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From Crisis to Opportunity: Prospect for Legal Cooperation in Myanmar^{*}

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1. Introduction
2. Political Deadlock
3. The Role of the United Nations
4. The Role of Neighbors
5. Changing Role of Civil Society
6. Urgent Need of Capacity
7. Expansion of Humanitarian Space in Myanmar
8. The Role of Japan: Prospect for Legal Cooperation
9. Conclusion: Crisis or Opportunity

1. Introduction

The situation in Myanmar has involved suspicion, ignorance and the contempt of the international community. The process of economic development seems to be slower than that expected by the international community due to the government's mismanagement and twenty years of the Western diplomatic and economic sanctions¹⁾. The government's five years plan for 2006-2010 aims for average GDP growth rates of 10 % to be achieved through the higher agricultural production, new gas fields, and

^{*} In this essay we use the name Myanmar in accordance with the practice of the United Nations.

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increase in hydropower generation²⁾. The reality on the ground is that the humanitarian community is unable to do nearly enough for populations in grave need of medical assistance.³⁾ The United Nations Security Council (UNSC) formally discussed the political situation in Myanmar for the first time in September 2006⁴⁾. It appears that international community has not been unilateral for the people to achieve their democratic aspirations in Myanmar. The UN estimates more than 30 % of the population is living in acute poverty lacking basic foods. Myanmar's estimated per capita GDP is less than half of that of Cambodia and Bangladesh. The average household is forced to spend almost three quarters of its budget on food. One in three children under five are suffering from malnutrition, and less than 50% of children are able to complete their primary education. It is estimated that close to seven hundred thousand people each year suffer from malaria and one hundred and thirty thousand from tuberculosis⁵⁾. Myanmar is the lowest recipient of overseas development assistance among LDCs⁶⁾. The government spends 0.3% of the gross domestic product on health⁷⁾. Consumer price inflation is set to fall in 2009-10 from an estimated 27.3% in 2008, largely

1) Myanmar was categorized as “not free” and ranked lowest along with seven other states by Freedom House's *Freedom in 2006*. The country was ranked 130th (“Medium”) in the UNDP's Human Development Index (HDI) Rank in Human Development Report 2006 despite the modest UN assistance.

2) Asian Development Bank, *Asian Development Outlook 2007: Growth amid Change*, Asian Development Bank, 2007.

3) Médecins Sans Frontières (Doctors Without Borders: MSF) have listed Myanmar among top ten humanitarian crises of 2008. Details can be seen in <http://doctorswithoutborders.org/publications/topten/story.cfm?id=3233> (accessed on 31 December 2008).

4) China and Russia vetoed arguing that the situation in Myanmar does not threaten international peace.

in line with falling fuel and food prices⁸⁾. Lack of transparency and accountability, poor governance and widespread corruption, incompetence and mismanagements together with the Western economic sanctions deprive the country of chances to implement its right to development despite its own beauty and natural resources. An outflow of refugees to its neighboring countries such as China, India, Thailand and Malaysia become significant. The problems of chances to implement child soldiers and forced labor are increasing despite the government's commitment with ILO. The UN experts have strongly urged to release political prisoners by condemning severe convictions and current unfair trials⁹⁾. The country is in the needs of urgent

5) The Statement by Mr. Charles Patrie, a former country representative of UNDP in Myanmar, at UN Day in Myanmar, 7 October 2007, available at https://yangonunct.unric.org/index.php?option=com_content&task=view&id=97&Itemid=73 (accessed on 19 December 2008). According to him, some hardliners in Myanmar refused to accept the country's reality and he was expelled. Mr. Charles Patrie's Remark on the Updated Burma/Myanmar Conference, Canberra, Australia, 11 December 2007.

6) According to OECD, Myanmar receives only 2.88 dollars per person, while Sudan receives US \$55/person, Zimbabwe is US \$ 21/person and \$63/person for Laos. See Refugees International, "Burma: A New Way Forward." *Bulletin*, 26th March 2008, available at <http://www.refintl.org/sites/default/files/burma0308.pdf> (accessed on 19 December 2008).

7) It is estimated that 240,000 people are currently infected with HIV in Myanmar. 76,000 of these people are in urgent need of anti-retrovirus [ART], yet less than 20 % of them receive it through the combined efforts of MSF, other international non-governmental organizations (INGOs) and the Government of Myanmar. The lack of accessible treatment resulted in 25,000 AIDS related deaths in 2007 and a similar number of people are expected to suffer the same fate in 2008, unless HIV/AIDS services – most importantly the provision of ART – are urgently scaled-up. See in "A preventable fate: The failure of HIV/AIDS treatment in Myanmar," Médecins Sans Frontières, 24 November 2008, available at <http://doctorswithoutborders.org/publications/topten/article.cfm?id=3195> (accessed on 31 December 2008).

