Legal Issues on Burma

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Legitimacy Issue:

Modernization, Democracy and Constitutional Reform in Burma

Issue on Constitution Drafting Processes:

Comparative Constitution Drafting Processes in the Philippines, Thailand and Burma

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Constitutional Protection of Environment in Burma

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Preface

Justice is a necessary prerequisite of any law for the compliance of the people with the law. If natural justice and the law are incompatible , law looses all its' moral force. Both the people and the government must comply with the law if the rule of law is to be said to genuinely apply. Without such compliance the actions of the state rapidly become random, self-serving and unpredictable.

It is the Burma Lawyers' Council's aim to vigorously oppose all unfair and oppressive laws, and to restore the basic principles of the Rule of law. Only when the basic principles of the Rule of Law are put into practice and adhered to, it will assist and support the emergence of a modern, advanced and a new democratic country.

In order to establish a peaceful democratic human society, the people of a country need to observe the principles of rule of law. However, in Burma, from 1962 until now, not only have successive military rulers shown a brazen disregard for legal norms in the manner in which they have come to control the levers of power, but they have, over the years, promulgated a plethora of laws and decrees which are of doubtful legality under both international and Burmese domestic law. The common people are denied their basic rights under the Rule of Law. As a result, in general, most common people in Burma have doubts in the concept of rule of law as a shield to protect their fundamental rights and freedom. This will create a great problem for the establishment of a peaceful democratic country in future.

With the assistance of the NOVIB and the National Endowment for Democracy, the Burma Lawyers' Council has already established a legal research centre. Based on the research under the principles of Rule of Law, this journal presents the legal analysis on the major issues of Burma in connection with the issues in this region. The Burma Lawyers' Council will exert efforts to publish the journal regularly.

Modernization, Democracy and Constitutional Reform in Burma

Introduction

This is the report to mainly assess the ploy of the ruling military regime in Burma, self-claimed State Law and Order Restoration Council (SLORC), to achieve legitimacy to rule the country for the long term through the National Convention, their constitution making process. This paper will explore how the SLORC have manipulated the political process through legal device to gain legitimacy and credibility, domestically, but more importantly to them, regionally and internationally. Moreover, there will also be a brief analysis on the constitutional principles laid down by SLORC's National Convention.

This report mentions the attempt of the democratic and ethnic forces and that of the National League for Democracy led by Daw Aung San Suu Kyi to resist legitimizing the SLORC's rule and to produce a (proposed) future constitution.

It is food for thought whether, without political liberalization, modernization in Burma is conceivable or not. The paper will also explore the economic investment and its influence on democratic development in Burma.

In this report, Burma Lawyers' Council send some information to the international community with regard to a proper constitutional reform to achieve democracy and modernization in Burma in order to take consideration into account.

Background

Burma gained its independence in 1948. Before 1962, almost all the political parties in Burma were weak in practice, in the exercise of democratic principles. The leading parties such as the Union Party, Anti-Fascist Freedom League and National United Front themselves had a misconception of federalism and were much reluctant to exercise the principle of equality with regard to the non-Burma ethnic nationalities. The majority of the people were also not well familiar with the idea. The racial chauvinist military clique led by Gen. Ne Win seized power on March 2, 1962, when there was a movement for federalism and abolished the 1947 constitution the next day.

The economy of Burma started to deteriorate from the year 1966 under the military rule. The regime tried to get foreign assistance for solving the economic problem. Due to the absence of a constitution, it did not make much headway. Accordingly, it drafted a constitution for forming a one-party state which fully guaranteed the perpetuation of military dictatorship. A referendum was held on the draft constitution in 1974 and the people were forced to support it. Then the general election was held and the so-called civilian government, dominated by military and ex-military officers, was formed according to the constitution and widely publicized. Subsequently, Burma became one of the least developed countries in the world and the popular democratic uprising against the ruling regime occurred on 8-8-88. It was ruthlessly pushed down by the army and approximately over three thousand people were shot dead in the streets. The SLORC staged a military coup and came to power. Despite the general election in May 1990, the regime neglected its result and did not transfer power to the electing winning party, National League for Democracy led by Daw Aung San Suu Kyi, winner of Nobel Peace Laureate. Instead, she was put under house arrest for six years and released her in 1995. Nevertheless, up to the present time, her movement is still heavily restricted.

SLORC's Quest For Legal and Political Legitimacy

The State Law and Order Restoration Council s (SLORC) response to the democratic elections of 1990, in which the pro-democracy candidates decisively won the legal and political right to take power, has been a concerted attempt to achieve legal legitimacy through the adoption of political strategy.

SLORC's retrospective decree that those elected in 1990 were elected for the purpose of formulating the country's constitution, was followed by the convening of the National Convention (hereafter referred to as the Convention). The Convention has been cloaked in legal and consultative artifice to bring an appearance of form to an illegitimate process.

Regional and particularly international credibility is of the utmost importance to the ruling military dictatorship. Contrary to the assertions of many international governments, that is that the SLORC Generals do not care if the international community chooses to isolate them politically and economically, there is evidence which suggests that they do care.

The SLORC have been pursuing a deliberative policy of engagement with the international community and by their actions it is evident that they do not want isolation either voluntary or involuntary. It is timely for all international governments to analyze the current situation regarding the SLORC's engagement policy. That the SLORC do care what the international community thinks, gives leverage to those countries whose foreign policy objective is the restoration of democracy in Burma.

Despite the SLORC's current hold on power through its military strength, without political legitimacy, which they can only consolidate through legal device, it is inconceivable that the SLORC will overcome their current political and economic crisis.

The political crisis of course arose in 1990 after the democratically elected members of Parliament were prevented by the SLORC from constituting government. These members and supporters are the pro-democracy forces, led by the Nobel Peace Laureate Daw Aung Suu Kyi. They continue to gain strength and support from their own community, including the Ethnic Peoples, and that of the international community.

The SLORC have attempted to persuade the people that only they can provide strong and legitimate government, and they continue their attempts to obtain the assistance of the international community in this regard.

That the SLORC rule without legal legitimacy is beyond doubt, although they make feeble attempts to claim otherwise. However they know that they cannot sustain their argument either in domestic or international law. Knowing this they pursue political legitimacy, because without political legitimacy, their power will be short lived.

Much to the chagrin of the SLORC they know that political legitimacy

does not ensue from military power or from the trappings of political office, like sitting at the United Nations or getting a place at the ASEAN table. Political legitimacy comes from the people. [The Universal Declaration of Human Rights reflects this universal principle, which is that the will of the people shall be basis of the authority of government.]

The Ethnic Peoples have also denied the SLORC this and will continue to do so. Their denial takes many forms, some passive and some aggressive. The denial and resistance continues, even where there are cease-fire agreements in place.

Either way the result is the same, a denial of the thing that the SLORC most needs to consolidate their long term objective to hold on to power. Only when power is wrested from the SLORC will the people of Burma be free from the atrocious human rights abuses, which are well documented in authoritative sources, they have suffered under the illegal military rule of the SLORC.

Why did the SLORC hold the 1990 May Election?

In order to understand the modus operandi of the SLORC in the current situation, it is necessary to understand their rationale for the holding of the 1990 election.

In August 1988 there was a popular democratic uprising, whose aim was to overthrow the ruling military generals who ruled the country under the party name of the Burma Socialist Programme Party (BSPP). In September of that same year, a military coup d etat seized power, calling themselves the State Law and Order Restoration Council (SLORC). The only substantive change was in the name from BSPP to that of the SLORC, because the men who seized power were the same men who had ruthlessly held power for decades.

This was a pre-emptive strike to reassert their control and prolong their power. At this time the generals knew that the people would no longer tolerate their dictatorship form of rule and Burma was slowly withdrawing from its political cocoon to open up to the international community. This parallelled the dominance and rise of the Asian Tiger Economies and the Association of South East Asian Nations (ASEAN).

At this time, the country was in economic chaos, the price of rice was beyond the means of the ordinary people and the BSPP had demonetarized

the currency, the kit.

The SLORC then informed the people that they would have a multi-party democratic election. This was in a sense a form of legal device, which gave the SLORC time and opportunities to organize in a manner that would maximize their chances of holding onto power in the future. It also stabilized the immediate political situation giving them an interlude of peace.

Martial law however was not suspended and continued to operate throughout the lead up to and during the election and is of course still in operation today.

It was the SLORC's Announcement No. 1/88 which 'authorized' the holding of multi-party elections. The Announcement inter alia read as follows:

1. To stage democratic multiparty elections after fulfilling all the above stated responsibilities.

2. The present Elections commission for Holding Democratic Multi-Party Elections will continue to exist for the successful holding of multi-party elections.

3. In order to be ready for the multi-party general elections, all parties and organizations which will accept and practice genuine democracy to make preparations and form parties now.

As a result 235 political parties were formed according to Announcement No.1/88 (#) cited above. This certainly created the impression of a multi-party situation. However, many of these parties were too small to be effective. Moreover, their activities were restricted by various oppressive measures instigated by the SLORC, through the military authorities.

The BSPP had by this time disbanded, but in essence reformed under the name, the National Unity Party (NUP). The SLORC allowed the NUP the use of all the offices and buildings through out the country, previously the property of the BSPP.

They were also given the operation of an existing business called the "100 lakes and 100 plantations"— a large scale agricultural and fish breeding project — in Pegu Division, approximately 50 miles from the capital Rangoon. Prior to 1988 this particular business was operated by the De-

partment of Fisheries and Agriculture of the BSPP. It was simply a transfer of business proprietorship. Through this business the NUP was able to earn 12 million Kyats (US$ 1,846,153 app. with official exchange rate), which was used to help fund their election campaign.

Former members of the BSPP were encouraged to join the NUP, and the SLORC helped to recruit new members by supplying money and necessary authority. In practice the SLORC restricted the activities of the democratic parties at every opportunity, whilst giving the NUP unlimited support. They assumed that the NUP would win the election, but gave it every opportunity to maximize its chances.

It is sui generis that if the NUP had won the election the SLORC would have transferred power, thereby adhering to its original promise to transfer power to a democratically elected government.

This promise was stated by the then SLORC General Saw Maung in his address to the nation on 23rd September 1988.

Moreover, we additionally promise that the armed forces, after transferring power to a democratically elected government which will emerge from a free and fair election, shall only perform its principle tasks of defense, security of the state and maintaining law and order, etc...

He reiterated this promise in response to a question from a journalist from the News Agency of Burma at a media conference of 9th June 1989.

Had the NUP won the elections as the SLORC Generals had anticipated, the NUP would have achieved political and legal legitimacy to rule the country, thereby consolidating the power of the SLORC Generals. It can be argued and sustained that the 1990 May election was a ploy of the SLORC, effected by legal device, to achieve the legitimacy. [The fact that the SLORC would go to such lengths to try and achieve what they could have with military might, gives support to the view put earlier that the Generals have chosen engagement over isolation.]

