Legal Issues on Burma
JOURNAL

ISSN 1513-9174

No.12 (August 2002)

Regular Features

Prospect for the Democratic Transition in Burma

Proposed Mass Media Law

Ne Win's Family Conspiracy Trial & Some Questions

Burma's Toothless Money Laundering Law

Special Features

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Justice or Punishment: Forgiveness or Vengeance: Amnesty or Amnesia: Is There a Middle Path for Burma?

Forgotten: Political Prisoners in the Context of Transitional Justice

Seeking Justice for Previous Human Rights abuses and Democratic Transition in Burma

In Brief

Collapse of Transitional Strategy

International Criminal Court

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Burma Lawyers' Council

Legal Issues on Burma
JOURNAL

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

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

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The Editor

Legal Issues on Burma
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Contents

Regular Features

Foreword 1

Prospect for the Democratic Transition in Burma 3
Joseph Silverstein

Proposed Mass Media Law 17
BLC Concept

Ne Win's Family Conspiracy Trial & Some Questions 29
B.K. Sen

Burma's Toothless Money Laundering Law 35
Legal Aid Section

Special Features

Transitional Justice

Justice or Punishment: Forgiveness or Vengeance: Amnesty or Amnesia: Is There a Middle Path for Burma? 38
Thein Oo & Ms Janelle Saffin

Forgotten: Political Prisoners in the Context of Transitional Justice 64
Danya Marshman

Seeking Justice for Previous Human Rights abuses and Democratic Transition in Burma 85
Zulma Niranda

In Brief

Collapse of Transitional Strategy 93
B.K. Sen

International Criminal Court 95
B.K. Sen

Cover design & layout - Ba Maung Zin

FOREWORD

This publication includes a special feature focusing on the issue of "Transitional Justice." Burma's military regime, the State Peace and Development Council (SPDC) has been forced to create some political space by way of agreeing to "talks" with the opposition leader. Burma is passing through a critical stage of its history. After a short period of constitutional rule (post-independence), it has been under military dictatorship for the past 40 years. Repression, coupled with the restriction of freedom and fundamental rights has not broken the spirit of the people. The 8.8.88 uprising demonstrated this invincible power. The battle cry in the movement was "We want democracy here and now!" The Junta retreated and modified its strategy. It held a General Election in May 1990 with a promise to return power to the elected representatives of the people. The post-election period has been a trying time for the elected representatives. Most have been arrested and the Junta refused to negotiate with the representative leader of the pro-democracy movement. Daw Aung San Suu Kyi was herself placed under house arrest. The gross abuses of law and defiance of the peoples mandate are now a history of the past. What is important today is the engagement that the Junta has made with the democratic leader, agreeing to hold political talks, but not yet agreeing to political dialogue. They have set Daw Aung San Suu Kyi free. The trial of Ne Win's family members for an attempted coup has roused the world's attention, and somewhat baffled locals. It is political death and the end of the Ne Win era is significant. These events have raised illusions, hopes and cynicism. Be that as it may. In this backdrop, the dialogue held between the opposition leader and the Junta has become of national importance. The issue of Transitional Justice will assume significance and urgency in the dialogue. It will, like it or not, become a crucial issue. During the regime's long rule, the consistent gross violation of human rights being its hallmark. Unless the transition deals with the past it will be devoid of legitimacy.

The contributors have approached the issue in their own ways. The goal is to put in place a non-controversial formula so that the transition can move forward. This issue should not be a roadblock to the regime transformation. From one extreme "forget and forgive" to the other extreme "of punish and teach," the fragmented society, has to be crafted with sustainability. The question now is not whether Burma needs democracy, but how to manage this transition. Hopefully, this publication may shed some light on the dilemmas and help in the management of the democratic process. In that sense, this publication could also act as a contributor in national reconciliation.

In order to maintain the identity of the Journal being one primarily of "Legal Issues," regular feature articles have been included. Lack of access to information inside Burma due to the regime's ironclad restrictions, which generates widespread fear, prevents us from having primary sources. However we endeavour to keep the issues topical and relevant to the what is happening in Burma and what we hope to happen, that is transition. We appreciate the understanding and cooperation of our readers.

