for supplementary finance (including loans) to the Regions and States from Union funds; it provides advice on financial matters and carries out duties assigned by the Pyidaungsu Hluttaw and submits a draft Union budget bill to the president. The Financial Commission may seek advice as necessary from financial experts. [§230]

16. Union ministers and the Attorney General are required to meet the criteria (the various qualifications and restrictions mentioned above) for election as Pyithu Hluttaw representatives, although there is a higher minimum age (40 years for ministers, 45 for the Attorney General), and they are also required to be “loyal to the Union and its citizens” (and in the case of the Attorney General to have certain relevant experience).¹⁴⁹ Ministers are appointed by the president with the approval of the Pyidaungsu Hluttaw; however, the only grounds on which the Hluttaw may reject nominees is if they fail to meet the constitutional criteria for appointment. The ministers for defence, home affairs, and border affairs must be military personnel nominated by the commander-in-chief. Ministers appointed from the civil service are deemed to have retired on appointment as a minister; however, military personnel appointed as ministers are not required to retire or resign from the military [§§232, 237].

¹⁴⁸ Since Burmese pronouns are neutral with respect to gender, the masculine form in the English version is an artefact of translation, and does not necessarily imply any bias in the original text.

¹⁴⁹ They are not required to be Hluttaw representatives, and must resign from any such position on appointment as a minister.

17. The same provisions apply to deputy ministers and the deputy Attorney General (including the requirement that the deputy ministers for defence, home affairs, and border affairs be military personnel nominated by the commander-in-chief), except that appointments are not submitted to any Hluttaw, and the age requirement is lower (35 years for deputy ministers and 40 for the deputy Attorney General) [§§234, 239].¹⁵⁰

18. The term of office for ministers and the Attorney General and their deputies is the same as that of the president. Ministers and the Attorney General and their deputies may be removed from office by the president; in the case of military personnel, this must be done in coordination with the commander-in-chief [§§235, 240]. Ministers and the Attorney General may also be removed on the same grounds and following the same procedure as for the impeachment of the president and vice presidents [§§233, 238].

Regional Executive

19. Each Region and State has a government, headed by a chief minister, and comprising ministers and an Advocate General [§§247-248].¹⁵¹ Its executive power extends to administrative matters over which the Region or State Hluttaw has law-making powers or other matters provided for by law [§249]. The Region or State collects certain taxes and revenues, including land revenue, excise revenue, toll fees, fisheries royalties, vehicle taxes, and taxes on the extraction of wood and other forest products (except teak) [§254, Schedule Five]. The chief minister does not have the power to return bills to the Region or State Hluttaw, and such bills automatically become law after seven days if they have not been signed [§195].

20. Chief ministers are required to have the same qualifications as Union deputy ministers. They are appointed by the president from among the members of the respective Region or State Hluttaw, with the approval of the Hluttaw concerned; however, as with Union ministers, the only grounds on which the Hluttaw may reject nominees is if they fail to meet the constitutional criteria for appointment [§261]. The chief minister then selects, for

approval by the Hluttaw and appointment by the president, an Advocate General and Region or State ministers, who must have the same qualifications as the chief minister, but are not required to be Hluttaw members.¹⁵² State or Region ministers for security and border affairs must be military personnel nominated by the commander-in-chief.

21. The chairpersons of the Leading Bodies of any Self-Administered Areas in the Region or State are automatically appointed as State or Region ministers for those areas, and any State or Region Hluttaw representatives from ethnic nationality populations elected on the basis of the 0.1 per cent population criterion (see above) automatically become State or Region ministers for matters relating to that ethnic nationality; at the discretion of the president and in consultation with the chief minister, these ministers may also be given charge of other ministries [§262].

22. The term of office for the Region or State government is the same as that of the president [§262(m)]. Chief ministers, Region or State ministers and the Advocate General may be removed from office by the president; in the case of military personnel, this must be done in coordination with the commander-in-chief [§§264, 268]. Chief ministers, Region or State ministers and the Advocate General may also be removed from office through impeachment, on the same grounds and following a similar procedure as for the impeachment of Union ministers, except that this is initiated and voted on by representatives of the Region or State Hluttaw concerned, following investigation [§§263, 267].

23. Each Self-Administered Area has a legislature (consisting of at least ten members) known as a "Leading Body", which exercises legislative power over matters listed in Schedule Three of the constitution, including transport infrastructure, public health, development affairs, utilities, and preservation of forests and environment in the area. Executive power extends to these matters and any other matter prescribed by law. Leading Bodies draw up annual budgets for the approval of the Region or State government concerned; they do not have any autonomous revenue-collection authority [§279].