The National Convention, the SLORC's Major Political Strategy to Achieve Legal Legitimacy Domestically, Regionally and Internationally

When the election result failed to fulfill their expectations, the SLORC immediately issued declaration No.1/90, which states inter alia:

"Therefore, the representatives elected by the people have a duty to frame a constitution for the future democratic state."

The essence then of the declaration No. 1/90 was that the power would not be transferred to the elected representatives, it would continue to reside with the SLORC, and the duty for which the representatives were elected was to draw up the constitution.

At law and under rule of law conditions, Declaration No.1/90 was invalid by the nature of its retrospectivity which negated the election laws which had been accepted by the people and duly acted upon. They also had the imprimatur of the international community, that had observed the election process and despite the difficulties of favoured treatment given to NUP and the incarceration of political detainee, the NLD s General Secretary Daw Aung San Suu Kyi, they were to a large degree open.

The question of fairness is a moot point though and the fact that the SLORC afforded the NUP many advantages and arrested and detained the General Secretary of the largest and widely supported political opposition party, belies any claim of fair. The UN has standards for elections and classifies the right to franchise and a free and fair election process as a basic human right. It is characterized as the right to participate in political affairs.

Vis-a-vis the above position, if declaration No.1/90 was to be operative, the elected representatives should have had the freedom to organize the constitutional process, either through a convention and/or the formation of a constituent assembly, without the SLORC control or interference.

What transpired was that the SLORC continued to hold power by force and subsequently issued declaration No.11/92 dated April 24,1992, titled, "The Convening of a National Convention." This was the first that the people had heard of the idea of a "National Convention" and the SLORC immediately drew up a working plan. Until this declaration was issued, the SLORC had stayed silent on their intentions about declaration No.1/90 and the transfer of power to the elected representatives.

The SLORC maintained control of the National Convention process and out of the 485 elected representatives, only 99 were permitted to attend. The other 603 members were chosen by the SLORC to represent their interests.

The absolute control of the process continued to dominate the National Convention to the extent that delegates were not allowed to have free discussions without fear of persecution by the authorities.

The National Convention is commonly referred to as the 'sham' conven-

tion and given the manner in which the SLORC has manipulated the process to specifically serve their interest and silence the interests of the people, the Ethnic Peoples and those democratically elected, the descriptor 'sham' is a fair comment.

The Australian Federal Parliament's Joint Standing Committee on Foreign Affairs, Defence and Trade s inquiry into Human Rights and Progress Towards Democracy in Burma found that the Convention was not representative nor a forum for free discussion and further that the claims of the work of the Convention as outlined by the Burmese Ambassador to the United nations in February 1995, have failed the test of scrutiny when examined with the information presented to the committee (p 70 Final Report).

The UN Special Rapporteur on Burma came to the view that the Convention was marred by excessive control, surveillance and harassment of delegates, and a lack of true representation and free exchange of ideas. Moreover, he believed that, despite the assurances of the Government of Burma to the contrary, they did not intend to transfer power....(pp 72-73 Final Report)

Cease-fires with Ethnic Peoples, SLORC's Political Attempt to bring the Ethnic Peoples into the euphemistically called legal fold

Ethnic resistance has been a feature of Burmese political life for many decades and it was not until recent times, with the 1988 popular democracy uprising, that the ethnic peoples were offered a real choice to participate in political life through a democratic federal union. This was evident by the overwhelming vote recorded for Daw Aung San Suu Kyi's political party, the National League for Democracy (NLD), in the 1990 elections. The NLD won 392 of the 485 seats. The Ethnic Peoples clearly expressed their desire for democratic government through their voting power

To strengthen their claim to legitimacy the SLORC knew that they had to have a forum which included the tri-partite groups; them, the Ethnic Peoples and the pro-democracy forces led by Daw Aung San Suu Kyi. The National Convention provided such a forum and a legal form, but left the SLORC in absolute control and involved no devolution of their power. It is a claim, with reasonable justification, that the SLORC negotiated the cease-fires to get the Ethnic Peoples into the National Convention, thus demonstrating their credentials in having all parties involved in a political

process.

To gain some understanding of why the Ethnic Peoples agreed to the cease-fires with the SLORC, one has also to factor in the historical and contemporary relationship between the Thais and the Peoples of Burma.

Burma's neighbours in the adjoining Association of South East Asian Nations (ASEAN) countries, have adopted consensus view that a policy of the constructive engagement is the best method for dealing with the SLORC's isolation and human rights problems. The constructive engagement policy is a recent political development, which has impacted on Burma's close neighbour, the Thai Government in their relations with the SLORC.

The Thai's traditionally accepted the fact of the Burmese living in their territory and particularly along the border between the two countries. This gave the added security to the Thai's as they had been historical enemies with the Burmese. It suited their political purposes.

The ASEAN policy of constructive engagement combined with the new policy direction of the Thai Government combined to put the organizations of the ethnic peoples of Burma under pressure to enter the cease-fire agreements with the SLORC. The above changes in policy direction of ASEAN and the Thai Government aided the SLORC in their efforts to effect the cease-fires.

Key terms of the agreements were that material assistance would be provided by the SLORC so that the Ethnic Peoples could develop their regional economies. They would also continue to hold their arms. The non-negotiable term put forward by the SLORC was that the Ethnic Peoples would declare to "Return to the Legal Fold", by the fact of entering the agreements.

The Ethnic Leaders knew that the SLORC s s assertion that they were returning to the legal fold would not further the SLORC s claim to legitimacy. Only the SLORC could achieve this by transferring power to the those lawfully elected. which would have no direct impact on their relationship with the SLORC. The Ethnic peoples had never been part of the SLORC's so called "legal fold" as they had no previous political relationship them. Further that the Ethnic Peoples recognized the SLORC s military power but not their legitimate power.

The agreements would be used to promote their legitimacy to their

ASEAN neighbours and the international community. This legitimacy would in fact add weight to the SLORC's argument that they are legally entitled to hold power. They would further claim that only they had secured and could continue to maintain peace in Burma.

This would also be seen as important in terms of regional security issues. It was also promoted as the SLORC having the peoples support for the National Convention process. Another feature of the cease-fire agreements was that the SLORC coerced the Ethnic Peoples Organizations to attend and be delegates to the National Convention.

This peace had previously been secured and affirmed by the 1990 election result. At the election it was done of the ethnic peoples' own volition and not by force. History demonstrates that political compacts entered into willing and as equals, is more likely to survive and strengthen, while peace secured in conditions of force and threats of future force, is a tenuous peace at best.

Ethnic Peoples have not publicly stated their support for the view that the SLORC is a legal government, nor a legitimate one and they have never endorsed the National Convention, even when they have participated. They have now stated the contrary view.

Endeavors of the Democratic and Ethnic Forces to Resist Legitimizing the SLORC's Rule

The democratic and ethnic forces have publicly and repeatedly declared their position against the National Convention since its commencement.

U Khun Mar Ko Ban and U Daniel Aung, two elected representatives from Phe Khon and Mong Ping constituencies in 1990 May election, originally participated in the National Convention. After a brief encounter they boycotted it. At the time, 1994, they also fled to the ethnic controlled area. They were forced to take this action because they knew that the SLORC would be likely to charge them with "offenses" for their public declarations of boycott. (They could be charged under either the 1950 Emergency Provision Act or the 1975 State Protection Act)

U Daniel Aung had taken responsibility as a member of the presidium, by chairing sessions in the National Convention, therefore quite experienced in the operations of the Convention.

In October 1994, under the sponsorship of the National Council of the Union of Burma (NCUB), a "Constitutional Seminar" was held in the Marnerplaw liberated area, which was the headquarters for the democratic and ethnic resistance forces. The focus of the seminar was the issue of the illegitimacy of the National Convention. 159 delegates and 66 observers from 40 various democratic and ethnic organizations from inside and outside the country convened to the biggest seminar ever held in the liberated area.

Addressing the seminar, U Daniel Aung, urged the delegates participating in the National Convention as follows:

I think this is the time for all delegates who are now attending the National Convention to decide bravely and bluntly whether to become so-called historical defendants or heroes of the nation . In conclusion, may I say that let us, all pro-democracy revolutionaries here, join hands together and strengthen our unity to destroy all anti-democratic principles brought about by the SLORC s National Convention. (excerpt from U Daniel s public address, for detailed analysis see the BLC publication cited following)

The seminar delegates unanimously agreed to the following position statement on SLORC's National Convention:

As the SLORC is not a legally elected government, it has no right to convene a National Convention. The National Convention being held by the SLORC is merely a fraudulent one . It is concluded that the basic principles for a state constitution laid down by the convention are for the legalization of the rule of the military dictatorship. Therefore, all the delegates reach the position to totally repudiate the SLORC s National Convention and results emanating from it. .

The Burma Lawyers' Council published the Constitutional Seminar Record "Analysis of SLORC's National Convention", April 1995. It has been published in English and distributed widely both inside and outside the country.

In Mandalay, the second capital of Burma, seven people were arrested by the SLORC, charged with the distribution of the above publication. They were all sentenced to seven years term for the charge.

Following the release of Daw Aung San Suu Kyi in July 1995, the leaders of the NLD analyzed the SLORC's National Convention and made a political decision to have the NLD delegates boycott it in September, 1995 with the following reasons:

Mae-Tha-Raw-Hta Seminar in 1997; The Ethnic Peoples Major Political Challenge to the SLORC's Legitimacy through the National Convention

Following the boycott of SLORC's National Convention by the National League for Democracy led by Daw Aung San Suu Kyi, it is now the case that almost none of the 1990 elected representatives are convention delegates.

As a result the SLORC were forced to adjourn the National Convention and have as yet to set a date to resume sessions. During the past year that the Convention has been in adjournment, the political activities of the Ethnic Peoples Organizations designed to challenge the legitimacy of the SLORC's National Convention have intensified.

The Ethnic Peoples have found no discernible difference in the living standards in their areas, contrary to a term of agreement in the cease-fire policies. The SLORC had contracted with the ethnic organizations leaders to fund development in the largely rural and regional area of the ethnic peoples. Enough time has now elapsed since the signing of the cease-fire agreements, for the Ethnic cease-fire groups to realize that the cease-fires have not led to political solutions to their and the country's political problems.

They are also of the view supported by their experience and evidence, that the National Convention is not a mechanism capable of resolving the current political situation, because both its formation and its process is terminally compromised and they recognize that it is fraudulent in intent and practice.

In 1996,cease-fire and non-cease-fire Ethnic Peoples groups have developed a closer working relationship than previously existed. The unambiguous objective is to exert their efforts to promote political activities which are designed to discredit the military dictatorship and further weaken its major political agenda, the National Convention.

