

# **BURMA'S STATE PROTECTION LAW**

**An Analysis of the Broadest Law in the World**

*by*

*P.Gutter and B.K. Sen*

**Burma Lawyers' Council**

**P.O. Box 29, Hua Mak P.O., Bangkok 10243, Thailand**

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## **Foreword**

by

**H.E. U Thein Oo,**  
Minister of Justice,  
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Now that the world is increasingly becoming entangled in the global war against terrorism, it seems as if 'state protection' is being put into a new legal perspective. Of course it is necessary to restore order in times of crisis. But it is the question whether this would justify the existence of overly broad laws that provide governments with martial-law-like powers.

Any legislation or actions taken in the name of state protection must conform with international human rights standards. The military government in Burma, unfortunately, betrays a staggering contempt for such standards. The Burmese junta's legislation is only used to quash the principles of basic human rights, to perpetuate military rule and to terrorize the country's citizens.

This publication proves that even the global war against terrorism cannot in any way justify the existence of Burma's State Protection Law. Nevertheless, it makes one thing very clear, namely that basic human rights must not be violated in the attempts to draw up broad anti-terrorism bills.

## **Introduction**

The September 11, 2001 terrorist attacks in the United States have put state protection into a new legal perspective. Two weeks after the attacks, the Security Council of the United Nations approved a resolution which requires all countries to adopt new anti-terrorism laws. Jeremy Greenstock, the chairman of a new Security Council counter-terrorism committee, said he seeks the "broadest possible" legislative defense against terrorism in each of the United Nations' 189 member states. The vast majority of governments he has consulted have embraced the resolution's requirements "because they feel the need", he said. This raises serious concern as the laws already on the books provide most governments with enough power to handle whatever threat does exist. Greenstock denies this by saying that his committee is there "to help the world system upgrade its capability to deny space to terrorism".

But as the saying goes, the road to hell is paved with good intentions. The restoration of order during times of crisis is certainly commendable, but unfortunately, in order to fight

terrorism, governments are increasingly baking harsh, over-broad laws that would give them martial-law-like powers.

Any form of detention of persons without trial is obnoxious to the whole idea of democracy. Many governments maintain that there may be some justification for implementing preventive detention in times of emergency, but it is imperative that any use of preventive detention be confined to specific, limited circumstances. It must include adequate safeguards to protect the fundamental rights of detainees. Protections are needed to ensure that preventive detention is used to combat terrorism, and not merely dissent from government or majority practices. Otherwise any arrest without court order or detention without charge is illegal – although this is very much like the way a ruthless military junta has been ruling Burma since 1962.

The Burmese junta takes full advantage of the global war against terrorism. The generals hope that it may justify the existence of their Draconian legislation, such as the State Protection Law of 1975 which enables imposition of wide-ranging restrictions on individuals. Acts like this ensure the perpetuation of military rule.

The junta's use of its laws to quash the principles of basic human rights in Burma is widely known. The junta has enforced laws curtailing civil and political freedom. It abuses law to crush any political opposition. Current Burmese laws and regulations hamper

and even criminalise freedom of thought, the dissemination of information and the right of association and assembly. The most commonly applied laws banning civil and political rights have

been the Official Secrets Act of 1923, the Emergency Provisions Act of 1950, the Unlawful Association Act of 1975, the Printers and Publishers Registration Law of 1962, and harshest of all, the State Protection Law of 1975 (also called the State Protection Act, or the Law to Safeguard the State Against the Dangers of Those Desiring to Cause Subversive Acts). The suppress peaceful political dissidents. It was used to keep Daw Aung San Suu Kyi under house arrest between July 1989 and July 1995.

Thousands of political prisoners currently remain in prison in Burma. Many of them have already served the terms to which they were sentenced, but are still under continued arbitrary detention. Prison conditions include cruel and inhuman treatment. Torture of political prisoners is frequently reported. There is a lack of adequate food, water, sanitation and health care, while the Jail Manual is gathering dust.

In order to really help the world system upgrade its capability to deny space to terrorism, the first thing Jeremy Greenstock's committee should do is to help stop terrorism committed by the state. Because Burma's military government terrorizes its own citizens. And the main power base for that government is, indeed, the broadest possible law in the world – the State Protection Law.



### **The Constitutional Period, 1948-1962**

Unfortunately, independence did not bring peace and progress to Burma. In the period from 1948 to 1962, during the U Nu government, there was a lot of civil unrest in the country. Within months after independence, the Communists went into revolt and took some army battalions with them. Several other ethnic and political groups also took up arms against the state. The insurgencies nearly caused the Union of Burma to collapse. As a result, the Preventive Detention Act, also called the Public Order Preservation Act or POPA, was enacted. Unlike the State Protection Law of 1975, the POPA had provisions of representation and was also subject to writ remedy in the Supreme Court. Although the government largely lost control over the situation, a law like the State Protection Law was not enacted. By and large the POPA was sued and in extreme cases Article 120 of the Penal Code was resorted to. The redeeming feature was that at least there was a Constitution and a Supreme Court, and that legal remedies were available.

In 1958, the unity amongst the democratic leaders dissolved

completely. Although the army's established tradition was to eschew politics (except when opposition to Communists was concerned), Prime Minister U Nu recommended that General Ne Win, the army chief, should replace him and create political conditions so that new elections could be held. Ne Win's caretaker government lasted for 16 months. Unlike the Revolutionary Council that would seize power in 1962, not a single army officer was included in the caretaker cabinet. It adhered to the 1947 Constitution but lacked political support. It was responsible to the Prime minister and not, except through him, to the Parliament. Ne Win, hardly tolerating dissent, alienated the people and when elections were held, he lost by a wide margin to U Nu who promised to restore democracy. During this period, new insurgencies developed as minorities, who previously supported the government, went into revolt.

From April 1960, U Nu resumed Burma's leadership and devoted his administration to strengthening democracy. He planned to convene all minority leaders to find a solution to their grievances through peaceful discussions. However, just before U Nu could announce his own recommendations for peace, on the night of 2 March 1962 troops from outside of Rangoon were brought in. They arrested all members of the government, all minority leaders and other possible opponents as they successfully completed the coup. By the morning of 3 March, General Ne Win declared that a Revolutionary Council of 17 military officers under his leadership had taken charge.

### **Military Rule, 1962-1974**

Ever since it seized power and overthrew the country's Constitution, Burma's junta has ruled in different garbs. Initially the Revolutionary Council ruled with laws taken over from the previous democratic government. Except the abolition of the Supreme Court and the provisions for redress of infringement of fundamental rights, Ne Win kept the earlier legislation and judiciary in place. The 1947 Constitution remained in effect in areas not altered by decree. There was ongoing civil unrest throughout Burma, but the necessity for Draconian legislation such as the State Protection Law was still not felt. The Emergency Provisions Act and the Unlawful Association Act—ironically passed by the democratic government in the 1950s—were considered sufficient.