8) The Economist Intelligence Unit, *Country Report, Myanmar (Burma)*, December 2008.

humanitarian assistance, while international community has not achieved a consensus for action.

2. Political Deadlock

The government's road map has been very controversial particularly on the process of drafting the constitution which was alleged to have been approved in May 2008¹⁰⁾. Accordingly, for or against 2010 election is still the issue of debate. Opinions are divided on whether 2010 election will be free and fair. For people inside Myanmar, there seem no other alternatives. There might be emergence of rubber-stamped assemblies as equivalent of National Convention which has been convened for 14 years without freedom of discussion. The best case scenario might be enlightened assemblies only making a possibility of check and balance to non security issues. Civilian representation would be 330 seats out of 440 seats for lower chamber and 168 seats out of 224 seats for upper chamber. According to defenders, altogether 498 seats in assemblies and one civilian vice president are definitely better than nothing. They believe the election law with regards to operative two assemblies is still a negotiable issue¹¹⁾. The National League for Democracy Party (NLD) called for the government to review the

9) Available at <http://www.un.org/apps/news/story.asp?NewsID=27076&Cr=myanmar&Cr1#> (accessed on 18 December 2008).

10) Four of the seven steps in the road map have been completed, offering the way for elections in 2010 in a country that has been ruled by the military since 1962. Under the government's "road map" to democracy, Myanmar has adopted a new constitution after a widely criticized referendum held on 10 May 2008, only a week after a deadly cyclone Nargis on 3 May, and on 24 May in disaster areas. The government announced on 29 May 2008 that the new constitution was adopted with the approval of 92.48% of votes.

11) Nay Win Maung, "Way forward in 2010," *Burma/Myanmar Day*, 29 October 2008, Brussels, Belgium.

Constitution within six months and to conduct an inclusive meeting with pro-democracy groups¹²⁾. It has insisted that 25% of military presence in the parliaments after the election in 2010 would be just a word and in practice the military would dominate again in the country's future. On the other hand, the current leadership of the NLD has been critical due to lack of strategy and its limited institutional capacity under the government's serious repression. Anyway, an agreement between analysts of politics in and out lies at the central problems of Myanmar. The country would never become a rice bowl again in the region even if sanctions were withdrawn unless its political deadlock could be solved in a proper way.

3. The Role of the United Nations

Amongst international organizations, the United Nations has a very unique role in democracy promotion as an international agent for democratization despite its serious challenges¹³⁾. There is a huge gap between citizens' expectation in transitions and what the UN has achieved so far. Myanmar is a noteworthy example¹⁴⁾. Five points of the UN mission in Myanmar which had been agreed upon with the Secretary General's Group of Friends for Myanmar¹⁵⁾ are to release all political prisoners including Aung San Suu Kyi; to have a dialogue with Aung San Suu Kyi; to create a credible political process; to address socio-economic issues including the idea of an economic forum; and to regularize the role of the Secretary

12) The NLD's Statement on 22 September 2008. The NLD won a landslide victory in the country's election in 1990, but the regime refused to hand over the power.

13) Edward Newman, "UN democracy promotion: comparative advantages and constraints," in: Edward Newman and Roland Rich (eds.), *The UN Role in Promoting Democracy: Between Ideals and Reality*, UNU Press, Tokyo, 2004, pp. 188-207.

General's Good Offices¹⁶⁾. Apparently, there has not been enough pressure, either internal or external, on the government to implement these functions. Notorious prisons in Myanmar have kept more than 2,000 political prisoners charged with criminal offences¹⁷⁾. More than 150 activists including leaders of the "88 Generation Group" have been given long jail terms in November 2008¹⁸⁾. The government released more than 9,000 prisoners in September 2008, but a few political prisoners included. The Human Rights representative offered to make his own investigation and the government has not responded yet. The International Committee of the Red Cross(ICRC) was not able to visit the prisons since 2006 and it had to close five key local

14) There are altogether 30 formal resolutions passed by the UN General Assembly and its Commission on Human Rights on Myanmar, as well as four consecutive human rights reporters and two successive UN Special Envoys calling for national reconciliation in Myanmar. The current UNSC presidential statement of 11 October 2008 and 2 May 2008 called for the need for a genuine dialogue and release of all political prisoners. The most reliable information related to the situation of human rights in Myanmar can be obtained in UN General Assembly, "Promotion and protection of human rights: human rights situations and reports of special rapporteurs and representatives" (A/63/341), 5 September 2008, available at <http://www.reliefweb.int/rw/rwb.nsf/db900sid/YSAR-7K8RC2?OpenDocument> (accessed on 19 September 2008).