Under the initiative of the National Democratic Front, the biggest and authoritative Ethnic alliance in Burma and member organization in the National Council of the Union of Burma, the Ethnic Nationalities semi-

nar was held at Mae-Tha-Raw-Hta in the Karen National Union controlled area in January, 1997. The seminar was attended by 111 delegates and observers from the ethnic nationality organizations mentioned below:

1. Karenni National Progressive Party
2. Pa-Oh Peoples' Liberation Organization
3. Wa National Organization (WNO)
4. United Wa State Party (UWSP)
5. Palaung State Liberation Front
6. Kachin Independence Organization
7. All Arakan Students and Youth Council
8. Lahu Democratic Front
9. New Mon State Party
10. Arakan Liberation Party
11. Kayan New Land Party
12. Shan United Revolutionary Army
13. Shan Democratic Union
14. Karen National Union
15. Chin National Front

Following 1988, that was the largest and most significant Ethnic Nationalities political gathering in which the cease-fire as well as non-cease-fire Ethnic Peoples groups participated.

The key resolution of the seminar with regard to the SLORC's National Convention was as follows:

We demand the dissolution of the SLORC's sham National Convention and the holding of a Tri-Partite Dialogue comprised of the representatives of the SLORC, Daw Aung San Suu Kyi and the pro-democracy forces, and the ethnic nationalities, for the solution of political problems by political means.

On February 12, 1997, in the ceremony of the Union Day, Daw Aung San Suu Kyi publicly made a reference to the Mae-Tha-Raw-Hta agreement and expressed her appreciation to it.

The political importance of the above mentioned seminar and position statement cannot be overestimated, as it directly but passively resists any

attempt by the SLORC to obtain political legitimacy through the legal device of the national Convention or similar means. This denies them the opportunity to legitimate their power both politically and legally.

Economic Investment and its influence on democratic development in Burma

Foreign companies have already invested over SIX billion US dollars in Burma.

Investment in Burma (Until 30.6.97)

No	Country Permitted	Enterprise	Investment
1.	United Kingdom	29	1318.81
2.	Singapore	55	1215.15
3.	Thai	41	1132.80
4.	U.S.A	16	582.07
5.	Malaysia	23	524.17
6.	French	3	470.37
7.	Netherlands	5	236.84
8.	Indonesia	4	219.95
9.	Japan	15	195.89
10.	Korea	14	72.50
11.	Austria	2	72.50
12.	Hong Kong	17	64.44
13.	Australia	11	40.06
14.	Canada	9	32.53
15.	China	8	28.76
16.	Germany	1	15.00
17.	Denmark	1	13.37
18.	Philippines	1	6.67
19.	Bangladesh	2	2.96
20.	Macao	1	2.40
21.	Israel	1	2.40
22.	Sir Lanker	1	1.00
	Total	**260**	**6242.76 (Million US$)**

According to SLORC, following the year 1988, the Gross Domestic Product (GDP) of Burma is 5.8 percent. Inspite of these claims the inter-

nal economic situation has been steadily declining. The average person receives no benefits from the money flowing into the country.

Despite the opening of Burma to foreign investment and propaganda about liberalization, the military still controls vital aspects of the economy through a series of restrictive practices. For example, prices of essential commodities are regulated by the Committee for the Reduction of the Consumer Prices, chaired by military generals. That Committee seeks to suppress inflation through price control. Farmers are compelled to sell a proportion of their harvest to the State at prices well below the market value. Transportation of goods across township boundaries is regulated by local military authorities.

Reports of inflation in the cost of rice is particularly troubling as rice is the staple food of Burma. The price per pyi (a small basket which can feed a family of four for one day) rose to 70 Kyat (Burma Currency) in low land and 125 Kyat in Shan State while the salary of a high school teacher is about 1,500 Kyat. Wages for other government servants and workers remain extremely low. In spite of restrictive regulatory controls, inflation is running at 40-50 percent a year.

The small Burmese middle class, made up of business people, professionals and intellectuals and traditionally the source of democratic political change, also is not free to pursue business activities unencumbered by military interference. Even with the current level of foreign investment, it seems the middle class will never have a chance to grow because of the relentless supervision of the ruling military regime over the economy.

The mass influx of illegal Burmese labourers into neighbouring countries and the departure of Burmese academic and professionals to other countries is a clear signal that something is terribly wrong with the economic stability of the country.

Under the SLORC's so-called "Open Market Economy", the whole economy is monopolised by the Army, military elite, Union Solidarity and Development Association and Myanmar Holding Co. Ltd, SLORC's lackeys association and company. Estimate place the military budget as high as 60 percent of the country's income. Although the tourist and hotel industries have become one of the main businesses, it is the military elite who gain, and few higher paying skilled jobs are available for the local people. The health care system lacks basic medicines and medical workers. It is now common for the people to say they go to hospital to die rather than to get well. The rural areas face even more desperate economic problems than the urban centres.

Under current policies of constructive engagement, within Burma foreign investment is benefiting only the SLORC regime, not the people. That the SLORC "economic boom" is not benefiting an overwhelming majority of the people of Burma becomes daily more obvious. In short, Burma's economy is a military monopolised economy which is having a devastating impact on its own people.

The economic crisis is the state of the SLORC's economy which has a least developed country (LDC) rating. Despite its attempts to enter the world economy, Burma is categorized high risk and international investors are wary of Burma, due to both the combined political and economic situation. A significant number of investors have ceased operations in Burma as a result of political factors and the American company UNOCAL is defending a legal suit in a US jurisdiction for alleged wrongs in the Burmese jurisdiction.

According to SLORC, for the 1996-1997 budget year, there are deficit of 54470 Million Kyat for finance and 5577.2 Million Kyat for trade. The collapse of SLORC's "Visit Myanmar Year" and other economic plans are also attributed to unskilful management, lack of infrastructure, a large amount of military expenses and political unstability such as the student demonstration in December, 1996. "Open Market Economy" articulated by SLORC remains, in practice, unsuccessful.Without political liberalization, modernization in Burma is quite inconceivable.

Constitution making process for political leberalization in Burma

Article 21(3) of the Universal Declaration of Human Rights mentions that the will of the people shall be the basis of the authority of government. A constitution should be based on the free will of the people and with provisions guaranteeing their rights and, as they themselves would protect it, only then would it be durable. As such, the people should have the rights to participate in the constitution making process freely. Contrary to this, SLORC has controlled and monopolized all other constitution making processes of the people.

On the sixth anniversary of May 27,1990 multi-party general election in Burma, the conference organized by the National League for Democracy (NLD) between 26 to 28 May 1996, laid down a resolution to draft a constitution for future Burma. Nevertheless, after that, SLORC provided Law No (5/ 96) and Article (3) (d), restricted the actions of the NLD and

other people to draft a constitution. According to Article (4), the punishment for the violation of this provision is from five to twenty years term imprisonment.

The Democratic Alliance of Burma (DAB) is composed of 21 pro-democratic and ethnic resistance organizations. It started the process of drafting the basic law in 1990, and was able to present the draft at its 1993 congress for approval. Subsequently, the National Council of the Union of Burma, a defacto parliament formed with the DAB, National Democratic Front (NDF), the National League for Democracy-Liberated Area (NLD-LA), and the Members of Parliamentarian Union (MPU) as a base, held a constitutional seminar in October 1994, in Manarplaw, in order to broaden the process, and advice and opinions given were collected. With the aim of continuing the effort to produce a draft constitution acceptable to all the indigenous nationalities and the entire people of Burma, an international constitutional seminar was held in Philippine.

The NCUB adopted the Draft Constitution of the Federal Union of Burma as a first draft constitution on its conference held from 16-23 May 1996. The draft constitution is to be refined by integrating the advice of international constitutional experts as well as the Burmese people through organized workshops to be held by democratic and ethnic opposition groups. The input of these discussions will result in an amended version of the draft constitution.

Proposed political program including a constitutional reform to achieve democracy and modernization in Burma?

The National Council of the Union of Burma (NCUB), the legitimate government body the National Coalition Government of the Union of Burma (NCGUB), and other Burma democracy organizations, that have always requested dialogue on the basis of equality and mutual respect. Tripartite dialogue participated by pro-democracy forces led by Daw Aung San Suu Kyi, the ethnic nationalities forces and the SLORC is the grand political program.

The following steps are the proposed political program of the NCUB in order to achieve the national reconciliation through the tripartite dialogue.

(1) After signing an agreement based on the position formed by the leaders in the tripartite dialogue, the SLORC is to declare a nation wide

cease-fire, release all political prisoners and rescind all repressive laws and orders.

(2) A People's Assembly consisting of representatives elected in May 1990 general election is to be convened.

(3) The People's Assembly is to declare a general amnesty, to form an interim coalition government consisting of persons chosen pursuant to an agreement reached during the tripartite dialogue and to adopt an interim constitution for the interim coalition government.

(4) The interim coalition government is to organize and hold a genuine National Convention for laying down principles for the constitution of a future federal union.

(5) The People's Assembly is to draft a constitution based on the principles laid down by the National Convention and to enact it.

(6) A government of the people is to be elected and formed in accordance with this new constitution.

This article concludes with a recommendation which we hope the readers will be able to utilize to assist those who geniunely seek democracy and the rule of law to obtain it.

Recommendation

In order to achieve the transfer of power to the democratically elected representatives, the cessation of human rights abuses in Burma, the international community is requested to extend their assistance to the efforts of the oppressed people in Burma by not taking any action which would provide legitimacy to the SLORC.

Comparative Constitution Drafting Processes in the Philippines, Thailand and Burma:

Drafting Process plays Crucial Role for Contents

For a society where fundamental human rights and civil rights are guaranteed, laws that are made in a way without upholding the consent of governed may not be considered as fair. This ideas will apply most importantly in constitution making. It does not necessarily mean that all the people must be involved in all law making processes, but it is necessary that those who make laws have the people's mandate.

While many are interested to debate the contents of the constitution, we should not neglect that the drafting process itself is the primary determiner of the contents of the constitution.

For a nation where democratic atmosphere has prevailed may start their debates on the contents, nations where any form of an authoritarian governance is existing must start debates on the constitution making process.

We can also lean that how the world longest lasting constitution of United States of America was made. Delegates to the constitutional convention could really represent the will of the to-be-governed by the upcoming constitution. Other examples also exhibit that a free and fair constitution making process can guarantee a lasting constitution. Australia, Sweden, Norway, Japan, Federal Republic of Germany are among good examples.

Likewise, the collapse of constitutions written under totalitarian and authoritarian regimes reflect that the constitutions did not take into account the will of the governed when drafted. The constitutions in such countries were approved by totalitarian regimes in a way that the regime could ab-

solutely control. It became clear the government-sponsored drafting process determined the contents of the constitutions.

It may be rather difficult to say that the contents of one constitution are better or worse that that of others, because the contents may vary from country to country depending their political needs. But what we can conclude from a comparison among the different constitutions is whether the constitutions represent the will of the people or not. Most constitutions of western countries attempt to represent the will of the . people while all totalitarian and authoritarian constitutions have the characteristic of not representing the will of the people. This differences result from how the constitutions are drafted.