The Publication Team

In the last publication, Issue 11, the name of Sao Shwe Thaike, the first President of Independent Burma, was spelled incorrectly. The Burma Lawyers' Council apologises and deeply regrets this error.

Prospects for the Democratic Transition in Burma

*Josef Silverstein**

On May 6, 2002, the military government in Burma released Daw Aung San Suu Kyi from house arrest. Its official spokesman, Lt. Col. Hla Min, said "Today, marks a new page for the people of Myanmar and the international community…We shall recommit ourselves to allowing all of our citizens to participate freely in the life of our political process, while giving priority to national unity, peace and stability of the country as well as the region." As the news flashed around the world and drew positive responses from political leaders, diplomats and newspaper editors, only in Burma did the state-controlled newspapers, radio and television ignore the event and statement and the people of Burma learned of it from international radio broadcasts and word of mouth.

In addressing two audiences, was the government sending each a different message? To the outside world, was it saying that this was a first step and political change soon would be underway for the people of Burma while the message to the people inside of Burma, was it saying that Daw Suu Kyi's release did not represent any change as the military's existing undisclosed plans for the nation's political future were still guiding its action.

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The Burmese rulers probably hope that the release of Daw Aung San Suu Kyi will appear to imply that they are doing more than what they intended to do. For twelve years they have repeatedly said that they were

laying the foundation for what they now call a “discipline” democratic state according to their own timetable and plans. In mid-May, they reported that the National Convention Convening Commission, which has been writing the principles for a new constitution, met on the 15th; it gave no details nor did it say when its work would finish. While some foreign states and commentators around the world have criticized what the Burma military rulers have revealed about their ideas of a “democratic” system, others have given enough praise to encourage the ruling junta in Burma to believe that in a divided world, they can say anything they want and enough states will be satisfied to offset those who are not. For the deeper meaning of the release of Daw Aung San Suu Kyi, this must be seen in the context of what else is occurring and being said by the military leaders before assessing the importance of her release as a harbinger of political change.

Although the euphoria amongst the people of Burma, following Daw Aung San Suu Kyi’s “freedom” continued for days as she moved about Rangoon and met with party members and people at large, but when the government made no further gestures supporting the idea that change would follow, the people’s enthusiasm began to decline. Journalists, both local and foreign, also began to convey growing doubts as they heard increasing skepticism from their informants and looked for the next step in this slow dance of political change. Meanwhile, Daw Aung San Suu Kyi moved gingerly, testing the boundaries of her “unlimited release” and sought to breathe new life into her party. On June 14, she made her first trip outside of Rangoon, going on a two-day trip to the monastery on Thamyinnya Hill in the Karen State to visit the Burmese monk, U Winaya.

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She also made her first visit outside of Rangoon in 1995 to meet with him following her release from her earlier house arrest. This recent visit was her initial test of freedom and, if successful, probably will be followed by visits to party headquarters elsewhere in Burma, meetings and talks with people, making speeches, participating in rallies and trying to publish a party newspaper.

The real measure of whether or not freedom and democracy in Burma is increasing or decreasing cannot be measured by the freedom of Daw Suu Kyi alone, but must be gauged by the amount enjoyed by the people. There are at least three issues in the current political life of the nation which are important indicators of whether or not their condition is improving or declining—the civil wars, political prisoners and the prevention of elected representatives to form a parliament.

On the day after Daw Aung San Suu Kyi's release, soldiers stationed in the border areas ordered the people of Kho Kay village in the Karen state to leave their homes or be shot; the soldiers made their point by killing the people's livestock and burning their houses and rice barns as punishment for antigovernment sympathy and to create internal discord. This was not an isolated event. Similar events and worse occur all the time elsewhere in the hill and border areas where journalists cannot go, to see and talk with people who have been victimized and fled their villages seeking safety in the jungle or across the international border. In the most recent report of the ILO on forced labor, the international organization repeated what it said before, that the military has not discontinued the use of forced labor in the border areas and no soldier or officer has been arrested, tried and convicted for his involvement in human rights violations, which Burma, by international treaty, said it would do. The rulers' wars against the ethnic minorities has been in progress since the 1950s and there are no signs that they are taking steps to end them now or in the immediate future.