15) The group includes five permanent members of the Security Council, India, Japan, Republic of Korea, Thailand, Indonesia, Singapore, Vietnam, Australia, Norway and the EU presidency.

16) According to Mr. Gambari, these tasks are absolutely on the hands of the government to response. See Colum Lynch and Michael Abramowitz, "U. N. Mulls Reengaging Burma With More Aid: Diplomacy Unable to Yield Political Reforms," *Washington Post*, 28 December 2008, A 16.

17) For further information, see <http://www.amnesty.org/en/region/myanmar> and <http://www.aappb.org/aboutaapp.html> (accessed on 31 December 2008).

18) Under Myanmar Electronic Law, some leaders were sentenced to 60 years for sending 4 email-messages outside Myanmar (fifteen years per message!). An Interview with their families on 3rd December 2008.

offices. The UN special envoy, Mr. Ibrahim Gambari, after his visit in August 2008, admitted poor results of his mission. The envoy paid his latest visit to Myanmar between 31 January and 3 February. The Prime Minister General Thein Sein asked to lift sanctions on Myanmar as a precursor to political stability during their meeting. Even though the UN and the Burmese neighbors regard the mission as a process rather than outcome, the doubt over the UN's efficiency has increased arguing its lack of a clear strategy on Myanmar. Pro-democracy groups claim that the special envoy is running out of time and his future visit would be a waste of time. Some have been pressing for Mr. Ban Ki-Moon, the eighth United Nations Secretary-General (UNSG), himself to go. However, he seems to avoid fruitless visits. He often showed his disappointments over the government's unwillingness to deliver on its promise on political dialogue and to release political prisoners¹⁹). We believe either cancellation of the UNSG's trips to Myanmar or wait-and-see approach will make the country more politically isolated and it is not going to help people in Myanmar. It may not help the cause of the pro-democracy movement even if the envoy quits his position. Perhaps, the problem has not been with the UN and it has been the victim of the UN system as Mr. Gambari said in an interview that the UN cannot rely simply on "the power of persuasion with too little in the [diplomatic] toolbox."²⁰) The dilemma also underlines on the mindset of the one plus the regime and that of some pro-democracy groups. Indeed, the way the UN deals with Myanmar seems "Realpolitik" and the younger generation is paying an enormous price. Many are calling for more creative approach to engage with

19) Opening remarks at Year-End Press Conference by the UNSG on 17 December 2008, available at <http://www.un.org/webcast/sg.html> (accessed on 19 December 2008).

20) See Lynch and Abramowitz, *op. cit.* (n. 16).

the regime. Exile groups urged to carry out humanitarian intervention²¹⁾. Some shows their deep frustrations calling for an arms embargo and the acceptance of the case as the subject of the International Criminal Court (ICC). By no means should the future of Myanmar be decided by the people of Myanmar, but the UN should seriously engage in the development of a **neutral forum**, creating **true interfaith dialogue** as an urgent necessity. According to senior UN officials, special envoy Mr. Ibrahim Gambari has proposed that nations offer Burma financial incentives to free more than 2,000 political prisoners. He also calls for an increase in development assistance to Burma and proposes that wealthy countries expand the nation's access to foreign investment. In the months ahead, the UN leadership will press the Obama administration to relax U.S. policy on Burma and to open the door to a return of international financial institutions, including the World Bank²²⁾. The bank left in 1987, because Myanmar did not implement economic and political reforms. Mid-level UN diplomats should frequently visit Myanmar to hold discussion with Burmese counterparts at regular

21) Htet Aung, "Can't the UN Pass a Burma Resolution Now?," available at http://www.irrawaddy.org/opinion_story.php?art_id=8680 (accessed on 19 September 2008). See also Lalit K Jha, "Remove 'Unjust' Economic Sanctions: Junta," available at http://www.irrawaddy.org/print_article.php?art_id=14341 (accessed on 2 October 2008).

22) It is reported that there is a design to establish an "Economic and Social Forum" to serve as a vehicle for coordinating international development efforts. The attitude of UN, however, seems to be fluctuating. On the recent movements in the UN and U. S., see Lynch and Abramowitz, op. cit. (n. 16).

On 18 February 2009, the U.S. Secretary of State Hillary Rodham Clinton stated in Jakarta, Indonesia, "Clearly, the path we have taken in imposing sanctions hasn't influenced the Burmese junta," adding that the route taken by Burma's neighbors of "reaching out and trying to engage them has not influenced them, either." See Glenn Kessler, "Shift Possible on Burma Policy: Sanctions Have Failed, Clinton Says, Hinting at Other Tacks," *The Washington Post*, 19 February 2009, A. 11.

intervals. The government has left little or no scope for negotiations and it has delayed a regular representation on the ground. Anyway, in Myanmar, the UN has been an easy target both for pro-democracy groups and the regime.