Still the Emergency Provisions Act has been grossly abused. Its vagueness and ambiguity violate the minimum international standards laid down in respect to laws affecting the liberty of persons. The 1947 Constitution already included enough provisions to declare a State of Emergency, so it was not even necessary to proclaim an Emergency Provisions Act. In reality it is

not concerned with a State of Emergency at all. It is just an over-broad law that confers sweeping powers on the authorities to silence and punish any act of real or perceived dissent, even in the absence of a proclaimed State of Emergency. Under the Act, anyone who "violates or infringes upon the integrity, health, conduct and respect of State and military organizations and government employees towards the Government, or causes or intends to disrupt the morality or behaviour of a group of people or the general public, is liable to imprisonment of up to 7 years". Article 3 of the Act prescribes the death penalty for anyone who "causes or intends to cause sabotage, or hinders the successful functioning of State, military, and criminal investigation organizations'. The Emergency Provisions Act violates the fundamental tenets of jurisprudence; no one shall be subject to greater limitations for the purpose of meeting the requirements of morality, public order and general welfare. In addition, under the Emergency Provisions Act any person subjected to arrest is not informed about the reason of arrest.

The Emergency Provisions Act also ignores that any person under arrest must be brought before a judge to seek bail. The Act is against the provisions for protection of liberties under Article 29 of the Universal Declaration of Human Rights and Article 5 of the International Covenant of Civil and Political Rights. Other domestic laws have sufficient provisions to meet situations

apprehended in the Emergency provisions Act. For example, Articles 121 and 122 up to 130 of the Burma Penal Code adequately meet with the clauses relating to high treason of the Emergency Provisions Act. Moreover, the provisions for law, order and tranquility under Articles 5(e) and (j) are covered in Articles 143 and 144 of the Burma penal Code, which has wide provisions for punishment of all sorts of crimes and offences.

The Revolutionary Council established a military dictatorship with a hierarchy of security councils under its control, reaching from Rangoon to the smallest village. Membership in the councils was limited to military officers. Having failed to win the backing of the political parties, the Buram Socialist Programme Party (BSPP) in July 1962. Again, membership came largely from the armed forces. In 1971, following the first BSPP Congress, the party was converted from cadre to mass and given the responsibility to oversee the writing of a new constitution. Following a fake referendum on this new constitution at the end of 1973, the junta proclaimed it was adopted on 3 January 1974. Elections, equally fake, for seats in the new government were held and in March the second phase of military rule began.

### **Military Rule, 1974-1988**

With the introduction of the 1974 Constitution, the Bur-mese judiciary was drastically changed. The new Constitution provided for one party only (the BSPP) and set forth the rights and duties of the people. Rights included freedom of speech, association and assembly, but these were drastically limited by the duty "to abstain from undermining (a) the sovereignty of the state, (b) the essence of the socialist system, (c) unity and solidarity of the national races, (d) peace and tranquility, and (e) public morality". The Constitution empowered the military government to declare a state of emergency or martial law.

In 1974, the military faced popular unrest from the workers and students, with violent strikes and serious riots taking place. Shortly thereafter the State Protection Law was promulgated. The military saw the political situation as explosive and unpredictable. General Ne Win was in need of an absolutely arbitrary law that would safeguard the continuation of military rule. Although articles regarding fundamental rights had been incorporated in the

Constitution, the State Protection Law patently violated these rights. Even worse, the truth was that the State Protection Law governed the country while the Constitution was merely kept as a facade.

In 1981, Ne Win resigned from presidency but continued to head the BSPP. The junta became more and more unpredictable. In 1987 for instance, during sudden 'economic reforms', the military demonetized three banknote denominations literally overnight with no compensation. Almost 70 percent of the currency in circulation became worthless. In July 1988, while social unrest was increasing, the BSPP appointed general Sein Lwin as the new party head and later president. The military officially declared martial law. The legendary August 8, 1988 national strike resulted in thousands of deaths and arrests. On 12 August, Sein Lwin resigned after 18 days of an embattled presidency. He was replaced by Dr. Maung Maung, a civilian lawyer. However, following more uprisings in August and September 1988, the military staged a bloody coup and established a new dictatorship under martial law, called the State Law and Order Restoration Council (SLORC).

### **Military Rule, 1988-1997**

The SLORC, with General Saw Maung, the Chief of Staff as its head, forcefully put down the popular movement, again with thousands of deaths and arrests. Saw Maung assured the people that the sole aim of military intervention was to restore law and order to “ensure peace and tranquility”. Although he promised to improve the economic situation and organize multiparty elections as soon as possible, the 1974 Constitution was suspended. The National League for Democracy (NLD) quickly emerged as the leading opposition party, led by Daw Aung San Suu Kyi. She traveled widely and attracted large crowds, despite the SLORC decrees that public gatherings be limited to four persons only. In July 1989, the SLORC placed Daw Aung San Suu Kyi under house arrest, but in spite of this the NLD achieved a stunning victory in the May 27, 1990 elections. However, the SLORC refused to accept this and began to eliminate its opposition systematically.

In July 1990, the SLORC issued declaration No. 1/90 which stated that “the military does not observe any constitution but is governing the nation under Martial Law”, thereby enforcing laws



beyond reasonable limits. In 1991, for instance, a monk from Mandalay was sentenced to three years under the Emergency Provisions Act, because he had written an article about the Buddhist tenet of non-violence. In the same year the State Protection Law was made harsher by Amendment No.11/91. This abolished the right of appeal to judiciary and removed the semblance of justice. The punishment of arbitrary detention was extended from 3 to 5 years. While Daw Aung San Suu Kyi was under house arrest, her detention was extended. She was finally released in July 1995. Her release initially raised hopes for an improvement in the human rights situation in Burma, but nothing has changed.

In April 1992, the SLORC issued Order No. 11/92, which indicated that a National Convention would be set up “in order to lay down basic principles to draft a firm Constitution”. However, the vast majority of the Convention’s delegates were selected by the SLORC to ‘represent’ the farmers, workers, and minorities, or were ‘specially invited persons’. Of course the principles discussed by the Convention had to conform with the objectives as defined by the junta, which included “the participation of the military in the national political leadership role of the State”. There is no sign that the Convention is near any conclusion.

In June 1996, the SLORC issued Law No. 5.96, which provides for imprisonment for anyone who expresses political views openly, its

official name is “Law for the Protection of the Stable, Peaceful, and Systematical Transfer of State Responsibility and the Successful Implementation of National Convention Tasks, Free from Disruption and Opposition”. Under this Law, any one who commits an offence to instigate, protect, say, write or distribute anything which would disrupt and deteriorate the stability of the State, communal peace and tranquility, and the prevalence of law and order, [or an offence] to affect and destroy national consolidation, [or] to cause misunderstanding among the people”, is liable to imprisonment from three months to twenty years. This Law is dangerously overlapping the State Protection Law, and a great impediment to peaceful transition to Rule of Law.

In 1996, a Buddhist monk from Moulmein was sentenced to two years under SLORC Law No. 5.96, because he had distributed leaflets about *Samma-sati* (‘Right Mindedness’) without prior permission from the local authorities. However, the judgment did not answer the question as to how Right Mindedness and possibly lead to deterioration of the stability of the State, or to misunderstanding among the people. The junta also used Law No. 5.96 against Daw aung san Suu Kyi. She has repeatedly been refused permission to leave her compound and is still under virtual house arrest. Meanwhile, the SLORC signed ceasefire agreements with some of the ethnic forces while launching major offences against others.