The release of political prisoners from captivity is a second important marker of political change. Between 1988 and 2002, the military rulers denied that there were any political prisoners even though the world knew that Daw Aung San Suu Kyi and others were held without charges, trials or convictions. Following a leadership change in the ruling group in 1992, Gen. Than Shwe, the new junta leader, admitted that the state held political prisoners and announced that it was beginning to release them. Recently, responsible estimates of the number held in captivity was between 1,500 and 2,000; since Amb. Razali Ismail, Special Envoy of the UN Secretary General, and Special Rapporteur Prof. Paulo Penheiro for the UNHRC began their visits to Burma, 200-250 are reported to have been released. At the time of Daw Suu Kyi's May release, Col. Hla Min made a positive announcement that the ruling junta had released 600 and that it would continue to release "those who will cause no harm to the community…" However, this was challenged almost immediately by Col. Tin Hlaing, who, while attending an international meeting in Malaysia, declared that Burma no longer was detaining any political prisoners and that the 200 "so-called NLD members were actually involved in criminal activities…" With the world aware of the continuing imprisonment of Ko Min Ko Naing, other student and party leaders—some beyond the date of the completion of their sentences—and ordinary citizens, Daw Aung San Suu Kyi made clear her party's position on the issue when she told an interviewer from The Irrawaddy:

> "Regarding the release of political prisoners, we have prioritized it as one of the most crucial issues—that they are all released uncondi-

On the day after Daw Aung San Suu Kyi's release, soldiers stationed in the border areas ordered the people of Kho Kay village in the Karen state to leave their homes or be shot; the soldiers made their point by killing the people's livestock and burning their houses and rice barns as punishment for antigovernment sympathy and to create internal discord.

> tionally and at the earliest possible date. The Burmese junta knows it as well. This happens to be one of the things that I have mentioned again and again since I was released. We are totally frustrated at the slow progress in the release of political prisoners. We want them to be released immediately and unconditionally."[2]

An unpublicized aspect of the tragedy of holding political prisoners is that their prisons are widely scattered throughout the country and their families face unnecessary difficulties in locating them, large expense in traveling long distances to visit them and uncertainty in knowing when they will be released. If, as Lt. Col. Hla Min said, a new page for the people of Burma was opened on May 6, it was not blank; it is stained by the names of political prisoners still under detention who are carried over as unfinished business to be completed before political change can be said to be finally underway.

On May 27, journalists, still in Burma, and the world at large encountered afresh, the issue of the unseated elected representative to a parliament, which the government will not allow to assembly and take power. More than 1,000 people joined Daw Aung San Suu Kyi to celebrate the twelfth anniversary of the 1990 election. As each anniversary of the date arrives and passes, the people of Burma and the international community are reminded that despite UN resolutions calling for the government to permit the parliament to form and carry out the first step in a peaceful transfer of power, the military rulers disregard the appeals and continue they dictatorial form of rule. When forced to say anything, they now contend that too much time has passed since the election and therefore it should be ignored and everyone should look forward to a new election which will be held after the constitution, the rulers are preparing, is in place. This was made clear when the Burma Ambassador to Canada, U Nyunt Tin, speaking on Canadian Television, three days after Suu Kyi's release, said, in response to a question about the election, that "it [was] already 12 years ago. Even in the (sic) any Western democracy countries, term of MP is 4 years or 5 years. It is 12 years now… Now we close the chapter."

If, as Lt. Col. Hla Min said, a new page for the people of Burma was opened on May 6, it was not blank; it is stained by the names of political prisoners still under detention who are carried over as unfinished business to be completed before political change can be said to be finally underway.

But Daw Aung San Suu Kyi has not forgotten the event and, with local and international attention focused upon her said, on May 10,

> "This is a matter of policy so this is something that will have to be discussed. We have always been flexible…and we are ready to negotiate an outcome which will be favorable to the people of Burma." [3]

A week later, she addressed the issue again, this time making a stronger and more direct statement.