4. The Role of Neighbors

“China, India and ASEAN are seen to be vultures circling around the carcass of Burma, taking as much as they can while they can. In the eyes of many Burmese this unseemly behavior is what they expect of their greedy neighbors and nobody buys into the polite fiction of constructive engagement except those who profit it.”²³⁾

The policy of the West and Europe have a clear concern on the issue of human security in Myanmar, whereas ASEAN and her neighbors like China and India are more preoccupied with concerns of national security and their own economic developments. As a consequence, experts concluded that there is no way to influence the regime in Naypyidaw. The underlying policy of ASEAN, the principle of non-intervention in internal affairs, is the best excuse for some ASEAN members in the practice of quiet diplomacy. ASEAN has been widely criticized after its failure of constructive engagement with Myanmar. It is unlikely that her neighbors, particularly China and India, will be able to put a concrete pressure on Myanmar due to the fact that they increasingly need energy and natural resources from Myanmar for their growing economies. In addition, they still believe security and stability is more important than human rights and democracy in

23) Jeff Kingston, “Burma’s Despair,” *Critical Asian Studies*, vol. 40 (1), 2008, p. 31.

Myanmar²⁴⁾. Myanmar not only stands in a crucial geographical position for China to access Indian Ocean, but also shares a 2,000 kilometer border. Growing economic ties with Myanmar telecommunication sectors and natural gas pipelines makes China reluctant to insist Myanmar to move forward a concrete political reform. However, Chinese scholars reject the patron-client analogy of China-Myanmar relations²⁵⁾. The China National Petroleum Corporation (CNPC) has signed a 30-year natural gas purchase and sale agreement in Rangoon on 24 December 2008²⁶⁾. In early 2009, China is scheduled to build oil and gas pipelines from Kyaukpyu, a port on the Bay of Bengal, to its southwest Yunnan Province. China and Burma agreed to the US \$2.5 billion pipeline project in November. Apart from China, Thailand is also a major buyer of Burma's natural gas, purchasing at least US \$2.7 billion in 2007²⁷⁾. Myanmar deserves a realistic action from her neighbors rather than just their words to support Mr. Gambari's effort. It is indeed necessary to commit for what and how they can persuade the government of Myanmar

24) There have been suggestions that China's constraints in dealing with Myanmar rest in four general areas: the troubled history between the two countries; China's on-going domestic development that relies on natural resources from Myanmar; the status quo of border security; and the impact of democratization in Myanmar on China itself. Quoted from Xiaolin Guo, "Dealing With Myanmar: A Unity of Divided Interests," *Policy Paper*, Institute for Security & Development Policy, June 2008, available at <http://www.isdp.eu/files/publications/pp/08/xg08dealingwith.pdf> (accessed on 3 December 2008).

25) See Chenyang Li, "Myanmar/Burma's Political Development and China-Myanmar Relation in the aftermath of the 'Saffron Revolution'," in: Xiaolin Guo(ed), *Myanmar/Burma: Challenges and Perspectives*, Institute for Security and Development Policy, 2008, pp. 107-128.

26) Available at <http://www.cnpc.com.cn/eng/press/> (accessed on 31 December 2008).

27) "China Signs Burmese Gas Deal for 30-year supply," available at http://www.irrawady.org/print_article.php?art_id=14849 (accessed on 27 December 2008).

to enter into a time-bound dialogue. International human rights defenders and Nobel Peace Prize winners often urge China to stop selling weapons and military vehicles to Myanmar. Some argue that democratic Myanmar might be a big concern for China which gained an enormous economic benefit from the isolated regime²⁸⁾. Therefore, it is not surprising that the West's appeal to China and India to use their good will and influence on Myanmar has been ignored.

5. Changing Role of Civil Society

"I make no pretence at having any special insight into the Burmese national character, culture, or traditions. However, Myanmar is primarily a Buddhist country, and as far I am aware, humility, compassion, understanding, tolerance, forgiveness, gentleness, compromise, conciliation, moderation, and pursuit of truth and reason are virtues that a Buddhist is expected to hold dear. Regretfully, not much of these are in evidence these days. I believe we would gain a lot of domestic as well as international prestige and recognition, if the fundamental precepts of our religion were more appropriately reflected in the conduct of our national affairs, and not confined to the performance of rituals and merit-making deeds that are steeped in our customs and beliefs. I also believe that the people of Myanmar must try harder to be more forthcoming and to put forward independent thoughts and ideas, not in anger or frustration or to criticize or to blame, but as good Buddhist in the pursuit of truth and reason, in

28) In a meeting with a Chinese Businessman in Tokyo, he frankly admitted that he prefers doing business in Yangon rather than that in Tokyo. He was able to sell his cellular about US \$1,000 per set in Yangon in 2002, while he only earned 1 yen in Tokyo.