There are also some relevant experiences in ASEAN nations that constitution drafting process can determine the contents in final draft of the constitution. Recent Thai constitution drafting process and Burma's present constitution drafting process demonstrate the best examples. The Philippines, Indonesia and Cambodia have also given very good lessons about whether or not a constitution represents the will of people due to how it was drafted and approved.

Although there is no international blueprint for how a constitution drafting process should be carried out, it is not acceptable if the process is totally controlled by those who illegitimately hold state power. For the purpose of this paper, I will examine the constitution drafting processes in three countries-the Philippines, Thailand and Burma.

The Philippines:

The Philippines' present constitution, also known as the 1987 Constitution, is the fourth one in the Philippines' political history[1]. It was written after Ferdinand Marcos was forced to step down by a People's Power Revolution. The constitution clearly reflects the people's strong desire to prevent the re-emergence of dictatorship. The Filipinos were able to write the 1987 constitution in a way that represents their will because they were able to control the process.

The 50 member-Constitution Commission was appointed on April 23, 1986 by the Ms. Corazon Aquino, who was serving as interim president at that time under the temporary constitution, also known as freedom constitution. When the Constitution Commission drafted the constitution they tried to bring the opinions of the people into account at all points during the drafting process.

Eighteen sub-committees were formed under the Constitution Commission to work out the details on special issues. These committees collected the opinions of the people and combined commonly held ideas into the constitution. The Commission arranged public hearings, plenary sessions and public consultations in different parts of the country. Generally, the constitution drafting process of the 1987 constitution was probably the fairest ever in The Philippines.

The experiences of two previous constitution drafting processes are the experiences leading to the 1987 constitution making in terms of emergence of the constitution making that will take into account the will of the to-be governed. The 1935 constitution was drafted during a transitional period when The Philippines was under US control. That constitution was drafted by a Constitutional Convention as provided by the Philippines Independence Act approved by US president Franklin D. Roosevelt. The 1935 constitution was ratified by the Filipino electorate[2].

The political atmosphere in the early 1970s was a major factor for the emergence of the 1973 constitution. Ferdinand Marcos, who ha 1 been president of the Philippine since 1965, suffered from the 1971 Senate election results. Marcos' opponents won six of eight seats in the Senate. An increase in the people's support for Benigno Aquino forced Marcos to make changes in the constitution. On March 16, 1967, the Congress passed a resolution to convene a constitutional convention in 1971. Marcos declared martial law on September 23, 1972. Marcos placed several members of the political opposition under arrest, made major changes in government, and took control of the mass media.

The most important point was Marcos' attempt to change the system of government from a presidential one to a parliamentary one. Aquino's popularity among Filipino indicated he would probably defeat Marcos in the upcoming presidential election. In order to prevent this, Marcos administration introduced a parliamentary government system in the 1973 constitution. Commentators pointed out that whatever system Marcos chose, Marcos would be disqualified from running in the third presidential election, because of the stipulation in the 1935 constitution. Aquino was most likely succeed him. Marcos governed the country without elections for the executive post under the 1973 constitution until he was defeated by the people's power revolution. Instead, Marcos chose the rule through a series of referenda.

Under the 1973 constitution, Marcos concurrently held the positions of president and prime minister. The government could not be dismissed by

the legislature with a vote of no confidence, as is allowed in most parliamentary system of governments. Marcos extended preserving his own family by appointing his wife as Mayor of Manila, and later minister post, his daughter as leader of youth movement and his son as presidential assistant.

Filipino people might have learnt form their suffering under the dictatorial rule of Marcos what sort of constitution they need to guarantee their rights, how to restrict the power of the president, and how the constitution should be drafted and ratified.

The drafters of the 1987 constitution included special provisions for how to prevent dictatorship. The 1987 constitution also extends fundamental rights and civil rights. People's dreams were made possible in the constitution as the drafting process was under the control of those who represented the will of the governed.

Thailand:

Probably one of the most important events in recent Thai political history is the Black May 92 crisis, which was also a constitutional crisis. Leading this constitutional crisis is the fact that previous constitutions were drafted and approved under different types of authoritarian and semi-authoritarian governments resulting lack of peoples' rights. The fact that Thailand's politics was highly influenced by army personnel may make people's disappointment and led to the 1992 constitutional crisis.

Thailand became constitutional a monarchy in 1936. Since then, the country has not enjoyed political stability under any of subsequent constitutions. 15 constitutions have been enforced during the last 65 years of constitutional monarchism in Thailand.

Recently completed constitution making process derived from the peoples' dissatisfaction with previous constitution.

In 1991 there was a military coup in Thailand in which a regime calling itself the National Peace Keeping Council (NPKC) seized power from the elected government of Chatichai Choonhavan. The NPKC carefully picked twenty members to form a commission to draft a permanent state constitution.

In December 1991 the NPKC passed a permanent constitution for the

Kingdom of Thailand which raised several controversial points, including allowing a non-elected person to become prime minister and an increase in power of non-elected Senators. Under these provisions, Gen. Suchinda Kraprayoon, one the coup leaders subsequently became prime minister of Thailand.

These events angered many people and finally led to mass demonstrations. The government countered these mass demonstrations with violence that, according to confirmed sources, resulted in 52 dead, 700 injured, 200 missing and 3500 detained. The upheaval, one of the most bloodiest in modern Thai history, was later known as Black May 92. The conclusion that can be drawn from the experience of Black May 92 is that many lives of Thai people were sacrificed for a more democratic political system, including an elected Prime Minister and a democratic constitution.

Although successive governments amended the 1991 constitution, these charges failed to meet the democratic expectations of the people who continued to demand a fully democratic constitution drafting process. Consequently, the present constitution drafting process of Thailand and the events leading up to it, are a good lesson for how people can struggle against authoritarian pressure for an emergence of democratic constitution drafting process. The whole Thai constitution making process is solely in hands of those who are willingly to reflect the will of people.

Burma:

After the 1988 uprising, The State Law and Order Restoration Council (Slorc) staged a coup on September 18, 1988. After they took power, they issue Statement No. 1 which said that they would hold a multi-party democratic general election in 1990 and transfer power to the elected people's representatives.

The Slorc expected its political party National Unity Party (NUP) would win, but instead the National League for Democracy (NLD) under the leadership of Daw Aung San Suu Kyi, captured over 80 % of the seats.
In order to justify their refusal to recognise the newly elected government, the Slorc issued Order No. 1/90 which stated that the duty of 1990 elected representatives was not to govern but rather to draft a new constitution.

The NLD had attempted to adopt a temporary constitution and to assume, but Slorc's Order No. 1/90 prohibited this. In mid 1992 Slorc de-

clared plan to convene a Nation Convention to lay down the guidelines and basic principles for a new constitution.

By initiating a constitution drafting process under its strict control, the Slorc has been able to delay transfer of power to the elected people's representatives from the 1990 election and to make sure that army will play the leading role in national politics in the future. The National Convention held its first session on 9 January 1993. Sessions of the National Convention have been postponed several times. After 4 years the National Convention still has not yet been completed.

The Formation of the National Convention

More than 600 out of 702 total delegates to the National Convention were hand- picked up by the Slorc. Only 99 elected representatives were entitled to take part in the National Convention and the rest represented seven other categories of representatives such as workers, peasants, government servants, leaders of political parties (no matter of election or not), intellectuals, army personnel and respected politicians, who were believed to be Slorc-appointees. Slorc unilaterally declared that the National Convention was convened to achieve 6 aims. The primary stipulation. was that the Tatmadaw (army) would take the leading role of national politics in the future.

The Slorc made clear that there could be no questioning of the principles of military's leading role in politics in future Burma. The freedom of speech of the delegates is strictly prohibited. Action can be taken against any delegate who is considered delivering speech or circulating pieces of paper criticising National Convention.

The question of the legality of the National Convention

The legality of the National Convention is highly controversial. This became clear after the National League for Democracy withdrew from what many have called the "sham" maneuverings of the regime. Today, only 15 of all of the 485 elected representatives from 1990 election are participating in the National Convention.

Many have openly pointed out that the Slorc's National Convention is not the proper body to draft the state constitution[3]. Total control of the Slorc in the National Convention is due to the text they need. The princi-

ples laid down by National Convention do not meet the will of the people and the needs of Burma's diverse ethnic groups.

The NLD's Constitution drafting process:

The NLD had expressed its own view on the future constitution of Burma since the election campaign period in early 1990. However the NLD has made clear that basic principles for a lasting state constitution should only be adopted by a genuine national reconciliation convention[4].

After winning in the 1990 general election, the NLD prepared to adopt a temporary constitution. Elected representatives of the NLD gathered in Ghandi meeting hall in Rangoon in July 1990 and adopted a temporary constitution aiming for the transfer of power from the Slorc.[5] On the eve of the meeting, the Slorc issued Declaration No.1/90 stating that it held power under martial law and was not bound by any constitution and would hold power until it had ensured that a sufficiently strong constitution was in place.[6] A new wave of arrests followed, in which mainly elected people's representatives from the NLD were imprisoned.

The May 1996 NLD party congress confirmed again that the NLD was to draft a state constitution while continuing boycott the National Convention.[7] The Slorc angrily responded to the NLD's plan to write a constitution, because it directly challenged the legality of the National Convention. The Slorc issued a new law No. 5/96, prohibiting any body from writing or discussing a state constitution or from criticising the criticism of National Convention.[8]

NCUB constitution drafting Process

The National Council of the Union of Burma (NCUB), an opposition alliance formed in liberated areas, that is the areas out of Slorc's control, is now working actively on drafting a democratic constitution.[9]

The NCUB has made it clear that the constitution being drafted by the NCUB is to be presented to the constituent assembly or a similar body which will be convened when Burma achieves democracy. The NCUB has organised three international seminars and several local seminars on its proposed draft constitution to which representatives of different ethnic

and political organisations were invited. The NCUB is just preparing for the future by beginning a free and frank discussion about constitutional matters, which is needed amongst the different ethnic groups and the political organisations.

The nature of NLD constitution is temporary while the NCUB is proposing a draft for a democratic Burma to be presented in a genuine National Convention, or Constituent Assembly, when Burma achieve democracy.

Comparative points

The control of the process and the final text of the constitution are mutually interdependent. While the Philippines and Thailand are moving along the right path in the constitution drafting, Burmese people may be able to learn from their experiences about how important the drafting process is. In inclusion, I would like to make some comparative points.