### **Military Rule, 1997 to Date**

In November 1997, the SLORC was renamed the State Peace and Development Council (SPDC). Although the three most senior members of the regime retained their positions in the SPDC, there is reportedly a power struggle between two factions in the regime—one led by Lieutenant-General Khin Nyunt (the Intelligence chief, who is for economic openness) and the other led by General Maung Aye (the Army chief, who is opposed to too much openness too fast). The SPDC is currently one of the world's worst human rights violators. Even the United Nations, usually hesitant to criticize its members, has condemned the junta's abuses. The March 1998 resolution that was adopted unanimously by the United Nations Human Rights Commission described a deeply disturbing list of abuses committed by Burma's military junta, including torture, murders, rape, forced labour, and political imprisonment. The junta continues to imprison citizens for efforts to speak and associate freely. The State Protection Law of 1975 has become the main power base for the junta, which now rules by decree. In reality, the only law in Burma is what the generals from day to day decide it to be.

### **The State Protection Law of 1975**

Burma's State Protection Law (Pyithu Hluttaw Law No. 3 of 1975) consists of a Preamble and 24 Articles. The Burmese-language version of the Law does not give the exact date it was passed, it just says '1975'.

The Preamble is as follows: "The People's Assembly enacts the following Law in order to prevent the infringement of the sovereignty and security of the Union of Burma against and threat to the peace of the People, and against the threat of those desiring to cause subversive acts causing the destruction of the country, without impeding citizens' fundamental rights".

However, Article 3 (about the powers to declare Emergency) can be construed as the real preamble of the State Protection Law. So the Law is not only sailing under false colours, but the Preamble is also contradicting virtually every article of the Law. Because the State Protection Law is, more than any other law in Burma, grossly impeding citizens' fundamental rights.

## **Articles 1 and 2: Name and Definitions**

Chapter 1, Article 1 of the State Protection Law gives the name of the Law, while Article 2 defines the terms commit, Central Board, and Person Against Whom Action Is Taken:

*“Commit*, in the context of this Law, is to perform or about to perform, or to abet, or to assist in, any act that either directly or indirectly, in any manner, threatens any provision under Article 7 to this Law;

*Central Board*, in the context of this Law, is the Board organized under Article 8 of this Law;

*Person Against Whom Action Is Taken*, in the context of this Law, is any person whose fundamental rights are being restricted by any provision under this Law, or any person who is under arrest and detained following such restriction”.

The original Burmese-language version of the State Protection Law provides a rather vague definition of the word ‘commit’ — the main ingredient of the offence described by the Law—which under Article 7 empowers the Central Board to impose restrictions

on a person's rights. The Burmese version is confusing enough to interpret the word 'commit' directly as an action posing a danger to public order. Compare this with the explanations in Article 124 of the Burma Penal Code: "Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section", and "Comments expressing disapprobation of the administrative or other action of the Government, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section". Yet many people have been detained under the State Protection Law only because they expressed disapproval of the junta's policies.

Interestingly, except in Article 7, the term *commit* does not occur anywhere else in the State Protection Law. The Law basically refers to Persons Against Whom Action Is Taken. Does this mean that persons against whom action is taken need not necessarily have *committed* any offence? The definition also mentions "any act that threatens the provision of Article 7 of this Law". This is nonsense. Article 7 empowers the military to restrict people's fundamental rights. How can somebody commit an offence in order to threaten the restriction of his fundamental rights?

### **Articles 3 to 6: State of Emergency**

Chapter 2, Article 3 of the State Protection Law says, “In order to be able to protect in advance against threats to the sovereignty and security of the state and the peace of the people, the State Council (a) may declare a State of Emergency for any territory in the country; (b) may, if necessary, restrict any citizen’s fundamental rights in any territory in the Union of Burma”.

Article 3 can be construed as the real preamble of the Law. The Article speaks about the powers to declare Emergency. The State Protection Law is therefore conceived in the context of Emergency. No Emergency has been declared. Admittedly according to the junta, peace and law and order prevail. The current regime has even styled itself as the ‘State Peace and Development Council’. Article 3 bombastically provides for pre-emptive action in order “to protect the sovereignty and security of the State”, but none of the detainees under this Law were involved in any public demonstrations or strikes, and none of them were armed when they were arrested. This has nothing to do with law enforcement only with fear that something might happen that

disturbs the junta. Fear led the generals to invoke the State Protection Law. If this fear were well-founded, then surely the detainees would have been put for trial. But there has never been any evidence. The junta knew that every trial under this Law would be a farce. The judges in Burma are all selected on loyalty to the junta. So the only way to make the process watertight was to keep the detainees under protective custody.

The Burma Penal Code provides for actions to be taken in case of violence-related activities, which constitute breaches of public order. There are specific provisions in the Penal code, for example for rioting (Article 146), use of explosives (Articles 435 and 436), sabotage (Articles 430 and 431), assault (Article 351), murder (Article 300), incitement (Article 153), and high treason (Article 121).

Regarding the restriction of fundamental rights, the State Protection Law spells out the conditions to take action in that context. It is therefore argued that there must be a prior proclamation of Emergency to give validity to the rest of the Law (and to enable enforcement of the mechanism for preservation of the 'sovereignty and security of the state or public peace and tranquility', mentioned in Article 7, which is the rock bottom of the Law). Furthermore, a restriction clause is to be read in accordance with the principle of natural justice. It means that the meaning of a sub-clause in a section has to be gathered from the main provision. The main provision of Article 3 is Emergency.



With emergency not having been declared, the entire Law stands inoperative.

According to Article 4 of the State Protection Law, “The declaration of the State of Emergency under Article 3 shall not exceed sixty days. The State Council shall submit and seek approval at the next session of the People’s Assembly for any prolongation. If there is no such session within the next sixty days, an emergency People’s Assembly session shall be held and approval secured. If the Assembly’s approval cannot be secured, the State of emergency ceases to be in force from the day it is not approved. Any measures officially implemented prior to the expiration of the State of Emergency shall be lawful”.

Article 3 refers to the State Council and Article 4 refers to the People’s Assembly. Both ceased to exist with the coming of the SLORC. If State Council means SLORC or SPDC, what will ‘People’s Assembly’ mean? Moreover, the legal implication is different. The State Council was a creation of the 1974 Constitution. So what is substitution what?

Article 5 of the State Protection Law says, “immediately following the withdrawal of the declaration of the State of emergency, restrictions mentioned under Article 3(b) shall cease to be in force”.

Article 6 of the State Protection Law says, “If the declaration of the State of Emergency mentioned under Article 3(b) is withdrawn

within sixty days, the State Council shall submit and secure approval of its activities at the next session of the People's Assembly. If the Assembly's approval cannot be secured, the declaration of the State of Emergency shall cease to be in force from the day it is not approved. Any measures officially implemented prior to the annulment of the declaration shall be lawful".

The State Council, consisting of military officers, has to "secure approval of its activities" at the People's Assembly. It is highly unlikely that the Assembly's approval cannot be secured, because, if it exists, its members are military officers also. In other words, under Articles 4 and 6 the Law authorizes the military to approve *any* of its own, 'officially implemented' activities. This power is far too broad. The members of the armed forces in the whole of the Burma are protected from arrest for anything done 'within the line of official duty'. It provides the military with absolute immunity for all atrocities committed under the State Protection Law. The many instances of human rights abuses by the army have shown that without public accountability there is no incentive for the army to change its conduct.