24. Leading Bodies are made up of Region or State Hluttaw representatives elected from the townships concerned, military personnel nominated by the commander-in-chief (one-quarter of the total membership), and ad-

¹⁵⁰The constitution also has provisions for the appointment of an Auditor General and deputy, and for the formation of a Union Civil Services Board; these are separate from the government. [§§241-246]

¹⁵¹The constitution also provides for the formation of a Nay Pyi Taw Council, the chairperson and members of which are appointed by the president, and must have the same qualifications as Region or State ministers; member(s) of the Council with responsibility for security matters in Nay Pyi Taw must be military personnel nominated by the commander-in-chief [§285].

¹⁵²Except that, in the case of the Advocate-General, the age requirement is 40, and the person must have certain relevant experience [§266]. The constitution also provides for the appointment of a State or Region Auditor-General, who does not form part of the State or Region government [§§271-274].

ditional persons selected by these two groups. Members of the Leading Body select one of the members from the first group (that is, elected representatives) as chairperson. Other ethnic nationalities with a population of over 10,000 in the Self-Administered Area are entitled to have one representative appointed to the Leading Body [§§196, 275-277].

25. Administration at district and township level in the Union is carried out by civil service personnel [§288]. Administration at ward or village-tract level is assigned to “a person whose integrity is respected by the community” [§289].

C. Judiciary

26. The highest court is the Supreme Court of the Union, which is the court of final appeal [§§294-295].¹⁵³ Each Region and State has a high court, and there are courts of Self-Administered Areas, district courts and township courts [§293]. The head of the Supreme Court is the Chief Justice of the Union. Between seven and eleven judges, including the Chief Justice, sit on the Supreme Court and are appointed by the president with the approval of the Pyidaungsu Hluttaw; however, the only grounds on which the Hluttaw may reject nominees is if they fail to meet the constitutional criteria for appointment [§299]. The Chief Justice and judges of the Supreme Court must have the same qualifications as Pyithu Hluttaw representatives, except that they must be aged between 50 and 70, have relevant experience, be loyal to the Union and its citizens, and not be a member of a political party [§301].

27. The Chief Justice and judges of the Supreme Court hold office until the age of 70, unless they resign, are impeached, are found by the medical board to be medically unfit to continue or die [§303]. Impeachment may be initiated by representatives of the Pyithu Hluttaw or Amyotha Hluttaw (following the same procedure as for impeachment of the president and vice presidents), or by the president (through the Speaker of the Pyidaungsu Hluttaw) [§302].¹⁵⁴

28. There are courts-martial, which deal with cases relating to military personnel (collectively or singly), including military personnel holding civil service positions; in such cases the decision of the commander-in-chief is final and conclusive [§§291, 319].

29. There is a Constitutional Tribunal of the Union, formed with nine members including a chairperson [§320].

The president submits a list of nine nominees (three chosen by him, three by the Speaker of the Pyithu Hluttaw, and three by the Speaker of the Amyotha Hluttaw) to the Pyidaungsu Hluttaw for approval; however, the only ground on which the Hluttaw may reject nominees is if they are clearly disqualified [§§321, 328]. Members of the Tribunal must have the same qualifications as judges of the Supreme Court, except that no upper age limit is prescribed, and they must have a “political, administrative, economic and security outlook” [§333]. The term of the Tribunal is the same as that of the Pyidaungsu Hluttaw [§335]. Members may resign, or be removed in accordance with the provisions and procedure for the impeachment of the Chief Justice and judges of the Supreme Court [§334].

30. The Constitutional Tribunal interprets the provisions of the constitution, vets whether laws promulgated by Hluttaw and actions taken by the executive are in conformity with the constitution, decides on constitutional disputes, and decides on matters related to the Union Territory brought by the president [§322]. Decisions of the Tribunal on these matters are final and conclusive [§324]. Those who can submit matters directly to the Tribunal for interpretation, resolution and opinion are the president, Speakers of the Pyidaungsu Hluttaw, Pyithu Hluttaw and Amyotha Hluttaw, the Chief Justice of the Union and chairperson of the Election Commission [§325].¹⁵⁵

D. Fundamental rights of citizens

31. Citizenship is extended to all current citizens and anyone both of whose parents are nationals of the Union, as prescribed by law [§§345-346]. (This is consistent with previous constitutions and the 1982 Citizenship Law.)