1. Bottom-up and Top-down drafter-selection methods

Generally, I would say that there are two types of selection methods for the drafters: the bottom-up method and the top-down method. If the drafters are chosen to represent the will of the governed, that drafter-selection process can be said the bottom-up. If the drafters are to represent the will of those who are in power, the drafter-selection method is top-down. There has been clear enough examples that those who pay special intention on the will of the people are chosen by bottom-up method. We can say that most of the Thai Constitution Drafting Assembly (CDA) - members were chosen by a bottom-up method. Despite criticisms that the appointing power may influence the works of Constitution Commission (CC), the CC members to draft the 1987 Philippines constitution were also selected in a bottom-up method. In every work throughout the constitution drafting process, the Constitution Commission took into account the will of the people. As long as the drafters are chosen to represent the will of the people, the drafter-selection method may be considered as bottom-up.

It is still early to say what type of drafters selection method of both NLD and NCUB. However it is clear that Slorc's drafter-selection method is absolutely top-down since delegates to the National Convention have no right or chance to include the will of the people in the constitution.

2. All forces working together in a single drafting process is essential

All forces in Thai society, including the opposition and ruling parties, worked together to draft a single constitution. However, as a result of the illegitimacy of the Slorc's constitution drafting process, the National Convention, different political forces in Burmese society are now involved in drafting two other constitutions—the NLD's one and the NCUB's one. As long as these rivals processes are going on, it is questionable as to how diverse political and ethnic groups can attain national reconciliation in Burma.

3. People's participation is key to the emergence of any democratic constitution drafting

Despite the fact that the Slorc constantly claims that the emergence of a state constitution is the duty of all Burmese citizens, they issued Law No 5/96 prohibiting any citizen or political party, including the NLD, from drafting a constitution outside the National Convention. In reality, therefore, the duty of Burmese citizens in the formation of the state constitution is merely to be silent.

The participation of the people such as exists in the Philippines and in Thai constitution drafting process is what the Burmese people so greatly desire. Having debates, agreements or disagreements over the articles, arguing clauses of the charter, and explanations of the CDA and so on have an enormous effect on the contents of the final draft.

4. Final approval process must be fair, no group should enjoy special privileges

The most interesting step in the Thai constitutional process for most Burmese is the way in which the constitution is approved. The process to approve the Thai constitution was clearly announced. If the Thai parliament might have failed to approve the draft, the people had the opportunity to do so in a referendum. This is the process that the Burmese people have been asking for, because at present the Burmese process is very secret and no one knows how a constitution will be approved.

As the CDA which represents the will of the people intends to achieve political reform through this constitution, there are many provisions that restrict the behaviour of politicians. Some governing politicians had publicly expressed their opposition to the draft, but they finally approved it

due to intense pressure from the present economic crisis.

If the constitution might have gone to a popular referendum, many are saying that there would have been conflicts between politicians and the people. Some academics warned that all key players in Thai politics should be careful to avoid confrontations like that of Black May 92. Thai people still remember their experiences and victory during the constitutional crisis in 1991-92.

The present Philippines constitution was approved at a time when the country was not under repressive rule. If Burma's constitution is to be approved under such a condition, a properly authorised constitutional assembly alone may approve. Under the present political situation, a people's referendum is probably the best way to approve the constitution since the constitution drafting process does not include the opinions of all major political forces and, most importantly, the will of the people.

5. People should have the ultimate power to alter any provision of an already-approved or amended constitution

Although the Slorc has not passed a constitution, the principles that have been laid down by the National Convention clearly demonstrate that only a person with military skills can be president. That criteria reflects absolutely military domination. Burmese people might be interested to learn how the Thai people responded when Gen. Suchinda Kraprayoon seized the position of prime minister without being elected.

What to be careful is whether the legislature alone should be allowed to make amendments to the constitution without the consent of the people who played important role in approving this new Thai constitution. We can not assume that the present Thai legislature sincerely approved the constitution; it did so it was afraid of people's pressure while the people are suffering from an economic crisis. The way Thai constitution was approved, therefore, is likely the way that is highly influenced by people's participation.

The constitution should be amended by the same method as that of approved. Some Thai politicians who oppose this -new constitution have publicly expressed that they will amend the constitution later in the legislature. It is very likely that the politicians will cut some provisions in the constitution that restrict politicians while promoting the right of the citizens. For these provisions, the CDA worked hard with the support of the

people. Therefore, if there the constitution is to be amended by the legislature, the amendment should have the people's approval.

The present Philippine constitution prohibits the president from running for reelection for a second-term. President Fidel Ramos' attempt to alter that provision was terminated by a people's campaign under the leadership of the former president Aquino. President Ramos' attempt to amend the constitution is not conformity with what the drafters had intended.

We should not forget that some of the provisions especially provisions relating to making amendments to the constitution are part of drafting process. It is meant that any constitution amendment process should give special consideration how the constitution was drafted and approved. If the Filipino people really want to restrict presidential re-election, the constitution should not allow the governing authority alone to amend the provision. Such an amendment should have to be approved by the people.

6. What Burmese can learn form others' constitution drafting processes

Constitutional development in Burma is currently very unsatisfactory, but the Burmese people can learn from what has happened in the Philippines under the 1973 constitution and how 1987 constitution came into force. In addition, Burmese may learn from what has happen in Thailand's constitutional history over the past six years. If Burmese people are aware of the Thai experience, they can use this knowledge to achieve a democratic constitution. However, Burmese should also be aware weak points in those two countries' constitution drafting processes.

Endnotes:

1. There had been three constitution in Philippines before the 1987 constitution. These are the 1898 constitution, the 1935 constitution and the 1973 constitution.
2. The constitution drafters were not hand picked, but formed a body to draft accordance with the colonial law. What is important to note concerning the drafting of the 1935 constitution is that the US imposed some restrictions to the contents of the constitution.
3. For the international community, there was a variety of views critiquing the National Convention. While the United Nations, for example, pointed out the weakness of the process and asked for the open participation of democrats including Daw Aung San Suu Kyi, ASEAN nations are just urging the Slorc to complete the National

Convention.

4. This meaning was expressed by Daw Aung San Suu Kyi at 42nd anniversary of Union Day. She read a NLD's Statement No. 9 which mainly deal with constitutional matters including the approval a new constitution and ethnic issues. See, Analysis of constitutional principles laid down by NLD and Mannerplaw Agreement, Shwe Hka-maunt Bulletin, December 1995, published in Burmese by NLD - LA.
5. Shwe Hka-maunt Bulletin, December 1995.
6. The Slorc's Declaration No. 1/90 issued on 27 July 1990.
7. The decision was declared at the completion of the NLD party meeting held on 26-28 May 1996, the sixth anniversary of the 1990 election.
8. Slorc Law No. 5/96 promulgated on June 1996.
9. Democratic Alliance of Burma, one of NCUB members, since middle of 1990 started drafting the constitution since before NCUB was formed. NCUB took over the process in 1994.

Legal Protection for Refugees from Burma

Introduction

This article will examine the responsibilities and obligations of Burma, Thailand, and the United Nations High Commissioner for Refugees (UNHCR)in relation to the current refugee crisis of Burma, and makes comment on the position of Bangladesh.

Thailand and Bangladesh's obligations and responsibilities, given that they are non-contracting parties to the 1951 Refugee Convention, will be commented on within the framework of their obligations at international law, both formal and customary.

It will be demonstrated that Thailand and Bangladesh as member States of the United Nations (UN), and as international citizens, cannot abnegate their responsibility towards the refugees from Burma, who cross the international frontier into their States.

The obligations and responsibility of any State towards refugees cannot be diminished on the basis of one's domestic law alone. International law, norms and practice afford protections to refugees, wherever they are situated.

The article concludes with recommendations that, if implemented, might assist those who have been forced to flee the oppressive and persecutory political and civil climate that operates in Burma under the rule of the military dictatorship, called the State Law & Order Restoration Council (SLORC).

The Current Refugee Crisis of Burma

Burma's refugee crisis has until recent times attracted only modest international attention, in contrast, the recent attacks on the Karen Peoples of Burma by the Tatmadaw (Army) of the military dictatorship of Burma, the State Law & Order Restoration Council (SLORC), has attracted wide international media coverage.

The attacks were unprovoked, with the Karen National Union (KNU) and the SLORC at the time still in negotiations regarding a cease-fire. The attacks were also attacks against civilians, and incursions were even made inside Karen Refugee camps and some were on Thai soil. Surprisingly, the Thai Government led by General Chawalit, did not formally object to the violation of Thai sovereignty.

International Refugee Law, Norms & Practice

The principal primary source of modern refugee law is that of the Convention on the Status of Refugees, adopted by the United Nations conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened pursuant to General Assembly resolution 429 (V) of 14 December 1950. This has been complemented and strengthened by it sole Protocol, the 1967 Protocol relating to the Status of Refugees.

The following list of International Instruments in addition to the above cited, are known as the basic instruments covering international refugee law.

1. 1946 Constitution of the International Refugee Organisation
2. 1948 Universal Declaration of Human Rights
3. 1950 Statute of the Office of the United Nations High Commissioner for Refugees
4. 1967 UN declaration on Territorial asylum
5. 1984 UN Convention Against Torture and Other Cruel, In human or Degrading Treatment or Punishment
6. 1989 UN Convention on the Rights of the Child
7. 1987 Constitution of the International Organization form Migration

Although there is a view that the Convention is somewhat redundant because of its narrowness of scope, it has provided, nevertheless, the basis for the development of a body of international and domestic refugee law, formal and customary, which can accommodate the contemporary situation of refugees.

In recognition of the 1951 Convention's fixed and limited definition of the term "refugee", the 1967 Protocol was notified.. Under the Protocol, States are able to elect a much wider definition for "refugee". Currently only a small number of States are contracting parties to the Protocol. The limited scope referred to has also been widened through the UNHCR's mandate to afford assistance and protection to a wide range of people in refugee situations, as directed by the General Assembly of the United Nations.

At international law the broadened definition is now the norm, with the narrow 1951 meaning being almost obsolete. Even if States do not honour this they do not refute it.

The Convention and the Protocol are still silent on many issues, particularly relating to women and children refugees: and egregious oversight given that approximately 80 per cent of the world's refugees are women and children. That silence, however, has been filled by the expanding international law, norms and practice of the UN, UNHCR and some States.

"The principles, norms and values that apply to asylum seekers also apply to refugees. Since the regulatory frame work is found in general principles of law, customary international law and other international instruments and arrangements, it applies to all States irrespective of whether they are party to the Convention."[1996 Australian Law Journal ILA Branch Sydney p 71]

There are other notable international instruments which add weight to the Convention especially the Geneva Convention, and International and Regional Human Rights Instruments. Whilst many do not cite refugees, it is their human rights universality which extends to refugees.

An international commentator on refugee law, Piere-Michel Fontain, has noted thet the Refugee Convention does not stand alone:

The principles, norms and values that apply to asylum seekers also apply to refugees. Since the regulatory framework is found in general principle

of law, customary international law and international instruments and arrangements, [1996Australian International Law Journal, ILA, Sydney Branch, P71]

There are other notable international instruments which add weight to the convention; especially Geneva Convention, and International and Regional Human Rights Instruments. Whilst many do not cite refugees, it is their human rights universality which extends to refugees.