### **Articles 7 to 9: Restrictions of Rights**

Chapter 3, Article 7 of the State Protection Law says, “The [military] Cabinet is authorized to pass an order, as may be necessary, restricting any fundamental right of any person suspected of having committed or believed to be about to commit, any act which endangers the sovereignty and security of the state or public peace and tranquility”.

If there is, has been, or will be an action, there can be reason to believe. According to Article 26 of the Burma Penal Code, “A person is said to have ‘reason to believe’ a thing if he has sufficient cause to believe that thing but not otherwise”. When there are true facts, there can be reason to believe. Article 1 of the Burma Evidence Act explains what a fact is, namely “any thing, state of things, or relation of things capable of being perceived by the senses, or any mental condition of which any person is conscious’. Thus, that a person holds a certain opinion is a fact. Non-violent opinions are also facts.

Whether facts are true or not can be verified only when

they are investigated. For example, the accused person is given the opportunity to explain the charges against him, or to test that the facts alleged are admissible or not, or concocted, or whether the facts could come within the principle of 'benefit of doubt'. The fundamental principle in criminal law is presumption of innocence. Only when there is hard evidence beyond reasonable doubt can a person be said to have committed an offence. Under Article 7 of the State Protection Act, there is no standard prescribed to determine 'reason to believe'—it is the whim or wish of the punishment giver to decide it. How critical it is that the detaining authority is given the absolute power of detention under a supposed law which is no law! The arbitrariness is manifest. Generally, in order to prove offence, the burden of proof of an alleged offence is on the person who alleges. But by detention and avoiding trial, the Burmese junta circumvents its legal duty to discharge burden of proof.

Article 8 of the State Protection Law says, "For the implementation of the authorization mentioned under Article 7, the [military] Cabinet may form a Central Board on its behalf, chaired by the Minister of Home and Religious Affairs. The Minister of Defense and the Minister of Foreign Affairs shall be members of the Central Board". There is no independence of the Central Board, the detaining authority and the [military] Cabinet. The Central Board is a constituent part of the [military] Cabinet. This means that the military can authorize itself without any accountability to anyone. The subjective satisfaction of the detaining authority is the requirement of the authorization under Article 7.

Article 9 of the State Protection Law is grossly contradicting its own Preamble, as it gives eight guiding rules for restricting citizens' rights: "In restricting fundamental rights of citizens, the following principles shall be strictly adhered to: (a) The restriction order shall be laid down by the Central Board only; (b) Only necessary restriction of such restriction shall be kept to a minimum; (d) In addition to regular review of the restriction order, earlier review of the order may be done as necessary; (e) If sufficient facts for filing a lawsuit have been gathered, the person against whom action is taken shall be handed over to the judicial authorities immediately; (f) The person against whom action is taken shall enjoy the fundamental rights as provided in the Constitution, in so far as there rights have not been restricted; (g) When any threat as described in Article 7 has ceased to exist, the restriction order shall be annulled immediately; (h) Any person detained under this Law shall, after being released, not again be arrested and imprisoned on the same charges".

This Article is against Article 11 of the Universal Declaration of Human Rights, which says that everyone has the right of presumption of innocence. This is also the principle of domestic law, but in this regard even the Burma Evidence Act is blatantly ignored. The Article, under (b), talks about "necessary restriction of fundamental rights". But who is going to decide what is necessary? And on what ground? Under (c) the Article promises to

keep the duration of restrictions ‘to a minimum’ This is also dangerously vague. And if under (e) the person, against whom action is taken, is handed over to judicial authorities, nothing has changed because the judiciary in Burma consists entirely of military officers.

It is argued that if there is no full fact, the person against whom action is taken has to be released, not kept under detention—but this appears nowhere. In the absence of provision, natural justice applies. That which cannot stand; trial, i.e. insufficient evidence, how can it be given legality by alternative of detention? The State Protection Law gives insufficiency of evidence a premium to hold a person’s liberty of ransom. And the nonsense goes on as the Article, under (f), says that the person against whom action is taken shall enjoy rights as provided in the Constitution, but in 1974 the Constitution was suspended. Admittedly the junta rules the country without a constitution.

Under (g), the Article speaks about “any threat as described in article 7”. However, Article & does not describe threats, as it merely mentions *actions* such as endangering state security—which means that as soon as the suspect is arrested, the threat under (g) has ceased to exist. And then the restriction order should “be annulled immediately”. This raises another concern, because what is immediately? Although the scope for flexibility in interpreting and applying the notion of “immediately” is very limited the Burmese junta’s judiciary has so far refused to define it,

also in terms of a specific time limit within which a defendant must be brought before a judge. Finally under (h), the Article treats us to a truly Kafkaesque clause that has nothing to do with natural justice—promising that any person detained under this Law shall, after being released, not again be arrested and imprisoned on the same charges.

### **Articles 10 to 15: Preventive Detention**

Chapter 4, Article 10 of the State Protection Law says that the “Central Board, in the protection of the State against dangers, has the right to implement the following measures through restrictive order: (a) A person against whom action is taken can be detained for a period of up to ninety days. This can be extended to a period not exceeding 180 days; (b) If necessary, the movement of a person against whom action is taken can be restricted for a period of up to one year”.

This Article is against Article 9 of the Universal Declaration of Human Rights, which says that no one shall be subjected to arbitrary arrest, detention or exile. The current detention of prisoners under the State Protection Law violates this provision. If the charges are criminal, the person against whom action is taken should be entitled to public hearing and the case should be referred to Article 124 of the Burma Penal Code. The detention of individuals without trial for any length of time, however short, is wholly inconsistent with the basic ideas of democratic government.



Article 11 of the State Protection Law stipulates that the “central Board can implement the restrictions as described under Article 10(b) as follows: (a) Designation of the territory to which the movements of the person against whom action is taken can be restricted; (b) Designation of the place where the person against whom action is taken shall reside; (c) Denial, as may be necessary, of travel; (d) Denial of possession or use of specific materials”.

This is against Article 13 of the Universal Declaration of Human Rights, which says that everyone has the right to freedom of movement. The Burmese junta, using the State Protection Law, seriously restricts the movements of NLD members, including Daw Aung San Suu Kyi. She has been kept under house arrest since 22 September 2000 without trial, on grounds of alleged breach of the travel ban that was imposed on her under Article 11 (c) of the State Protection Law. She is a citizen with her human right of freedom of movement as laid down in Article 13 of the Universal Declaration of Human Rights. She is the leader of a political party that was registered by the junta. Her party won the 1990 elections. The elections were held by the junta, and the results announced by the head of the junta. It is incumbent on her part to meet the people and her party members to honour the mandate given to her.

Freedom of association and assembly, freedom of expression and political freedom are rights guaranteed under the Universal Declaration of Human Rights. Daw Aung San Suu Kyi was

exerting her human rights when she went out on travel. The fact that the NLD was not banned is further evidence that there has been no threat to the state. The junta has no legal authority to invoke the State Protection Law. The punishment that the junta has given to a defenseless person, who is an internationally famed personality, is barbaric.