> "What we have always insisted is that the results of the 1990 election must be honored because it is a bad precedent to allow the results of an election to be set aside if they do not suit somebody's wishes. So what are we insisting is very much in line with the provisions of the United Nations resolutions on Burma— successive United Nations resolutions. it also says that the will of the people of Burma as expressed in the 1990 elections must be respected and honored. So this is what we have always asked for and I think this is something which is a very, very reasonable thing to demand should happen in a country that is progressing with democracy." [4]

When the party members met to celebrate the anniversary of the election, they backed her call for a peaceful resolution through dialogue. Meanwhile, the military rulers have said nothing in public to indicate a change from the position enunciated by its Ambassador in Canada.

For the people of Burma, the revival of the election issue brought back memories of Burma government intimidation, arrest, violence and murder as they pressured party members to resign from the party and the elected member to surrender their right to represent their constituents. After twelve years of various forms of oppression, thousands of members and many elected representatives, who suffered imprisonment rather than resign from the party and surrender their rights to represent the people, remain. Despite the best efforts of the military rulers to undermine her support, enough people remain loyal and recognize Daw Aung San Suu Kyi as their leader who was not permitted to stand for election, see the party's election victory as having established its right and legitimacy to govern and remind the world that the military rules by force alone with no popular support and no mandate. So long as the memory of the election and its results remain alive amongst the people, this chapter is not closed and political change has not begun.

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The three issues, together with the events and statements of May 6 and afterward, form a framework for examining the question, what are the prospects for a democratic transition in Burma? At this point, they are not promising. Six weeks have passed— as this is being written— and while the time may be too short to judge whether or not the military rulers were sincere and truthful when they declared their recommitment to "allow" all citizens to participate freely in the political process, they have given no concrete evidence that they soon will.

I.

Forty years have passed since Burma last enjoyed its original form of democracy. During that time, power has been concentrated in the hands of the military who have used it, in part, to erase the democratic legacy of the past. When the people rose on the streets of Rangoon and elsewhere in 1988, and called for political change from dictatorship to democracy, many who chanted the slogans did not know the meaning of the term, democracy. What they did know was that after twenty-six years of brutal, corrupt and incompetent rule by the military, they wanted change. Many stopped the few foreign reporters and tourists from the West and asked, what is democracy and how does it work?

They knew that it had something to do with civilian rule, choosing and changing your leaders by elections and freedom; they had hazy memories of civil society. Many remembered that before the military seized power in 1962, they could form almost any kind of association or group they wanted. They could publish and read newspapers and books on most any subject without interference by state censors, they could travel anywhere and visit any one without registering their moves and securing permission before leaving their homes. Schools and libraries were open and were stocked with reading materials on most subjects and people— adults and students— could organize political and social groups, discuss and advocate ideas which both supported and criticized the government's leaders and policies. Most knew that the military destroyed the Rangoon University Student Union building in 1962 where students and national political leaders debated the issues of the day and most future political and social leaders, such as Aung San, gained their first real political experiences within its walls. These and other things constituted past freedoms which, while far from perfect under Burma's first constitution, nevertheless, were rights and privileges most had never experienced under military rule.

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The foregoing forms the starting point of any discussion of democracy today and its prospects for Burma in the near future. The writings and speeches of Daw Aung San Suu Kyi, which are available in Burma, but not easily obtained, form an excellent source of what democracy should and can mean for Burma, once the dictatorship of the military and its authoritarian ideas are swept into the "dustbin of history."