The current international legal and normative situation regarding refugees can be described as follows:

States work on the basis of excluding refugees by reading down the meaning of the Refugee Convention and relevant domestic law. The jurisprudence is not one of inclusively. The UNHCR on the other hand has worked on the basis of inclusively through broadening the definition of refugee, or at least the situations where it acts to treat persons as refugees. It does this through its mandate.

UNHCR Mandate

The office of the UNHCR was designed to give effect to the Refugee Convention and it has a mandate to use its good offices to provide assistance and protection to refugees. It was established by the UN General Assembly specifically to provide international protection for, and to seek permanent solutions to, refugee situations. [Guy S G-G p7]

The UNHCR is required to follow policy directions of the General Assembly and the UN Economic and Social Council. (ECOSOC) [Gay S. Goodwin-Gill p9] A reading of the General Assembly's statements and directions regarding refugees reveals the broadening of the definition of "refugee", beyond that of "Convention Refugee".

In 1957 the General Assembly authorised the UNHCR to assist persons whose circumstances concerned the international community. These were people who would ordinarily be not within the purview of the UNHCR.

The most authoritative and persuasive power pertaining to refugees is that exercised through the office of the United Nations High Commissioner for Refugees. Their authority to extend their good offices in all

refugee situations irrespective of whether a State is a party to a refugee convention, is supported by their originating statute.

A recent development which provides further scope to the UNHCR to take action irrespective of the host State's contractual status, is The Conclusions on International Protection of the Executive of the UNHCR's Program. It is a blueprint for States and inter alias, covers the situation of armed attacks on refugee camps, such as in the current situation of Karen refugees who have suffered direct attacks on their existing refugee camps by the SLORC soldiers, and the situation of refugee women and children. Guy S. Goodwin-Gill in his authoritative text, "The Refugee In International Law" summarises the UNHCR's power thus:

"The field of the UNHCR competence, and thus the field of its responsibilities, has broadened considerably since the Office was established." [Guy S. Goodwin-Gill p 15]

Piere-Michel Fountain tells us that the power of the UNHCR is wide reaching in that they have the authority of the UN General Assembly to extend refugee status to persons in need of it, where the State in question is unable or unwilling to do so. [The Australian International Law Journal p 75]

Person seeking safety and/or asylum in another State, can find themselves being classified by the UNHCR into the following categories.

Convention Refugee Definition

The legal definition of refugee is to be found is the Refugee Convention and its Protocol. The authoritative international definition is identifiable by four key elements:

1. The people are outside their country of origin.
2. They are unable or unwilling to avail themselves of the protection of the country, or to return there.
3. Such inability enabled or unwillingness is attributable to a well-founded fear of being persecuted.
4. The persecution feared is based on reasons of race, religion, nationality, membership of a particular social group, or holding a political opinion[Guy S. Goodwin Gill pp19-20]

Mandate Refugee Definition

Another category of refugees is that of 'mandate refugees', named because of the practice of the UNHCR to act under its mandate from the UN General assembly. Such refugees are characterised as follows:

1. Those who, having left their country, can, on a case-by-case basis, be determined to have a well-founded fear of persecution on certain specified grounds; and
2. Those often large groups or categories or persons who, likewise having crossed an international frontier, can be determined or presumed to be without, or unable to avail themselves of, the protection of the government of their State of origin.[Guy S. Goodwin-Gill p17]

Persons of Concern to the UNHCR

To avoid the legalities of who is a refugee, and even where the UNHCR recognizes someone as a refugee, but is prevented from conferring that status on them, individuals can formally be deemed to be "persons of concern." the UNHCR's Statute defines a "person of concern" as a person who:

> ".... owing to a well-founded fear of being persecuted for reasons of race, religion, national or political opinion, is outside the country of his nationality and is unable, or, owing to such fear, ... is unwilling to avail himself (sic) of the protection of that country..."

Mandate Refugees and Person of concern are in effect no different. The term mandate refugee is a preferred on one, because it more correctly characterizes the situation of the person concerned.

Many Burmese apply to the UNHCR for this status, and, while may get it, many are refused. It appears to be done with a fair degree of discretion on the part of the UNHCR officer, and of course there is political pressure from Thai and Bangladesh Governments not to so classify such persons. In essence it recognizes them as refugees, without the benefit of the strictly legal sanction. Where classification is not essential, they are treated as "persons of concern".

Displaced Persons Internally and Externally

In the 1970's the term "displaced persons" first started to appear in the language of the UNHCR and such people were referred to as "persons requiring the help of the UNHCR."

It has proved to be and effective legal device politically to overcome the deficiency of a State not being a contracting party to the Refugee Convention. The UNHCR and State tend to use this term. It is of course convenient for States, such as Thailand who have stated that some of the current Karen asylum seekers are "temporary displaced persons".

There are both internally and externally displaced. Obviously, it is more difficult to assist the internally displaced, however the UNHCR has and does manage to do this. Given the above statement, the question of whether "internally displaced persons" should be afforded the assistance and protection of the good offices of the UNHCR, is not yet settled.

An individual may gain UNHCR recognition as an convention or mandate refugee or both. Those who have fled Burma into Thailand or Bangladesh, although technically convention refugees, cannot be classified as such because the UNHCR does not operate in Thailand or Bangladesh under the authority of the Refugee Convention, Protocol or similar. They have offices, though, respectively in Bangkok and Dhaka. In these circumstances, the concepts of "persons of concern" and "displaced persons" are fortuitous for the refugees.

Legal Status of Refugees from Burma Living in Thailand and Bangladesh

The situation of the refugees from Burma living currently in Thailand and Bangladesh is uncertain and in some cases perilous. These two States are discussed because of the large numbers of refugees from Burma (approximately 100,000 to Thailand and approximately 250,000 into Bangladesh) who have fled to them. There are many more in both countries, but they are considered to be there for economic reasons. China and India also have Burmese refugees living in their countries.

Most have no "refugee" or "persons of concern" status with either the host country or the UNHCR, and there are documented cases of refugees being treated and arrested as illegal immigrants. The arrest of such per-

sons is arbitrary and the sentences are varied. Some are incarcerated and then freed in the host country, others sent back to Burma, while some are detained and sent to refugee camps or safe areas on or near the border and others are deported, It is an ad hoc situation.

As a matter of public record in Thailand, it is known that two persons, namely Tin Maung Htoo and Toe Kyi, alias Tint Zaw Oo, asylum seekers, were gaoled as illegal immigrants on or around the 6th December 1993. They were sentenced, along with others, to 40 days imprisonment and served a lot longer than the original sentence. Their detention clearly violated the international standards relating to the treatment of asylum-seekers, [Amnesty International January 1996 AI INDEX; ASA 39/01/96 DISTR: SC/CO] and violated Conclusion No.44 of the Executive Committee UNHCR, to which Thailand is a party. (See more on this in the section of Thailand and Bangladesh's obligations internationally)

A cursory glance at situation of those who have fled Burma into Thailand and Bangladesh, indicates that they are refugees within the Convention or Mandate meanings and they fulfill the criteria of UNHCR "persons of concern".

It would be helpful and humanitarian if the Burmese refugees were classified accordingly.

The UNHCR can give recognition to an individual as both convention and mandate refugee or as a mandate refugee. The characterization of and individual as a mandate refugee usually arises where the individual is in a non-contracting State, such as Thailand, or the State recognizes only the limited refugee definition.[Guy S. Goodwill Gill p33]. If individuals want to be considered for another country re-settlement program, then it is necessary to have their refugee status determined. [op cit p34] As the majority don't need to have their status determined for re-settlement, the question does not arise.

Criticism of the UNHCR

In recent times, however, the UNHCR has not escaped criticism that it, too, appears to be restricting the scope of its work, by taking a narrow view of what constitutes a refugee situation. A current example is where Burmese Muslims from Arakan State are characterised as economic migrants, determined it evidently appears, through the interviews of a minuscule number of the asylum seekers. There is strong evidence that suggests the largest number are indeed refugees.

The UNHCR has been loudly criticised regarding the adoption of voluntary repatriation as its preferred policy option to current refugee situations, its lack of rigorous concern for the rights of refuges it is repatriating, and its failure in advocacy, when the host State of the refugees is not so hospitable.

The criticism is growing and becoming more strident. The BLC recognizes the difficult situation in which the UNHCR sometimes finds itself, with and uncooperative host country. However, the UNHCR is an organization that not only cannot compromise, but it must be seen not to compromise.

There is a structural defect, though, in the UNHCR, almost one of its own making, in that it has adopted the dual roles of advocate for individual refugees and that of educator of those States responsible for refugee flows, This situation of institutional duality is common in many States. It is in fact a common bureaucratic failing of many modern governments, democratic and other. It is important in such situations for the conflicting roles to be separated, but essential in the UNHCR structure, so that the primacy of the protection of refugees can be safeguarded.

Voluntary Repatriation

The question of whether or not repatriations forced is a relevant one, because both the UNHCR and States have been scathingly criticised for their role in forced repatriations.

The only body charged with the right to determine that repatriation is feasible is the UNHCR. It is in violation of international law for any other party to take carriage of it. It is sui generis that repatriation has to be voluntary. In May 1992, the New York-based Lawyers Committee for Human Rights published ten General Principles Relating to the Promotion of Refugee Repatriation, which in essence restated the UNHCR position on repatriation. (see Appedix11 for full text of principles).

Human Rights Watch (H. R. W.) also claim that the UNHCR is violating its own rules on voluntary repatriation and cite in support the cases of the forced return of Burmese Muslims from Bangladesh and the forced return of Rawanda refugees by Burundi, Zaire and Tanzania. [The Nation newspaper Sunday 4th May 1997 Opinion A5]

In its briefing paper titled Repatriation of Burmese Refugees from Thai-

land and Bangladesh, The Australian Council For Overseas Aid (ACFOA) expresses similar concerns. The executive summary states:

"There have been serious problems with the UNHCR repatriation of the Rohingya refugees from Bangladesh into Burma between 1992-96. NGO concerns have included: refoulment by the Bangladesh Government; UNHCR's lack of transparency and information sharing; continuation of forced labour and other conditions of persecution which caused the Rohingya to flee; the minimal capacity of (the) UNHCR to monitor the welfare of the returnees.

Regarding the cease-fires between the SLORC and some ethnic groups, they further state:

"Under these conflicting conditions, Mon repatriation is beginning, without (the) UNHCR involvement, with no assurance of its voluntary nature, with no capacity to monitor the welfare of refugees, and with no NGO assistance. The arrest of Burmese in Thailand, including persons of concern to the (the) UNHCR, continues unabated." [Repatriation of Burmese Refugees from Thailand and Bangladesh, A briefing paper, ACFOA, in collaboration with the Burma NGO Forum, Australia 1996].