The action under Article 11(c) is to be read with Articles 7 and 10. In other words, traveling has become an act “endangering the sovereignty and security of the state or public peace and tranquility”. If that is so, the provision of the Universal Declaration of Human Rights would be a fraud. Under Article 10 of the state Protection Law, a person against whom action is taken has to be a potential danger to the State. Saw Aung San Suu Kyi cannot be a potential danger, as is now evidenced by the talks with the junta. It could be that she wanted the implementation of the 1990 election results, but that could not be constituted as being a ‘potential danger to the State’. It is thus a clear case of a politically motivated detention of a political opponent.

A travel ban itself is illegal and non-compliance with the order cannot constitute breach of Law as mentioned under Article 22, less a punishment of indefinite detention. The travel ban is a total defiance of Rule of Law under Article 5 of the Universal Declaration of Human Rights and also contravenes Article 13 of the International Covenant of civil and political Rights. Travel bans are inhuman and degrading. In addition to Article 11 of the

State Protection Law, the junta also still enforces the Village Act of 1908 and the Towns Act of 1907. These Acts restrict free movement within Burma, and make all travel subject to permission and reporting requirements. There is also the obligation that any person who intends to spend the night at a place other than his registered domicile must register with the local police in advance, and that any household hosting a person not domiciled there must submit to the police a 'guest list'. This is related to Article 11(b) of the State Protection Law: authorities frequently enter homes in the middle of the nights to check registration documents of occupants. In addition, SLORC Order No. 1/90, issued on 22 May 1990, stipulated that "action will be taken against all those who fail to report people illegally residing in their home". The Order threatens that those who fail to report their guests will be charged under Article 124 of the Penal Code, "for failing to disclose to the authorities concerned either an act or a conspiracy that amounts to high treason". The minimum sentence for this crime is seven years imprisonment.

the action under Article 11(d) is to be read with 11(c). It is often used to deny passports to people. In this way Article 11(d) constitutes a travel ban also. The official board that reviews passport applications often denies apparently on political grounds. Moreover, leaving Burma legally requires the possession of specific government authorization, which even in normal circumstances is extremely difficult to obtain. The junta carefully scrutinizes prospective travel abroad. And each time Burmese

citizens come back to the country, they are required to return their passports to the authorities. A passport application must be submitted each time a person wants to travel outside the country, they are required to return their passports to the authorities. A passport application must be submitted each time a person wants to travel outside the country.

According to Article 12 of the State Protection Law, the “Central Board shall obtain the approval of the [military] Cabinet prior to the detention of a person against whom action is taken, in case such detention is considered necessary for a period longer that stipulated under Article 10(a)”.

Article 13 of the State Protection Law stipulates that the “Central Board shall obtain the prior approval of the [military] Cabinet in case it is considered necessary to extend the restrictions mentioned under Article 10(b)”. There are no further guidelines as to what is deemed necessary.

Article 14 of the State Protection Law empowers the [military] Cabinet to “grant prior approval to continue the detention or restriction of rights of a person against whom action is taken for a period from 180 days up to 3 years”.

Article 15 of the State Protection Law says that “the Central Board may, in case measures are necessary to arrest or detain a person or to restrict a person’s rights, direct any Public Service to carry out such measures accordingly”.

This makes it easy for the junta to keep intercepting mail or tapping phone lines indefinitely. Unlike article 14, Article 15 does not provide for a specific, limited timeframe. The Burmese military is fully in control of every public service from the state railways to the telephone system, so every breath you take, every move you make, they will be watching you.

### **Article 16: No Real Provisions for Review**

Chapter 5, Article 16 of the State Protection Law gives a provision for review, although this sounds nicer than it is and is vulnerable to abuse. According to this Article, which is dangerously over-broad, “the [military] Cabinet or the Central Board can review and implement, as may be necessary, any order for restriction, arrest, detention, or denial of rights; (a) There will be at least one regular review every sixty days; (b) Restriction orders may be altered or annulled if necessary; (c) arrest and detention orders may be filtered or annulled if necessary; (d) Denial orders may be altered or annulled if necessary”.

A procedure which allows preventive detention (especially one that does so even in peacetime) but does not guarantee detainees the right to detailed information regarding the charges against them, does not provide fair review. There can be no meaningful review of the detention order without the guaranteed right to know the particulars of the arrest, promptly after the arrest. Article 16 (a) says that “there will be at least one regular review every sixty days”. A review exactly of what? Conducted by whom? The

original Burmese version of the Law literally speaks about “right of review from the center to the center”, which means that the detaining authority can review its own decision. The accused is not informed about anything. This is against Article 14 of the International Covenant of Civil and Political Rights, which provides minimum guarantees to the defendant “in the determination of any criminal charge”, including the rights to be informed, to have adequate time to prepare a defense, to be tried without undue delay, to legal counsel free of charge, to cross-examine witnesses, to use an interpreter, and the privilege against self-incrimination.

The meetings of the Central Board cannot be considered trials, as the person against whom action is taken is given no opportunity to rebut the materials on which the Central Board is supposed to make a decision. The Law’s failure to set specific criteria gives an excessively broad grant of power to the detaining authority, rendering the power vulnerable to abuse. The Law does not give any provision enabling courts to probe the legality or rationality of a detention order. The Law also states that “denial orders may be altered or annulled if necessary”. This is exactly what has happened so many times. For example, Daw Aung San Suu Kyi’s house arrest under the State Protection Law was suddenly extended, whereby the junta even used the Law retrospectively. Law must *never* be used retrospectively.

### **Articles 17 and 18: Reporting**

Chapter 6, Article 17 of the State Protection Law says that the “Central Board shall compile a regular report about its activities every ninety days”. Article 18 of the State Protection Law says that “if necessary, the [military] Cabinet can use the report mentioned in Article 17 to alter or annul any orders passed by the Central Board regarding restriction, arrest, detention, or denial of nay rights of citizens”. Of course the Central Board’s reports is not a public document. Remains the interesting question who is going to assess it.

Reporting means accountability, the very thing that military juntas are afraid of. So it is not surprising that in *Burma Law Report*, a government publication, cases under the State Protection Law have been consistently omitted. The judgments as mentioned in *Burma Law Report* are mostly related to the Penal Code, such as theft, swindle, embezzlement, rape, murder, and receiving stolen property. The reasoning leading to judgments in *Burma Law Report* usually consists of a few sentences only, while the whole text contains repetition of selected facts.



There have been thousands of political cases in Burma, not only under the state Protection Law, but also under the Emergency Provisions Act and the Printers and Publishers Registration law. judgments in cases under these laws, very often with an unjust, unfair, ambiguous and politicized nature, remain unreported.

### **Articles 19 to 21: Appeal**

Chapter 7, Article 19 of the State Protection Law says that “any person against whom action is taken has the rights of appeal while action is being taken”. It is difficult to imagine how to appeal “while action is being taken”. How can someone appeal while being dragged through the street by armed security troops?

Article 20 to the state Protection Law says that “appeal can be made to the [military] Cabinet regarding orders regulating restriction, arrest, detention or denial of rights laid down by the Central Board under this Law. The [military] Cabinet can annul, alter or approve the order as may be necessary”. This emphasizes the fact that the junta is not accountable to anyone.