It is the stated objective of both Daw Aung San Suu Kyi and the NLD leaders and the military rulers of Burma that the country, one day, will return to democracy. When the idea is discussed is there any real agreement between the two on its meaning? When Daw Suu Kyi was asked that question shortly after her release, she said optimistically, "I don't

think our real understand of democracy is any different, although perhaps some would like to put a different official interpretation on it." In response to a comment from her interviewer that it is the view of most people that the rulers do not believe that Burma is ready for democracy and that the country would fall apart if they [the rulers] loosened control, Daw Suu Kyi responded by saying that,

> "I don't think a country falls apart simply because there isn't a 'strong' junta at the top— 'strong' in a totalitarian sense. I think a truly strong junta is one that has the support and trust of the peo ple."[5]

Since, she said that during the nineteen months of confinement after being stopped from traveling and restricted to her home and in semi-isolation in 2000-2002, she held many talks with the military leaders centered on "confidence building" and not on substantive matters, one has to ask, when, if ever, did they exchange views on democracy? If one compares the constitutional principles the military rulers are preparing and their speeches with the writings and comments of Daw Aung San Suu Kyi and the temporary constitution the NLD leaders drew–up in 1990 by which they intended to govern, it is apparent that there is a wide gulf separating the two which can never be overcome unless they talk together and are ready to compromise in order to find an agreeable definition which they can use to develop an acceptable democracy system.

The military says that power belongs to the people. But when government had been in the hands of civilians who were about to lose or had lost control of it, the military leaders believe, with Mao Tse-tung, that "power grows out of the barrel of a gun" and they had to seize it. That in brief, is how Gen. Saw Maung explained the military's action in taking power in 1988 and he promised to return it to them, once an election was held and a civilian government was formed.[6]

But the reality is that after a dozen years of exercising power, the military wants to make it permanent. It created a national convention of hand-picked delegates to write the principles of a new constitution which will include the proposition that the military will participate in the leading role of national politics in the future state. Because the national convention was a creature of the military, its members had to clear everything with the military officers in charge and were not free to discuss what went on in the convention with people they represented. Daw Aung San Suu Kyi withdrew her party's representatives and refused to participate unless they were given freedom to talk freely, both in the halls of the meeting and outside with party members. This difference between the military rul-

"I don't think a country falls apart simply because there isn't a 'strong' junta at the top—'strong' in a totalitarian sense. I think a truly strong junta is one that has the support and trust of the people."

ers and Daw Aung San Suu Kyi has never been resolved and is part of the wide gulf between them.

The military recognizes that society is multiracial and multicultural, but all are not equal. The armed forces are dominated by Burman officers and recruits. This is not the way it was when Aung San and the British created the army in 1945. Then , its officers and recruits were drawn both from the Burman-dominated Tatmadaw, and from the indigenous ethnic minorities whom the British had recruited into the Burma Defence Forces. After independence and the eruption of civil war and insurgency, the Burma Army, under Gen. Ne Win, slowly replaced its minority members with Burmans. Today, Burman dominance exists throughout the armed forces and elsewhere in society.

Daw Suu Kyi and the democrats in Burma also hold the view that society is multiracial and multicultural, but, as citizens, all are equal before the law. It is the democratic view of Burma that all are equal as citizens to participate in politics and take part in the economy.

The military leaders use the brief experience of popular rule and a quasi-federal system of government between 1948 and 1962 as reason why Burma was a weak state with ineffective government and why the survival of the state was under constant threat. Only after Gen. Ne Win seized power and displaced the system in 1962 did the military establish strong central control and order.

The soldiers-in-power believe that national security takes precedence over all other obligations. Thus, the future elected leaders must have extensive military knowledge and experience and in time of emergency, executive power will be taken over by the Minister of Defence. The military demands that it must receive 25% of the seats in parliament; the budget of the armed forces will not be part of the national budget and will not be discussed or voted upon by the whole parliament; only the military members will discuss and approve their own budget requests. These and other related powers are needed to insure that the military can carry out its self-defined responsibilities to "ensure the nondisintegration of the union, the perpetuation of national unity and the perpetuation of national sovereignty."[7] What remains for the people are secondary powers. With real power so unevenly distributed and with no checks and balances, the peoples' powers can be set aside whenever the soldier-rulers declare that they interfere with the military's responsibilities to protect the people and the state.

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In 1962, U Nu, the last freely elected Prime Minister, invited all ethnic

leaders to come to Rangoon and enter into talks with the goal of finding permanent and lasting solutions to the political causes of disunity and political unrest. The minority leaders accepted the invitation, but before talks ended, the military seized power, jailed the participants and destroyed any chance for peaceful resolution.