32. The constitution enshrines certain rights for citizens (in some cases with certain caveats or qualifications indicated below in parenthesis), including [§§21, 34, 38, 347-360, 364-376, 380-381]:

- equality before the law;
- non-discrimination (based on race, birth, religion, official position, status, culture, sex and wealth), and equal opportunity (in public employment, occupation, trade, business, vocation, arts, science, technology);
- equality of salary and rights at work for women and men;

¹⁵³ The president has the power to grant pardons [§204].

¹⁵⁴ Judges of the high courts of Regions/States are appointed by the president following a similar procedure [§308].

¹⁵⁵ Chief ministers, Speakers of Region or State Hluttaw, chairpersons of Self-Administered Areas, and representatives numbering at least ten per cent of the representatives of the Pyithu Hluttaw or Amyotha Hluttaw may do so indirectly, in accordance with prescribed procedures [§326].

- equal rights for mothers, children and expectant women;
- non-discrimination in the civil service (based on race, birth, religion and sex, except for “positions that are suitable for men only”);
- right to life and personal freedom (“except in accord with existing laws”);
- freedom of expression, assembly and association (“if not contrary to the laws enacted for Union security, prevalence of law and order, community peace and tranquillity or public order and morality”);
- the right to settle and reside in any place within the Union (“according to law”);
- protection of movable and immovable property (“according to law”), and privacy and security of home, property, correspondence and other communication (“subject to the provisions of this constitution”);
- prohibition on enslaving and trafficking in persons, and prohibition on forced labour (except hard labour for convicts and public-interest duties assigned by the Union in accord with the law);
- freedom of conscience and religion (subject to public order, morality, health, and not extending to secular activities associated with religious practice; the “abuse of religion for political purposes is forbidden”);
- freedom to develop literature, arts, customs and traditions (“in accord with the law” and avoiding “any act detrimental to national solidarity”);
- the right to education, and the right to receive free compulsory basic education, and the right to health care (“in accord with the health policy laid down by the Union”);
- the right to elect and be elected to Hluttaw (subject to the constitution and relevant laws);
- the right to conduct business freely, and the right to private invention and patent (if not contrary to the constitution and existing laws);
- the right to redress by due process of law (except in time of foreign invasion, insurrection or emergency), protection against double jeopardy, the right of an accused to a defence, and prohibition on any person being held in custody for more than 24 hours without the permission of a court (except “precautionary measures taken for the security of the Union or prevalence of law and order, peace and tranquillity in accord with the law in the interest of the public, or the matters permitted according to an existing law”); and
- the right to seek protection of the Union in relations with foreign countries.

33. The possibility of making an application to the Supreme Court in order to obtain these rights shall not be suspended in time or war, foreign invasion or insurrection, unless public safety so requires [§§377, 379].

34. The constitution (like previous constitutions) notes that the Union “recognises the special position of Buddhism as the faith professed by the great majority of the citizens of the Union” [§361], and “also recognises Christianity, Islam, Hinduism and Animism as the religions existing in the Union” [§362].

E. Elections and political parties

35. The detailed arrangements for registration of political parties and holding of elections scheduled for 2010 will be set out in electoral laws and rules (yet to be promulgated). The constitution sets out the broad principles. The constitution provides for universal suffrage for citizens over eighteen (except members of religious orders, persons serving prison terms, persons of unsound mind, undischarged insolvents, and persons disqualified by election law) [§392]. It also provides for the recall of Hluttaw representatives, on the same grounds as impeachment of the president and vice presidents, if a minimum of 1 per cent of the electorate concerned submits a complaint to the Election Commission and if the Election Commission finds the complaint to be true [§§396-397].

36. The president establishes an Election Commission, with a minimum of five members (including the chairperson), appointed in accordance with the constitutional provisions for the appointment of Union ministers, including the required qualifications, except that the age requirement is 50 years, and the person must have relevant experience, integrity, and not be a Hluttaw representative or member of a political party; members also cannot hold other paid positions [§398].¹⁵⁶ Members may be impeached in the same manner as Supreme Court judges [§400].

37. Political parties must be formed and registered in accordance with the law, be “loyal to the State”, and “set the objective of non-disintegration of the Union, non-disintegration of national solidarity and perpetuation of sovereignty” (hence no separatist parties are permitted). They have the right to organise freely and participate in elections (in accordance with the law), and are prohibited from contact with insurgent groups, terrorists, and unlawful associations, and from obtaining direct or indirect funds from a foreign government, religious association, or other association or person from a foreign country [§§404-407].