HRW states that, in the recent repatriation exercise conducted by the UNHCR vis-a-vis the Rohingya Muslims, the refugees were not told that other Rohingyas voluntarily repatriated to Burma between 1992 and 1996 suffered disappearances and arrest by the Burmese authorities. Such a claim is grave indeed. This was in spite of and comminque signed between the governments of Bangladesh and Myanmar (sic) in April 1992, for the safe and voluntary return of the refugees. [Refugees from Myanmar, International Commission of Jurists Switzerland October 1992]

Further criticisms of this situation were made by Non-Government Organisations (N. G. O.s), who observed the operations directly, and the UNHCR was widely criticised for its apparent complicity in its massive "voluntary" repatriation of the Rohingyas, (Arakan Muslims) who live in Burma on the Burma-Indian border. A significant number of Non-Government Organisations (NGOs) that directly observed the situation told similar stories of refugees being interviewed without being given relevant information and of the use of a coercive technique of interviewing.

If refugees cannot have absolute faith in the UNHCR to offer them assistance and protection, which appears to be the case in the Burmese situation, perhaps it is time for the United Nations Secretary-General to intervene and help the UNHCR clarify its role, so that it can concentrate on its primary role as an advocate for refugees.

Non-Refoulement

At Pu Muang Refugee Camps, in Kachanaburi Province, Karen Refugees were subjected to intimidation and harassment by the Thai Army, under the command of the Ninth Division. The forced a meeting with them, lectured them for over three hours on the benefits of returning to Burma, with assurances that the SLORC would not harm them upon return. The refugees said that they did not want to go back, and the Commander was reported as saying to them: "If you don't want to go back, where will you stay?" and told them that they were not allowed to stay Pu Maung. The refugees reportedly asked for seven days to find and alternative site but he denied them this. It must be said that the UNHCR repeatedly requested access to the Karen refugees and have been repeatedly denied this by the Thai Government.

The Thai government and the Burmese Government, after a visit to Burma in 1992 by the Commander-in-Chief of the Thai Army, General Chawalit (now the Prime Minister), established a Repatriation Centre at Tak in Thailand. It forcibly repatriated students back into Burma. It has since closed, but other border centres operate as de facto repatriation centres.

"Persons of Concern" and those with UNHCR Refugee status have not escaped arrest and detention in Thailand Bangladesh, and some event have either been deported or forcibly repatriated.

The Executive Committee of the UNHCR in the XXX V11TH session passed Conclusion 44, which declared that "illegal immigration" of itself was not a legitimate reason for the detention of refugees. [International Commission of Jurists, p 20]. Thailand is a member of the Committee and Conclusion No.44 was passed by consensus.

Violation of Non-Refoulment

The recent development of the non-refoulement of refugees into a norm, or customary international law, binds States, even those who have not ratified the Refugee Convention. The principle obliges States not to return or force back refugees seeking asylum on their soil, who would if returned or sent to a State, would face the possibility of persecution.

The principle is embodied in the 1951 Convention, the 1967 Protocol, the

Convention against Torture, the 1967 Declaration on Territorial Asylum, the Principles concerning Treatment of Refugees(Asian-African Legal Consultative Committee Bangkok 1966, referred to as the "Bangkok Principles") with Thailand as a party and of course, the UN and the UNHCR, particularly the UNHCR Executive Committee.

The Executive Committee's Conclusion No.6 of 1977 recognized that the principle of non-refoulement was generally accepted by most States. [Guy S. Goodwin Gill pp 121-127]

In situations where persons are convention refugees the law is clear concerning the principle of non-refoulement and its applicability. It is less clear, where persons are not so classified; however there is enough scope within the body of international refugee and humanitarian law for the principle to apply to such person.

In the recent, 1997, SLORC and Democratic Kayin Buddhist Army (DKBA) military offensive against the Karen Peoples of Burma, Karen refugees, who were fleeing direct attack by the SLORC and DKBA military, claimed that they were forced back into Burma by some elements in the Thai military. There were enough independent witnesses to corroborate their claims.

Early in 1995, the then Interior Minister Khun Sanan Kachornprasart was quoted as vowing that Karens who sought refuge in Thailand would be "pushed back without having to wait for fighting to cease", because inter alia the Karens fleeing after the SLORC's demolition of Manerplaw, (Burmese and Ethnic Burmese Democratic Liberated Area) was as a result of a "military, not a political, matter." [The Nation newspaper Tuesday February 7,1995]

The Shan and Mon Peoples of Burma have to varying degrees been subject to the same treatment as the Karens, Rohingyas and Arakan as described above. It appears that the Shan have heavily subjected to violations of non-refoulement. Their situation and that of the Mon People will be the subject of a future article currently being researched by the Burma Lawyers' Council.

Thailand's Response to the Burmese Refugee Situation

Thailand's response to the refugees from Burma is one of contradictions,

subject to frequent change and discretionary. The Bangkok Post ran and Editorial Comment in its publication of Monday 10th March 1997, calling on the Prime Minister to explain both the government's policy on refugees, and its actions in the light of claims that Karen refugees were pushed back across the Border into Burma.

Thailand of course denies refugee status to those the people from Burma who flee persecution within Burma, as it has not ratified the Refugee Convention. However, the Thais have also allowed hundreds of thousands of them to reside in Thailand and this must be acknowledged. But in spite of this, their policy towards refugees from Burma is less than satisfactory.

The Thai Government has also condoned, by its failure to condemn or take action, attacks by the SLORC military on Burmese refugees on Thai soil.

The Thai Government has claimed that the Karens, particularly the recent influx, are not refugees, but, "temporarily displace persons". This characterisation of course, elicits less favourable consequences than if they were charaterised as "refugees". It limits the responsibility of the State of Thailand and restricts the role of the UNHCR and NGOs.

Thailand State as a non-contracting party to the Refugee Convention can deny responsibility for the refugees from Burma on that ground. Thailand State is, however, a member of the United Nations and an international citizen. On that basis, Thailand does have responsibility towards the refugees from Burma. States, irrespective of their membership of the United Nations or their status as contracting or non-signatory parties, are bound by international obligations to extend to refugees human rights considerations.

The Universal Declaration of Human Rights is the primary and most pervasive source of human rights law. The rights extended to all persons under this Declaration and associated law, cannot be negated by a State's domestic immigration law. Articles 13 and 14 specifically define rights vis-a-vis IV's displaced persons. They read as follow:

Article 13

1. Everyone has the right to freedom of movement and residence within the borders of each state.
2. Everyone has the right to leave any country, including his own, and to return to his country.

Article 14

1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.
2. This right may not be evoked in the case of prosecutions genuinely arising from non-political crime or from an act contrary to the purposes and principles of the United Nations.

There is also a body of international law, norms and practice that has developed regarding refugees, and Thailand, as an international citizen, incurs obligations.

Thailand has also participated in forums where refugee matters were specifically discussed and determined underlining a recognition of its own Government's role in relation to refugees. Thailand was a party to and was the host state for the Asian-African Legal Consultative Committee at its eighth session in 1966. The outcome of this session was an agreed statement called "Principles Concerning Treatment of Refugees", commonly referred to as the Bangkok Principles. The definition of refugee in this document is, in essence, the same as that of the convention refugee.

It is also a member of scrapheap the UNHCR's Executive Committee, which adopted Conclusion No.44 which inter alia declares that persons who are "illegal immigrants' under domestic law, is not a reason of itself, for detention.

The document also specifies the minimum standard of treatment that a party must give to a refugee. Not all articles were endorsed without reservation, including some by Thailand. Nonetheless, it is a party to the document and there by adopted clear principles about the existence of refugees, and its own nation's responsibilities toward refugees on its soil.

The fact the Thai Government also characterises the Burmese people as "internally displaced persons", a feature of the contrary manner of dealing them, does nothing to change the fact that under international law and practice they are essentially refugees.

States have developed a body of municipal law, which is generally restrictive. To be classified as a refugee involves and economic cost to the host State. It is this cost more than any other factor, including even the 'floodgates' argument, which drives States to narrow the legal interpretation of refugee.

Thailand does have its own Immigration Act of 1979 which does not rec-

ognize refugees. This means that the Burmese refugees who enter Thailand are by the operation of this act "illegal immigrants".

This greatly complicates the role of the UNHCR in recognizing them as "persons of concern". However Thailand could be reminded to abide by the UNHCR's executive Committee's Conclusion No.44 to which it is a party. (see above reference in)

Bangladesh's Response to the Burmese Refugee Situation

The response of Bangladesh is simulate to that of Thailand. It is outside the immediate scope of this paper to do more than to note that the discussion on Thailand can be extrapolated to Bangladesh.

Burma's Obligation Not to Create a Refugee Situation and Their Responsibility Towards Those Refugee Situations They Create

All UN States are bound by a general principle which is not to create refugee outflows. Having done so, they are further bound to co-operate with other States in the resolution of the situation.

The two compelling reasons why States should not act so as to create refugees are:

1. Human Rights considerations
2. Not to cause damage to other States legal interests [Ferney-Voltaire & Guy S. Goodwin-Gill preface p vii]

Burma has chosen not to be bound by these legal principles and continues to govern with a mixture of repression, brute force and fear. It takes no heed of human rights considerations and shows negligible concern for the damage it cause to its neighbours.

The only reason a person becomes a refugee is because of their State's failure to afford them human rights' protections and liberties. Refugees are not migrants, but persons who face insurmountable human rights problems in their country of origin. It is a State's breach of international human rights' law and norms which is the pre-condition to the creation of a class of refugees.

The General Assembly in 1981 established, The Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees and again condemned various practices as being the cause of refugee flows. Included in them were policies and practices of oppressive and racist regimes.

The SLORC military dictatorship does, however, operate in a manner which can be described as both oppressive and racist. That its rulers are oppressive is not in any doubt and the SLORC have called to account in many forums, including the United Nations. That it is racist is less well known. The nation of Burma is comprised of many Ethnic Peoples and yet they are denied any form of cultural recognition. Persecution of a person based on their race, ethnicity or nationality can be reason for them to flee the country and claim refugee status.

The treatment of the Ethnic Burmese can be seen to be in violation of one or more of race, ethnicity or nationality — all reasons, if one is persecuted, on that basis to claim refugee status.

The Ethnic Peoples of Burma call themselves Ethnic Nationalities. Nationality is included in the Refugee convention as a ground of persecution. It is Article 1A(2) and it has been judicially interpreted so as to embrace membership of a particular ethnic, religious, cultural, and linguistic community. [see London Borough of Ealing v. Race Relations Board (1972) AC 342 in which the court found that nationality did not mean simply national origin.. [Guy S. Goodwin-Gill p 45]

The corresponding international obligation to that of not to create refugee outflows is to co-operate with other States in the resolution.