moderation, and in an objective and tolerant ways, so that better results can be achieved in the efforts currently under way to establish a modern developed nation.”²⁹⁾

The prolonged absence of democratic governance in Myanmar has led to changing social attitudes in civil society such as widespread fear, and distrust between the regime and its people. If not addressed in time, this could lead to further conflict and violence. Some assert that foreign invasion is the only right cause due to inability of the weak civil society in Myanmar. There is no prospect of the regime change assisted by foreign invasion in Myanmar. The sanctions have been ineffective due to lack of support of her neighbors including China and India. There is a substantive disagreement between West and East particularly in the United Nations Security Council (UNSC) on the means to achieve democracy in Myanmar. We don't think the isolation, sanction, or ostracism will bring democracy in Myanmar. This does not mean that sanctions should be withdrawn. More justifications and concrete political movements will be needed, if one says that sanctions should be withdrawn and economic assistance should be carried out to save people. Sanctions stand as the only way to put pressure on the regime, while international complaints over its human rights abuses are ignored. Without international pressure, the better human rights' record would not be achieved. Suffering of the Burmese people is not only because of the Western sanction but widespread corruption and mismanagement of the regime through the country.

29) U Myint, "Foreign Aid: A Myanmar Perspective," in: Trevor Wilson (ed.), *Myanmar Long Road to National Reconciliation*, Institute of Southeast Asian Studies, Singapore, 2006, p. 269.

On the other hand, economic aid through constructive engagement has not been able to change the regime's behavior. A key is neither the withdrawal of sanctions nor economic aid, but to meet and work together for humanitarian needs, especially in such sectors as health and education. We believe that merely hoping for regime change will be an ignorance of the majority of people who are living in dire conditions. Well-established democracies among the people should have a moral responsibility to prevent the current humanitarian crisis. There is a serious structural problem with the economy such as excessively centralized control, a weak banking sector and double exchange rate system. However, it is important to bear in mind that resumption of ODA flows, even if it were to come in substantial amounts, might not by itself help to improve the welfare of the ordinary people of Myanmar, and especially the welfare of the large majority of the poorest people at the bottom of the income scale³⁰⁾.

6. Urgent Need of Capacity

"Many talented Burmese who now reside overseas, driven there by an oppressive regime that makes them feel unwanted or endangered, will likely return home to contribute to the democratic revival of their country, motivated not just by patriotic devotion but also by a wish to reunite with their families. The skills and talents that this diaspora can bring home could have a significant impact, as the cases of Vietnam, Cambodia, and East Timor have demonstrated."^{30a)}

30) U Myint, *op. cit.* (n. 29), p. 265.

30a) Kingston, *op. cit.* (n. 23), p. 38.

The capacity dilemma becomes significant in Myanmar after its long neglected and mismanaged policy on education. Myanmar has lost its own intellectual resources and their important role has been put in a hidden agenda since the socialist regime. The Regional Director of UN Office for the Coordination of Humanitarian Affairs (OCHA) emphasized the government officials in Myanmar lack the knowledge and technology to deal with foreign partners after the cyclone Nargis³¹⁾. In this regards, a majority of Burmese professionals in exile would contribute to the country's transition to democracy, if their return would not be endangered by the post-military governance. Bring the talents and skills back home would enormously benefit as has been the case in China and Vietnam. The government should be wise enough to utilize its best own resources, which can bridge between foreign donors and local NGOs in Myanmar. International assistance for education should freely flow to local people who have been isolated for decades. Many professors in Myanmar are not free to participate in international academic conferences due to severe bureaucracy in the Ministry of Education. Without the government's (cabinet) approvals, teaching staffs are not allowed to apply their passports and deputation orders to join even academic events. Despite the different understanding on the term "humanitarian aid", it should strengthen capacity building projects and health care system. This kind of cooperation will encourage the government officials to become aware of socio-economic problems and try to address them in more appropriate ways. Working with the bureaucracy in Myanmar for health and education through cooperation with NGOs will facilitate changing behaviors of middle rank officials. It will make them

31) Rajan Gengaije, "Humanitarian Assistance in the context of Mega Diasters - Sichuan Earquake & Cyclone Nargis," DMHA Lecture, 11 December 2008, AIT, Thailand.

understand the principle of accountability and transparency. This is not an easy task. A senior official of Japan International Cooperation Agency (JICA) admitted that changing mindset of bureaucrats seems quite tough. Many officials think their role as regulators rather than facilitators³²⁾.