Article 21 of the State Protection Law says that “if the Central Board considers it necessary to extend any orders passed under this Law with prior permission from the [military] Cabinet, an appeal can be sent to the Council of People’s Justices. The Council may alter, annul or approve the order as may be necessary”.

The right of appeal has been given to the Council of People's Justices, which is of course completely under the junta's control. After the military coup in 1962, the Supreme Court and the provisions for redress of infringements of fundamental rights were abolished. In addition, SLORC Notification No. 11/91 abolished Article 21 of the State Protection Law. The situation therefore is that there is no effective remedy at all. This is contrary to Article 8 of the Universal Declaration of Human Rights, which says that everyone has the right to effective remedy by the competent national tribunals for acts violation the fundamental rights granted by him by the constitution or by law. The State Protection law has to be taken into account together with its context. The context is that it was passed by the 'Pyithu Hluttaw' parliament of the BSPP, and the legislators provided the rights of appeal to judges as an integral part of the Law. When an integral part is torn out, the Law itself is vitiated. Hence, amendment under Notification No. 11/91 has rendered the State Protection Law invalid.

Admittedly the Law refers to detention of a person without trial in circumstances that there is no sufficient evidence to make a legal charge or secure conviction by legal proof, but may still be sufficient to justify detention in the interest of national security. It is left to the understanding of the arresting authority to determine what *sufficient* means. The absurdity of the Law becomes clear in its implementation. Detention is supposed to be for a maximum period of 3 years. After that, this is extended for another 3 years. This was amended to 5. It goes on and on. Regarding the revoked

right of judicial appeal, in practice this means that detention is now a continued process for any number of years until death. Detention under the State Protection Law is an inverted death sentence without charges and without trial. For instance, Si Thu Ye Naing and Aung Kyaw Moe were both detained in Tharawaddy Prison under the State Protection Law. Both of them died while under detention. There are at least fifty absolutely arbitrary cases documented within the ambit of the State Protection Law, where detainees have been in prison for at least 10 years. Their original terms had expired, but their current detention is under the extension period provided by Article 21 of the State Protection Law. The detainees are now being held under article 10(a) of the Law. Out of these fifty cases, that of Min Ko Naing is particularly noteworthy. His detention is absolutely arbitrary.

First, the military junta, which is the detaining authority, has no legality. It is a regime based on no Constitution or Rule of Law. The junta's seizure of power does not stand the test of international law. The doctrine of necessity has ceased to operate due to the May 1990 elections. The elections were a massive public demonstration to end military rule. The junta made a public declaration of multiparty democracy and its intention to transfer power to the elected representatives of the people. Because of the NLD's victory in the elections, the junta became *functus officio*. It no longer had jurisdiction except for the duty to convene the parliament. In such a context, the junta wielding power under the State

Protection Law is not only highly arbitrary but also immoral. Any law passed or enforced by such a regime without legal basis is invalid.

Second, according to the junta's response to the United Nations on 22 October 2001, Min Ko Naing was convicted under Article 124 of the Burma Penal Code and Article 17(1) of the Printers and Publishers Registration Law. Min Ko Naing has been in prison since 23 March 1989. His prison term would have expired in July 1999, but was kept under detention thereafter under Article 10(a) of the State Protection Law. This is totally illegal. If he was to be put under further detention, it could have been done only after releasing him and on new evidence of illegal activities during the period following his release. A prisoner who is in prison cannot be inflicted with punishment under the State Protection Law. How could he have committed acts constituting grounds for detention under the State Protection Law? The fact that he has been kept under article 10(a) violates Article 9 (h), however Kafkaesque, of the same Law. In fact, by continuing to keep Min Ko Naing in prison after having served his term, the authorities nullified the already passed order of commutation. The continued, indefinite detention can extend up to death of the prisoner. It is a tragic case of a prisoner subjected to death sentence without trial.

### **Articles 22 to 24: General Provisions**

Chapter 8, Article 22 of the State Protection Law says that “any person against whom action is taken, who opposes, resists or disobeys any order passed under this Law shall be liable to imprisonment for a period of up to three years, or to a fine of up to 5,000 kyats, or to both”. Article 22 is contradicting Articles 19 and 20, as it does not allow the detainee to resist any order passed under this law. Because in the eyes of Burma’s judiciary, if a detainee appeals, it means that he resists.

Article 23 of the State Protection Law says that “any provision under Article 7 shall be implemented only according to this Law”. This means that the junta deliberately ignores the Burma Penal code, the Burma Evidence Act, the Burma Police Act, the Human Rights Conventions, the Jail Manual, and so on.

Article 24, the last article of the state Protection Law, says, “For the purpose of effective and successful implementation of the provisions contained in this Law, the [military] Cabinet may issue

notifications, orders, directives and procedures as may be necessary”.

The tragic consequence of the provision under Article 24 is that the junta now rules by decree.

On 9 August 1991, the State Protection Law was amended by SLORC Notification No. 11/91. The salient amendments were that the right of appeal under article 21 was repealed, and that the maximum prison sentences under Articles 14 and 22 went up from 3 to 5 years, disproportionately harsh in relation to the alleged offences. The amendments were made applicable retrospectively, so that persons already detained under the State Protection Law prior to the amendment were also subjected to extended punishment.

In 1994, the SLORC announced that, according to advice received from their “legal advisers”, it would be justified to hold anyone arrested under the State Protection Law for a total of six years, arguing that the period of five years specified in Article 14 was in addition to the period of one year initially allowed under the Article. Of course this is an interpretation that does not hold water—it only holds political prisoners.

## State Protection and Preventive Detention

Laws and constitutions in many countries still contain provisions which are incompatible with international human rights standards, including excessive grants of sovereign and official immunity and sweeping powers of preventive detention. This is full of potential for failure, and highly vulnerable to abuse by detaining authorities. It is often hardly possible to distinguish harsh antiterrorism bills and preventive detention acts from martial law. It is common sense that words like 'state protection', 'security of the state', 'anti-terrorism' or 'public order' need consistent jurisprudence and clear criteria. Notably, European laws allow security of state as the only justification for preventive detention. The European Court, however, sees preventive detention as *per se* arbitrary and has interpreted this provision to apply only the pre-trial detention. That is, the provision authorizes detention only for the purpose of bringing an accused to trial by a judicial authority.

The word 'preventive' is opposite to the word 'punitive'. The object of preventive detention to intercept someone before he commits an offence and to prevent him from doing so. The



detention is made on suspicion or probability that the society will be harmed or the security of the state endangered. Any law which prescribes preventive detention is repugnant to human rights and democracy. It means that also persons without any criminal intent can be sentenced to imprisonment. Any legislation or actions taken in the name of national security must conform with international human rights standards. Most problematic is the lack of accountability of authorities. With vague language and inadequate safeguards, legislation implementing preventive detention gives law enforcement personnel too much power to detain individuals with little judicial oversight. One consequence of this power of detention is to leave detainees vulnerable to torture and inhuman treatment at the hands of law enforcement. Human rights organizations can document tens of thousands of cases of inhuman and degrading treatment and torture. Another effect of the broad grant of power is the discriminatory application of preventive detention laws, often for political ends.