¹⁵⁶ It is unclear how the Election Commission for the 2010 elections will be constituted. This will presumably be clarified in the forthcoming Election Law.

F. State of emergency

38. If administrative functions cannot be carried out in a Region or State or Union Territory or Self-Administered Area, the president may, after coordinating with the National Defence and Security Council, declare a state of emergency. In such case, the president (or a person or body formed by him) may exercise executive power in the area covered by the state of emergency, as well legislative power for matters covered by the relevant legislative list [§§410-411].

39. If there is an emergency endangering the lives, shelter and property of the public in a Region or State or Union Territory or Self-Administered Area, the president may, after coordinating with the National Defence and Security Council, declare a state of emergency.¹⁵⁷ In such case, local administrative bodies may obtain the assistance of the military to carry out their lawful duties effectively. The president may, if necessary, declare a military administrative order, conferring on the commander-in-chief executive and judicial powers and responsibilities for “community peace and tranquillity and prevalence of law and order” [§§412-413].

40. A declaration by the president of a state of emergency must specify the areas covered and the duration, and may, if necessary, restrict or suspend one or more fundamental rights of citizens residing in the area concerned [§414]. As with other presidential ordinances, a declaration of a state of emergency must be submitted for approval to a session of the Pyidaungsu Hluttaw within 60 days (if necessary by summoning a special session) [§415].

41. If there is an emergency that “may disintegrate the Union or disintegrate national solidarity or that may cause the loss of sovereignty, due to acts or attempts to take over the sovereignty of the Union by insurgency, violence and wrongful forcible means” the president may, after coordinating with the National Defence and Security Council, declare a state of emergency covering the entire country for one year. In such case, legislative, executive and judicial powers of the Union are transferred to the commander-in-chief to speedily resolve the situation, the legislative functions of all Hluttaw and Leading Bodies are suspended, and all persons appointed by Hluttaw or Leading Bodies are terminated from duty, with the exception of the president and vice presidents. For the duration of the state of emergency the commander-

in-chief may, as required, restrict or suspend one or more fundamental rights of citizens.

42. The president may, if requested by the commander-in-chief and after coordination with the National Defence and Security Council, normally permit two six-month extensions of the state of emergency. If the commander-in-chief reports that he has resolved the situation, the president shall end the state of emergency and return legislative functions to all Hluttaw and Leading Bodies. In the absence of a president, the National Defence and Security Council is empowered to decide on the extension and termination of the state of emergency and, on termination, to exercise legislative, executive and judicial as well as sovereign powers pending the formation of the Hluttaw and election of a president following elections that the Council must hold within six months [§§417-431].

43. The constitution provides for immunity for the legitimate actions of any administrative, civil service or military body or its members assigned powers and duties during any state of emergency [§432].

G. Amendment of constitution

44. Any provision of the constitution may be amended through a bill submitted to the Pyidaungsu Hluttaw by at least 20 per cent of its representatives, with approval requiring a vote of more than 75 per cent, except that for certain sections of the constitution, it is further required that a nationwide referendum be held with the approval of more than half of voters who are eligible to vote. Sections of the constitution that can only be changed with the additional step of a referendum include: basic principles; state structure; qualifications for and election of the president and vice presidents; Hluttaw structure; composition of Union and Region/State governments, Leading Bodies, and the National Defence and Security Council; judicial structure; provisions relating to state of emergency; and the constitutional amendment procedures themselves [§§433-436].

H. Other provisions

45. The constitution provides that the State Peace and Development Council continues to exercise sovereign powers until the constitution comes into force [§442]. Existing laws, rules, regulations, notifications, orders, procedures etc. continue to remain in operation in so far as they are not contrary to the constitution until and unless they are repealed or amended by the Pyidaungsu Hluttaw or Union government [§§446-447].

46. The constitution provides immunity for the State Law and Order Restoration Council, the State Peace and

¹⁵⁷ If not all members of the Council are able to attend, the president consults with the commander-in-chief, deputy commander-in-chief and ministers for defence and home affairs, pending submission to the full Council as soon as possible.

Development Council, their members, and any member of the government for any act done in the execution of their respective duties [§445].

The constitution provides, under Basic Principles, that the military has the right to administer and adjudicate all

affairs of the armed forces independently, including the participation of the population in Union security and defence, and is “mainly responsible for safeguarding the constitution” [§20].