7. Expansion of Humanitarian Space in Myanmar

“Burmese are running out of time and are already being engulfed by a gathering humanitarian crisis. ... The challenge on the assistance front is how to respond outside existing structures and how do you do it in an effective manner?”³³⁾

When you want to punish the government for numerous accounts of human rights violations³⁴⁾, the victims should not be the people under massive repression and torture. There is a broad consensus including exiled Burmese dissidents that humanitarian needs of Myanmar are growing. A common strategic framework to strengthen public institutions, system of security and justice, and public participation is essential. To empower the civil society, we need to promote habits of dialogue and more cooperation not only inter-community relations but in extra-community relations. These are grounds for peace buildings in divided societies. In fact, certain international aid workers have suffered the pressure from both the regime and its critics. It is often questioned whether aid can be delivered effectively without benefiting the government. In the words of Mr. Charles Petrie³⁵⁾,

32) An interview conducted in Yangon, in April 2008.

33) Mr. Charles Petrie, the former UN Humanitarian Coordinator until December 2007.

34) In spite of international appeals, prisons in Myanmar still hold more than 2,000 political prisoners including prisoners of conscience and many journalists since 1988.

“What we are doing in-country is using humanitarian principles of independence, neutrality, and impartiality to provide the space necessary to bring assistance”³⁶⁾. It is not clear that the current aid workers under his successor remain independent, when they respond to the cyclone Nargis³⁷⁾. Merely calling for aid without political progress has been a challenging issue, when we call for normalization of aid. Ideally, the rights to health and life are increasingly recognized as parts of customary international law. This calls for states to respect, protect and fulfill basic health needs in their territories. More than one third of the population lives below the poverty line, and 10% of the population are under food shortage. One third of children below five are malnourished, and one fifth of all children are born underweight. Maternal mortality is 230 per 10,000 live births³⁸⁾. This shows not only an urgent need of government funding but cooperation with International Non-Governmental Organizations (INGOs) in the areas of poverty alleviation, health and education, where more trainings and public awareness become an urgent necessity. Despite positive movements, the government of Myanmar should be more active in cooperation with international community such as an establishment of institutions for aid coordination.

35) Mr. Petrie was forced to leave Myanmar after his official statement on 24 October 2007. The statement publicly linked the September 2007 protests to widespread frustration at the hardships of day-to-day living and a “deteriorating humanitarian situation.”

36) Quoted from “Burma: Aid in a Tight Space,” *The Integrated Regional Information Networks (IRIN)*, 19 December 2007. Available at http://www.irrawaddy.org/article.php?art_id=9629 (accessed on 3 December 2008).

37) Widespread complaints about aid abuses came out aftermath of Nargis. But the UN senior official denied the reported cases on Burma/Myanmar Day in Brussels, 29 October 2008.

38) International Crisis Group, *Burma/Myanmar After Nargis: Time To Normalise Aid Relations*, *Asia Report*, No. 161, 20 October 2008, p. 14.

8. The Role of Japan: Prospect for Legal Cooperation

“There is no country quite like Myanmar for disinformation.”³⁹⁾

It would be politically unacceptable if we encourage foreign individuals and INGOs to go and work in Myanmar. We believe foreigners can make their own impression based on their visits. Contacts should be made between the civilian population and other parts of the world. That can create not only mutual understandings but also greater internal pressure on the regime which is willing to make the public more isolated. That will also develop further cooperation between civil society and international community. In a survey about how the international community can help to achieve democracy in Myanmar, many people in Yangon and Mandalay answered to send the UN armed forces in order to save succeeding generations⁴⁰⁾. However, the UN is considered as a community-building institution; to strengthen its structure and function is to provide it with greater community-building authority. The UN was to be the framework within which members of the international system negotiated agreements on the empirical rules of behavior and legal norms of proper conduct in order to preserve the semblance of society⁴¹⁾. The policy makers in the UN are highly concerned with unintended consequences of peacekeeping operations though it is very easy to bomb a particular country. On the other hand, the government will not take an active role in national reconciliation without internal or outside pressure to do so. The current leadership of Myanmar is

39) Derek Tokin, “Myanmar: A State in Transition,” available at <http://networkmyanmar.org/images/bp%208%20may.pdf> (accessed on 29 December 2008).

40) The survey was conducted by a Burmese leading think-tank group after the Saffron Revolution in 2007 and it was reported to the UN network in Tokyo.

fully aware that the military intervention led by either the UN or the Western group is unlikely to happen. In this regards, a frequent question we encountered has been “what Japan can support for democratization in Myanmar.” The answer would be “Japan can play a leading role to strengthen civil society in Myanmar.”