Especially now that governments are scrambling to draw up new anti-terrorism bills, there is a need to consider the view and needs of all members of the populace. The South African government, for instance, made concerted and effective efforts to encourage participation of all its citizens in this discussion. As a basic commitment to democracy, every government should do the same.

Unfortunately, countries whose leaders have used the rationale of law, order and discipline to impose martial law have discovered that such a move is akin to a pact with the devil. Yes, in the short term there may be gains in law and order. But in the long run the costs always outweigh the benefits. Yet the seductive charms of martial law continue to work their magic on those who are disillusioned by turmoil or terrorism.

To fight terrorism in the Philippines, President Fidel Ramos backed a bill that resembled Burma's State Protection Law. It would give the government martial-law-like powers. However, "The very means to fight terrorism are themselves the means to terrorize the citizenry", commented Bishop Teodoro Bacani. "What the Philippines needs is not the introduction of harsher law but better enforcement of the existing ones, which are adequate to deal with any troubles. To give greater powers to the military is a self-defeating proposition".

In January 1996, while decrying widespread political corruption in India, some politicians suggested that the armed forces should take over the government. As though on cue, a military coup took place days later in Niger, Western Africa. According to the coup leader, Colonel Ibrahim Barre Mainassara, the takeover was necessary to save the country from the "personal ambitions, intolerance, cronyism and corruption" that characterized the ousted government. But many would ascribe those very qualities to most of the martial-law regimes that have come and gone over the years.

This is almost predictable because the absolute powers of martial law tend to corrupt its practitioners absolutely.

On 14 December 2001, Britain's parliament approved a package of emergency anti-terror legislation that includes the right to intern foreign suspects without trial. However, the parliament voted to restrict powers given to police under the bill to matters connected with terrorism and national security and to retain communications data to cases only where national security is thought to be at risk. Unlike Burma's State Protection Law, some safeguards have been provided, even in extreme emergency situations. It is not the first time that Britain has enacted emergency legislation. In response to the violent and well-organized terrorist movement in Northern Ireland, the United Kingdom passed anti-terrorist legislation such as the Northern Ireland (Emergency Provisions) Act, and the Prevention of Terrorism (Temporary Powers) Act of 1989. The latter allows for a suspect to be held in custody without charge for up to seven days, subject only to the approval of the Home Secretary. The European Human Rights Court found this to be too long a period of detention. In comparison, Burma's State Protection Law mentions a pre-charge custodial period which is more than 26 times the period allowed by the United Kingdom's Act.

Following the September 11, 2001 terrorist attacks, the United States have adopted a strategy of preventive detentions on a scale not seen since the Second World War. The whole operation is being

conducted under great secrecy, with defense attorneys forbidden to remove documents from court and a federal gag order preventing officials from discussing the detainees. Law enforcement personnel have refused to identify lawyers representing people who have been detained or to describe the most basic features of the operation. The officials say they are prohibited from disclosing more information because of privacy laws, judges' orders and the secrecy rules surrounding the grand jury investigation of the September 11 attacks. The campaign appears to be less an investigative search for accomplices to the attacks than a large-scale preventive operation aimed at disrupting future terrorism. That is evident from the fact that none of the detainees has been charged in the plot or with other acts of terrorism.

The United States government's strategy and methods have elicited protests from defense attorneys and human rights activists. The Inter-American Court has also held that the right to judicial remedy to evaluate the lawfulness of detention is inviolable, even in times of emergency. To turn to preventive detention laws for a solution to the problem of terrorism would be to seek a cure that is worse than the disease.

Various countries, including Malaysia, Singapore, India and Bahrain, have Internal Security Acts that provide for two-year detentions. In Bahrain, the detention order is subject to appeal to High Court. In the event the detainee refuses to seek remedy, the prosecutor-general has to do this. In India the order is appealable to High Court, Supreme Court and the Human Rights Commission.

In India, the Maintenance of Internal Security Act, similar to Burma's State Protection Law, was abolished and replaced by the National Security Act, incorporating important changes due to previous abuse. The National Security Act specified criteria for the appointment of a central Board in order to make it independent of the authorities, and deleted the power of parliament to extend the period of detention. Such changes are an important step toward safeguarding liberties.

If persons have been kept under unlawful detention, they should be entitled to compensation. Burma's State Protection Law does not provide for this. Article 9 of the International Covenant of Civil and Political Rights and Article 5 of the European Convention provide the right to compensation for unlawful detention except in states of emergency. The Constitution of Nepal also has a provision to that effect. The underlying principle is the Law must never be intended to destroy a man and, for this reason, Law should be made as little Penal as possible.

State protection legislation is often conceived in the context of Emergency. Articles 352 to 360 of the Indian Constitution, for example, provide for the declaration, modification and termination of states of emergency.

The President of India, acting under the advice of the Union Cabinet, can proclaim a state emergency if he is *satisfied* that the security of the country is threatened either by external aggression or by internal armed rebellion. The proclamation is subject to parliamentary approval and can be extended indefinitely on a six monthly basis by parliament. Pending the proclamation, the central government can give directions to any state administration on the exercise of its executive powers. A proclamation (if based on threats to national security by war or external aggression) also has the effect of suspending the fundamental rights to freedom of speech and expression, freedom of assembly and association, freedom of movement and residence and the freedom to practice any profession, occupation or trade.

Great care should be taken to make any provision in the context of *satisfied* not an overly broad delegation of power to the executive. The 'subjective satisfaction' standard precludes effective judicial review and allows for discriminatory application of preventive detention laws. The executive's 'satisfaction' must be of rational probative value and must not be extraneous to the purpose of detention.

The Indian parliament has enacted extensive legislation implementing preventive detention, including the Armed Forces Special Powers act of 1958, passed in response to the Naga tribal insurgency. The Act allows response to the Naga tribal insurgency. The Act allows arbitrary arrest, search without warrant and summary execution with effective impunity. The National Security

Act of 1980 allows detention for up to one year without charge or trial, and two years in the case of Punjab. Article 151 of the Criminal Procedure Code allows preventive detention by police. The Terrorist Affected Areas (Special Courts) Act of 1984 allows for the trial by 'special courts' of persons charged with certain offences, whereby the burden of proof is reversed in certain circumstances. And although the Terrorist and Disruptive Activities Prevention Act of 1987 (TADA) lapsed in 1995, authorities still use it to detain 'suspects' by landing them to ongoing cases filed before 1995. There is an ongoing discussion in the Indian Parliament about the Prevention of Terrorism Ordinance of 2001 (POTO), an anti-terrorism bill which includes many of the features of the lapsed TADA.

India and Burma both had been under common colonial rule before they became independent. After independence the two countries continued the same legal system based on common law. The criminal justice systems in both India and Burma have been addressed by the Penal Code, Criminal Procedure Code, Evidence Act and some other laws. In this context it is interesting to draw some comparisons between India's POTO and Burma's State Protection Law. The POTO, promulgated on 24 October 2001, has already been widely criticized as abrogating fundamental human rights. It was meant to provide a new definition for 'terrorist act' in the light of the widespread criticism of such terms under the TADA. However, the POTO retains the same definition. In fact, 'terrorist acts' may now include more offences than before.