Burma has attempted at times to co-operate, but it could not generally claim that it is co-operative in the resolution of the refugee situations it creates. It is definitely not co-operative with the UNHCR. It appears not to offer any compensation or assistance to either the UNHCR or to its neighbours of Thailand, Bangladesh, India and China who have all received refugees from Burma.

It is not a friendly act to these neighbours to first of all cause refugees to flee to their countries and then the unfriendliness is compounded by the SLORC's refusal to assist the UNHCR and the host countries and to even acknowledge that they have a refugee problem.

States have a responsibility to govern in such away as to prevent refugee

flows it is of course sui generis that those States who operate on democratic principles, underpinned by the rule of law, are less likely to create refugee flows.

Burma is a long way from achieving the conditions precedent.

ASEAN's Response to the Burmese Refugee Situation

ASEAN has been quiet about the current refugee situation, other than deciding to admit Burma as a member to ASEAN. Prima Facie it appears that the SLORC are being rewarded by the ASEAN members for bad behavior. In the short term it enhances the SLORC's standing, yet in the long term it can only damage ASEAN's standing.

1992 ASEAN did make a strong public comment though, about Burma's treatment of the mainly Muslim Burmese who fled into Bangladesh. They called on Burma to show restraint. Singapore and Thailand called upon to allow the refugees to return home safely. [Refugees from Myanmar, International Commission of Jurists Switzerland October 1992 p 3]

Recommendations

In 1992 the International Commission of Jurists in their work, titled, "refugees from Myanmar', A Study by the ICJ Geneva, Switzerland, recommended that:

> "The Governments of Bangladesh, the Peoples, Republic of China, India and Thailand should grant asylum to the refugees fleeing persecution in Myanmar. (sic) Those governments should allow the United Nations High Commission for refugees to provide protection to these refugees. The international community should provide economic assistance to the refugees."

The Burma Lawyers' Council endorse the above recommendations and includes the additional:

1. That Thailand, India, Bangladesh and Burma, sign and ratify the 1951 Refugee Convention and the 1967 Protocol.
2. That all countries immediately observe the UNHCR's Executive Committee Conclusion No.44 regarding the detention of refugees "illegal immigrants".

3. That Burma desist from its current oppressive form of rule and abide by the results of the 1990 democratic election results.
4. That Burma fulfil its current oppressive form of rule and abide by the results of the 1990 democratic election results.
5. That the UNHCR abide by its repatriation rules and the principles document of the Lawyers Committee for Human Rights.
6. That the UNHCR separate its roles advocacy and education
7. That UNHCR abandon its policy of voluntary repatriation and assess each situation on its merits.
8. That Thailand comply with conclusions No.44-(see page11)
9. That Thailand abide by the "Bangkok Principle" as a dobted by the Asian-African Legal Consultative Committee.
10. That Thailand abide by the United Nations, Covenants and treaties it has ratified.
11. That ASEAN develop a policy foreign refugee situations whereby members work towards not creating such situations and agree to a bide by international nor and to co-operate with the UNHCR implementing its mandate.

APPENDIX 1

General Principles Relating to the Promotion of Refugee Repatriation (Lawyers Committee for Human Rights, May 1992 New York USA)

1. Repatriation should not be promoted unless all countries involved in the repatriation can ensure the protection of and respect for the fundamental human rights of the refugees.
2. Refugees must not be returned to any country where they would face persecution.
3. Refugee repatriations must be voluntary.
4. Repatriation should be promoted only if it can be accomplished in a manner that ensures safety and dignity upon return.
5. The UNHCR should be involved in a meaningful way from the inception of the repatriation plan to its conclusion.
6. Non-governmental organizations, in addition to the UNHCR, should have independent access to the refugees, both before and after their return.
7. Any repatriation plan should establish that the conflict has abated and

its attendant risks eliminated before promoting return.

8. Repatriation should be promoted only if there is no longer a likelihood of recurrence of the human rights abuses that precipitated flight.
9. Particular emphasis must be placed on the unique protection needs of returning women and children, who are a high-risk group within and already vulnerable population.
10. These principles and considerations may apply as well to unassisted repatriations.

A Seminar on Constitutional Protection of the Environment in Burma

A seminar on the Constitutional Protection of the Environment in Burma was held at Thammasat University, Bangkok, Thailand, from the 28th to the 30th July, 1997. The seminar was organised by Forum Asia, Images Asia, Union for Civil Liberty, and the Burma Lawyers Council. In attendance were delegates from various democratic ethnic nationality organisations from Burma, and legal and non-legal environmental experts from Thailand, Japan, the United States, Netherlands, Australia and New Zealand.

The Seminar was convened due to the result of the growing concerns at the serious environmental devastation in Burma by the SLORC military regime and other parties, by the unsustainable development and exploitation of the country's oil and gas reserves, forest and marine resources, minerals, river systems, and agricultural lands. This destruction is in addition to the ongoing environmental damage inflicted by the people as they exploit the natural resources out of ignorance, necessity, or desire for personal enrichment, or development.

The seminar expressed concern at the current environmental degradation in Burma, which is intertwined with the worsening political, economic and human rights situation in Burma, and acknowledged that these concerns can be properly addressed only when a political solution is achieved in Burma with the restoration of democracy. It was also acknowledged that in the meantime urgent measures must be taken to address the deteriorating environmental situation in Burma, and the need for the long term protection of the environment by formulating avenues for its protection, conservation, and restoration; that such avenues should include the protection through the Constitution, designed to protect the rights of the

people and to define the responsibilities of the government on the environment.

The Seminar then made recommendations which included the following, with respect to:-

1. the rights of all persons to a secure, healthy and ecologically sustainable environment.
2. the rights of the local people to information and community participation and to their informed consent, in the decision making of the conservation, protection, restoration, development and management of their environment and their national resources, and to the monitoring of same.
3. educating and encouraging the government authorities and the local people, to practice restraint and self-responsibility in the conservation, protection and the restoration of the environment.
4. enacting laws and regulations that will secure such notification and disclosure of the details of all proposed developments which will affect the environment of individuals or the general population as a whole.
5. claiming and obtaining from the government and responsible parties reparation and just compensation for damage to, or loss of life, health and/or property where such claims arise out of the damage to their environment.
6. every citizens' right of equal access to the use, management, and the protection of the clean and healthy air and water in their environment.
7. recognising the rights of the indigenous peoples to control their lands, territories, natural resources and traditional way of life including their right to preserve sacred sites.

Guiding Principles for the Protection of the Environment adopted by the 'Constitutional Seminar on the Protection of the Environment In Burma' 28-30 July Thammasat University Bangkok Thailand

Rights of all persons to a secure, healthy and ecologically sustainable environment.

Recognise the rights of Indigenous Peoples to control their land, terri-

tories, natural resources and traditional way of life including their right to preserve sacred sites.

Development projects should benefit local populations and serve the public interest.

Educate and encourage the government authorities and the local people to practice restraint and self-responsibility in the conservation, protection and the restoration of the environment.

Informed consent must be obtained from all affected communities for development and investment projects.

It is the duty of the citizens, governments and companies doing business in Burma to respect and abide by international laws and conventions relating to the environment.

Enact laws and regulations that will secure such notification and disclosure of the details of all developments including proposed ones, which will affect the environment of individuals or the general population as a whole.

Every citizen should have equal access to use, manage and protect the clean, healthy air and water. It should be clear that no one owns the air and water.

Recognition of different forms of land ownership including community, state and private.

Discourage agri-business which would adversely affect the environment.

Promotion of the use of traditional agricultural conservation practices and research for ecologically sustainable development.

Rights of traditional/subsistence farmers to water resources.

Integration of every community into ecologically sustainable development at a national level.

Constitutional Environmental Protection Clauses for all Constitutional Making Processes regarding Burma adopted by the 'Constitutional Seminar on the Protection of the Environment in Burma' 28-30 July 1997 Thammasat University Bangkok Thailand

Ethnic Peoples have the right to control lands, activities and natural resources and to maintain their traditional way of life. This includes the right to security and the enjoyment to their means of subsistence and the right to self-determination in development activities and the right to maintain their traditional way of life in a federal union.

All persons have the right to effective remedies and redress for environmental harm or the threat of such harm.

The rights of ownershop or possession by the ethnic peoples over the land which they traditionally occupy shall be recognised and their right to use lands that are exclusively occupied by them, and to which they have traditionally had access for their subsistence and traditional activities shall be safeguarded.

Every person has the basic right to a healthy and ecologically sound environment to sustainable development and to freedom from pollution and environmental degradation and activities that adversely affect the environment, threaten life, health, livelihood and well-being.

All persons have the right to an environment adequate to meet equitably the needs of present and future generations.

All persons have the right to infromation concerning the environment and to active, free, meaningful participation in planning, monitoring and decision-making activities and processes that can impact on the environment or development.

All persons have a duty to protect and preserve the environment and all member states in teh federal union shall respect and ensure the right to a healthy and ecologically sound environment for the present and future generaltions.

Development projects and activities should benefit local populations,

serve the public interest, protect human health, the environment and natureal ecosystems, respect for customary and traditional uses of natural resources and be fair to future generations. Further decisins regarding development projects and related activities shall be made concurrently by member States and the Federal Union. The informed consent which must be freely given for development projects/activities must be obtained from local communities and people affected or porentially affected.

No element in this constitution should be taken to imply licence to carry out activtites that cause significant environmental destruction that is no aspect of the contitution hsould have a negative effect on teh environment. Environmental protection should be implicit in all sections and articles of the constitution.

The state and citizens have rights and responsibilities to monitor, regulate and prevent the use, manufacture and importing of toxic wastes, harmful substances and environmentally harmful technologies.

The state and citizens must be encouraged to adopt development models and technology which is the moust environmentally benign (friendly) and appropriate under sustainable development criteria.

The rights of ownership and possesseion of the Ethnic peoples over teh lands whcih they traditionally occupy shall be recognised and their rights to use lands not exclusively occupied by them, but to wich they have traditionally had access for their subsistence and traditional activities shall be guaranteed.

The environment and natural resources should be managed inteh best interests of the people: and

- Local communities sould manage
- if there is conflict between communities the state should resolve such conflict
- if there is conflict between teh States the Federal Govenrmnet should resolve such conflict
- whatevr the decision it should be resolved in teh best nterests of teh people.

Ever person has the right to protect and consume the natural resources by legal and sustainable means.

If disasters happen to communities, peoples or individuals through the exploitation of natural resources and/or development, those parties have the legal right to claim repatriation and compensation on just terms.

Following is the Environmental Clause (24) Chapter (2) of the South African Constitution which was suggested as a good model clause.

Everyone has the right to:

(a) an environment that is not harmful to thier health or welll being;
(b) have the environment protected for the benefit of present and future generations through reasonable legislative and other measures; that

(i) prevent pollution and ecological degradatijon;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of material resources while promoting justice and economic and social development.