Japan, as the major donor before 1988, has been criticized for being lenient toward the regime⁴²⁾. A domestic pressure came to review its aid policy after Mr. Nagai Kanji's death in Myanmar on 27 September 2007. Mr. Gambari has been assured of Japan's support on the UN's cooperation for democratic and human rights reforms in Myanmar. Mr. Gambari, during his visit to Tokyo on 26 February 2008, showed a respect for Japan's decision to refrain from following the U.S.'s sanction. He has insisted that two-prong “pressure and incentives” approach is necessary to urge the junta to promote democracy⁴³⁾. Japan welcomed the regime's announcement of a referendum on a new constitution and general elections. But the participation of Daw Aung San Suu Kyi and others concerned has not been realized in the process of establishing a new constitution in Myanmar. Japan deems it important for Myanmar's national reconciliation that genuine dialogue involving all the parties concerned will be conducted⁴⁴⁾. Currently, the

41) Ramesh Thakur and Albrecht Schnabel, “Unbridled Humanitarianism: Between Justice, Power, and Authority,” in: Albrecht Schnabel and Ramesh Thakur (eds.), *Kosovo and the Challenge of Humanitarian Intervention: Selective Indignation, Collective Action, and International Citizenship*, UNU Press, Tokyo, 2000, pp. 496-504.

42) Japan, however has suspended its \$4.7 million aid planned for a business education at the University of Yangon following the shooting death of Japanese journalist Kenji Nagai in Yangon on 27 September 2007.

43) Kakumi Kobayashi, “Myanmar constitution worries Gambari,” *The Japan Times*, 1 March 2008, available at <http://search.japantimes.co.jp/cgi-bin/nn20080301a8.html> (accessed on 3 December 2008). See also note 46 infra.

Government of Japan has repeatedly urged Myanmar to release all political prisoners immediately and to promote the country's democratization process in a way that involves all parties concerned⁴⁵⁾, while it questions whether it would be correct measure to put pressure and impose sanctions to urge the improvement of human rights situation⁴⁶⁾.

Japan can play a vital role to establish the UNSG's Good Offices in Myanmar through its existing network⁴⁷⁾. Japanese government should take a lead on consideration of setting up an "Intellectual Network for Democratization in Myanmar." A significant amount of Burmese expatriate and foreign scholars for education and health will join in the network. Japan

44) Statement by the Press Secretary/ Director-General for Press and Public Relations, MOFA, on the Situation in Myanmar (Announcement of Timing of National Referendum on a New Constitution and General Elections), 10 February 2008.

45) Statement by the Press Secretary/Director-General for Press and Public Relations, MOFA, On the Situation in Myanmar, Sentence of Imprisonment against Political Activists, available at http://www.mofa.go.jp/announce/announce/2008/11/1184879_1070.html (accessed on 3 December 2008).

46) Mr. Yukio Takasu, the Japanese ambassador to the United Nations, stated at the press conference in New York on 14 November 2008 that Japan will be supporting the mediatory efforts undertaken by the UN envoy and continuing efforts to seek the possibility of economic cooperation and other measures to keep communications with Myanmar government. He indicated that it should be necessary to take into consideration of the historical and cultural background of a society to realize the human rights protection. *Nikkei Shinbun*, 16 November 2008.

During the current meeting between the special envoy Ibrahim Gambari and Japanese Foreign Minister Hirofumi Nakasone on 12 February 2009, they agreed that all the relevant parties need to participate in the democratization process of Myanmar and encouraged the Myanmar government to hold a general election in 2010 in a form that be congratulated by the international community. See "UN envoy, Japan encourage Myanmar on vote," *BurmaNet News, Agence France Presse (AFP)*, 12 February 2009, available at <http://www.burmanet.org/news/2009/02/12/agence-france-presse-un-envoy-japan-encourage-myanmar-on-vote/> (accessed on 17th Feb 2009).

would be the best candidate to lead such a network through its existing successful institutional frameworks such as JICA in Myanmar and Japan-Myanmar Centre⁴⁸⁾. The government of Myanmar would be able to organize a meeting point creating academic forum for scholars under the UN's flag. In addition, a mechanism for independent public polling will play an important role in changing mind-set of policy makers following the examples of Indonesia under JICA initiative.

A senior high ranking military officer noted as follows in the early 2007:

“What you called ‘an education mandate for Myanmar’ will likely to be a softer agenda instead of talking political agenda such as releasing Aung San Suu Kyi. This is something the hardliners don’t want to hear, when you are talking for development of Myanmar. First, you should make a smart choice from which we can create an open conversation. After building mutual trust, you can raise your particular preferences either legal reform or human rights educations under this educational aid mechanism.”⁴⁹⁾

There has not been a significant legal cooperation between Myanmar and international organization except that of ILO. Law is just on papers and the degree of rule of law is at the bottom. A serious flaw of judicial system in Myanmar today includes a rapid growth of special courts and closed trials,

47) The International Crisis Group recommended the UNSG to request sufficient resources from member states to support his good offices in the medium term, including for hiring necessary support staff and establishing an office in Myanmar or nearby. See International Crisis Group, “Burma/Myanmar: After the Crackdown,” *Asia Report*, No. 144, 31 January 2008.