Article 3 of the POTO defines terrorism so broadly that ordinary cases such as murder, robbery or theft can be covered by it, while the definition of ‘terrorist’ overlaps practically the entire domain of ordinary penal laws. According to Article 3, “Whoever conspires or attempts to commit, or advocates, abets advises or incites or knowingly facilitates the commission of a terrorist act or any act preparatory to a terrorist act, shall be punishable with imprisonment for a term which shall not be less than five years but which may extend to imprisonment for life, and shall also be liable to fine”.

The Ordinance also uses the words “with intent to threaten the unity, integrity, security or sovereignty’ of the State, almost equivalent to the words of the State Protection Law. Both laws have a common factor namely that they are intrinsically vague and overly broad. For example, the POTO is so loosely defined that any organization can be identified as a terrorist organization. The POTO violates India’s Constitution and its obligations under the International Covenant on Civil and Political Rights. The striking difference with Burma’s State Protection Law is that the POTO at least has provisions for judicial remedy. For example, an offence under the POTO will be cognizable as defined in the Criminal Procedure Code. Bringing the accused before a court, keeping him in custody, enlarging him on bail, and other provisions of law still apply. Also, under the POTO the judge must have the concurrence of the Chief Justice of the High Court. At least a semblance of independence of judiciary is put in place. In comparison, Burma’s



State Protection law is without any semblance of justice.

The United Nations Working Group on Arbitrary Detention noted in its report of 17 December 1993 that states of emergency tend to be a “fruitful source of arbitrary arrests”. In its report of 21 December 1994, the Working Group concluded that “preventive detention is facilitated and aggravated by several factors, such as exercise of the powers specific to states of emergency without a formal declaration, non-observance of the principle of proportionality between the gravity of the measures taken and the situation concerned, too vague a definition of offenses against State security, and the existence of special or emergency jurisdictions”. This adequately describes the situation under Burma’s State Protection Law.

In practice, the inundation of preventive detention laws creates a “when in doubt, detain” ethos in law enforcement. Safeguards are necessary to ensure that investigative inefficiencies, incompetence and doubt do not, in practice, translate into arrest and detention. A danger of inadequate safeguards is subversion of the criminal process. Without additional constitutional safeguards, any preventive detention law presents the risk that authorities will shy at courts for prosecution of ordinary offences and rely generously on the easier strategy of subjective satisfaction.

Even if there is popular support for new bills governing

preventive detention, the importance of public involvement in drafting such bills cannot be overestimated. People must be enabled to express their opinions and to have their needs taken into account, thereby giving them the sense that such legislation is the product and reflection of the views and interests of the citizenry. The process of adopting or reforming legislation must be transparent and inclusive. The final document should yield an integration of ideas from all interested parties, other organizations and individuals. If the people perceive legislation was imposed on them, its legitimacy and its required base of popular support will be seriously jeopardized. The people of Burma, of course, need no reminders. There are some lessons to be learnt from Burma's State Protection Law.

### **Is Burma Changing Towards Rule of Law?**

Since the end of 2000, there have been signs of a reversal in the hard-line junta. It started talks with Daw Aung San Suu Kyi. These ongoing talks are relevant in respect of Rule of Law. The junta has released a number of political prisoners. So far, 169 NLD members have been released, including 30 members of parliament. The international Labour Organization, the European Union and the International Red Cross have been allowed to visit the country.

However, a similar process began in April 1992. The junta had entered into ceasefire agreements with ethnic minorities and allowed the United Nations High Commissioner for Refugees to visit. In September 1994, there were talks between the junta and Daw Aung San Suu Kyi. In 1995 she was released from house arrest. But then, suddenly, the situation changed drastically and the worst kind of repression followed, with the arrest of the entire Central Committee of the NLD and renewed house arrest for Daw Aung San Suu Kyi.

Fair trial and due process of law in Burma have been consistently denied. Legal proceedings are not open to the public, and defendants are rarely allowed to engage counsel to argue their case. Most of the trials are carried out in summary fashion, with scant regard being shown to the evidence adduced. The validity of trials is also doubtful because there is still no independent judiciary. In most of the cases, verdicts are determined in advance of the trials, while lawyers are warned not to be proactive. Article 9 of the International Covenant of Civil and Political Rights provides that anyone who is arrested shall be promptly informed of the reasons for arrest, but in practice this rarely happens in Burma. Often Military Intelligence passes sentences orally at the time of arrest, before any trial has taken place. Unprofessional behaviour by court officials and the manipulation of the courts for political ends continue to deprive citizens of the right to a fair trial and the Rule of Law.

Even the fact that there are ongoing talks has not been reported in the Burmese newspapers. According to informed sources, the junta and the NLD are still in the 'confidence-building' stage and are far from reaching the ultimate objectives of the talks: democratization and the establishment of a civil government. However, the talks are considered by many not as a concession but as a device for the junta to launch another offensive against the pro-democracy movement—the talks are being carried out through a liaison officer who conveys messages between the junta and Daw Aung San Suu Kyi, who remains under house arrest. It is very much the question

whether the political situation in Burma is really changing towards Rule of Law.

## **Conclusion**

The Burmese junta's adherence to legal forms is a facade. The junta has no legitimacy and has systematically failed to abide by basic principles of legality and human rights. There cannot be a single justification, be it legal, social or otherwise, for the existence of a law as unreasonable as Burma's State Protection Law. It is easily the most Draconian law in the world. Still legislators may learn something from it, namely that basic human rights must not be trampled in the attempts to draw up harsh new anti-terrorism bills.

The Burma Penal Code has wide provisions for punishment of all sorts of crimes and offences. If they were considered as insufficient, some of its sections could be amended to meet extraordinary situations. In no case can special laws be called a law. Giving something the name of law does not make it a law. A real law has five main characteristics: (1) it is not vague or ambiguous; (2) it provides certainty; (3) it cannot be used retrospectively; (4) it is not open to various interpretations; and

(5) it has the provision for judicial review. Burma's State Protection law has none of these characteristics. Scrapping the state Protection Law would be sending a message that at least there is a semblance of Rule of Law in Burma. The judiciary, although hopelessly subordinated to the junta, would at least be given some space. The demise of the State Protection Law would be likely to herald a new chapter in Burma's transition to democracy. It would be a confidence-building measure.

Even the global war against terrorism cannot, in any way, justify sham legislation like the State Protection Law. It merely serves as a power base for a ruthless military junta. All political prisoners detained under the State Protection Law must be released immediately. Moreover, this Law does not even deserve to be amended. It should be abolished completely, right now.

# **BURMA'S STATE PROTECTION LAW**

**An Analysis of the Broadest Law in the World**

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**Burma's State Protection Law of 1975 is dangerously over-broad It Serves as a main power base for a ruthless military junta. The junta hopes that the global war against terrorism may justify the existence of the State Protection Law. However, this analysis proves that there cannot be a single justification for the existence of such a Draconian law.**  
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**Burma Lawyers' Council (BLC) was formed in 1994 in Marnaplaw, Burma. BLC is a non-government organization that is neither aligned nor under the authority of any political organization. BLC was formed by individual lawyers and legal academics joining together of their won free will. BLC aims to contribute to transforming Burma into a free, just and peaceful society wher all citizens enjoy protection under a federal constitution. BLC will achieve this aim by vigorously opposing all unjust and oppressive laws, in helping restore the rule of law.**

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