48) Japan-Myanmar Centre has been suspended at the moment, but it would be able to put into alive under the initiative of the UNSG's Good Office.

49) Conversation with a senior high ranking officer in Naypyidaw in February 2007 (the author had a variety of discussions on the matter with aid officials and professors from the Ministry of Education in Myanmar).

the military and the executive's interference in the examination process, written or oral instruction of Ministry of Home Affairs related to political cases. Training programs for judges, police officers and officials for jails should be encouraged not only to protect human rights defenders but to support those who are seen as being fearless among young bureaucrats. Human rights training program for government officials in Myanmar which run by Australian government from 2000 to 2003 was the innovative one. This should be a good example for further potentials. Japan can also offer its own mechanism with the cooperation of the UN. Three major players have been involved with capacity building in Myanmar legal system: University in its legal education, the Supreme Court and the Attorney General Office^{49a)}. We have encountered a number of questions in our network in and outside Japan including the United Nations' environment. They include: "In the contemporary courts in Myanmar, the precedents of the United Kingdom or other Commonwealth states can be cited in a judgment?; Can the courts have access to the legal information from foreign countries?; Are the judges in Myanmar aware of legal developments outside Myanmar?" The Supreme Court and the Office of Attorney General in Naypyidaw, a new capital of Myanmar, seemingly have no regular access to foreign judgments and current development of international laws⁵⁰⁾. Legal education in Myanmar has never access to leading academic URL such as LexisNexis research

49a) Two foreign PhD holders and one local PhD holder under the Supreme Court are available, while two foreign PhD holders are working for the Attorney General Office. Legal education in Myanmar was privileged to receive five legal scholars with foreign PhD and about thirty local PhD holders, while only one teaching staff was able to do her Master degree outside Myanmar. Not less than 10 Japanese Master Degree holders and a Japanese PhD holder have contributed in legal affairs under the Supreme Court, while four law officers who earned LLM in Japan can be found at the Attorney General Office.

services. They could hardly conduct academic exchange program with their foreign counterparts. Even sustainable academic programs have not been carried out despite remarkable human resources training program under the label of JDS (Japanese Grant Aid for Human Resource Development). Law department at Yangon University had a history of legal cooperation with Yokohama National University and Nagoya University⁵¹⁾. This should be encouraged. Holding seminars and roundtable in and between different sectors of the government employing local experts in these sessions can be very useful⁵²⁾. No better mechanism for legal cooperation can be found not only to develop existing network of JICA but to organize legal training programs⁵³⁾.

9. Conclusion: Crisis or Opportunity

There cannot be a single answer which can satisfy demands of all parties. Either crisis or opportunity depends on the stakeholders. It would be a great opportunity, if they are able to enhance their cooperation into broader humanitarian agenda together with legal assistance or legal

50) During our telephone-interviews which conducted between December 2008 and February 2009, 30 judges and judicial officers simply answered “No” for above questions and 5 senior judicial officers at the Supreme Court refused to answer.

51) One was held at the Department of Law in Yangon University under the title of “Seminar on Law and Development” jointly organized by foreign experts and JICA Myanmar on 21 December 2004. This was for the first time and a productive one among legal scholars in Myanmar.

52) Mona Elisabeth Brother and Jon-Andreas Solberg (eds.), *Legal Empowerment - a way out of poverty*, June 2007, Norwegian Ministry of Foreign Affairs, p. 154.

53) The Ministry of Education allowed some training programs led by foreign scholars and Burmese expatriate in Yangon between 2004 and 2007. An interview with a senior official of Department of Higher Education in Naypyidaw in March 2008.

cooperation in its true sense. Otherwise it may lead to a collapse of civilian and judicial organ which has already controlled by the military leaders. The sense of ownership should be well developed in line with international humanitarian principle. Otherwise, Myanmar will miss the opportunity to prevent further humanitarian crises. The level of restrictions and interferences in aid programs should be reconsidered to attract international donors. One kept in our mind is that “The essential issue is not foreigners, however well-wishing, may regard Burma, nor how theoretically their analyses sound. Rather, it is how well these foreign perspectives conform to Burmese conception of their own society. Whatever road Burma/Myanmar chooses, and whatever the results, action will be taken “bama-lo”, in the Burmese manner⁵⁴⁾. No one outside Myanmar can either design or import a model for democratization in Myanmar. A particular form of mobilization has been established in its own civil society. What we should do is professionally encourage people of Myanmar to do things in their own ways. Then, we would be able to formalize building social capital in the country.

54) David I. Steinberg, *Burma: The State of Myanmar*, Georgetown University Press, 2001.