Daw Aung San Suu Kyi and the NLD leaders also see dialogue as the way to solution. They believe that the internal wars reflect the unresolved political problems and that all involved participants must be brought together to talk, reason, compromise and seek lasting political solutions. Several of the issues trace back to the inequality felt and experienced by the ethnic minorities and the unwillingness of the military to resolve them by peaceful means. In 1963, when the military called a meeting of those in revolt to talk, the minorities quickly learned that it was not for dialogue, but a forum in which the military informed the others its conditions for ending the civil wars. The opposition could accept or reject the proposals. They rejected them and the wars resumed.

In 1989, the military adopted a new strategy which saw the rulers offer the insurgents cease-fire agreements which allowed the opposition to keep their weapons, continue to administer their areas and control their local economies in exchange for halting their wars against the state and not joining together with any minority group remaining at war with the state. Fourteen groups accepted and technically stopped their wars; five minorities continue their struggle with no end in sight. Throughout the thirteen years, there has been no dialogue on the causes and how to politically resolve the problems. The military's position is that the problems will be addressed by the future civilian government.

The military rulers argue that for a strong and united nation, Burma must have a unitary system of government. With all real power concentrated in the hands of the rulers in Rangoon, and with a strong all-embracing administration system radiating from the capital to the furthest village on the nation's borders, it will be possible for the government to respond to the needs and circumstances existing everywhere in the land. Also, given the fact that most of the ethnic minorities live in the mountains and border areas discontent and unrest can be dealt with quicker and more efficiently in a unitary state than in one which is decentralized; in the past, the states neither had the resources nor the manpower to deal effectively with all problems.

The minorities in Burma long have argued that they entered voluntarily into the Union in 1947; the original constitution established the principle that all states had the right to secede, but only gave it to two— the Shan

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and Kayah States. Much of the discontent among the minorities stems from the inequality between states on this and other issues. In 1984, ten of the largest ethnic minorities at war with the state signed an agreement not to demand the right of secession; instead, they asked for the creation of a truly federal union so that the residents could enjoy some political control over their lives and the right to preserve and protect their way of life. To date, that statement has never been acknowledge by the military and they never explored its meaning and how it can be applied to Burma. Instead, the ruling junta continues to insist that without a strong central state, the union will fly apart.

The federal ideas of Daw Suu Kyi grew, in part, out of the thought expounded by her father in 1947 when he united the peoples in the final stages of their march to freedom. His thought and statements centered on the idea of "unity in diversity" He pleaded with his followers not to interpret Burmese nationalism too narrowly. "It could only result in ugly consequences."[8]

In February 1947, shortly after returning from London, Aung San told the Hill Peoples two important things: first, that if they joined the Burmans in forming a political union, they "would be allowed to administer their own areas in any way they pleased and the Burmans would not interfere in their internal administration." And second, that they and their people would be equal to the Burmans— that there would be no dominant and inferior citizens. "If Burma receives one kyat, you will get one kyat."[9] Clearly, a federal Burma, gives everyone a stake in the nation's survival and success and creates a peaceful united state.

When Daw Aung San Suu Kyi was asked recently, "do you see a federalist nation in the future of Burma," she responded by saying that for a long and lasting union of Burma it would have to be federal. She reminded her listeners that many in Burma did not understand the term, federalism, believing, as many in the past believed, that it was "a system under which each state could opt to secede from the union. The NLD, she continued, had been trying to explain that that is not what it means. "Federalism" she said, simply means the division of powers between the central and the state governments, and that the constitution makes clear what powers the central government has and what powers the states have and who is responsible for anything that could be termed residual powers. "If there is a conflict over this, it could be resolved by the judiciary. She closed her remarks by saying that, "…the ethnic nationalities are not asking for secession. They are just asking for their rights within a true federal union."[10]

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The other great issue which divides the two rivals for power, is what con-

stitutes a democratic state. Daw Aung San Suu Kyi offers a traditional interpretation of democracy, that power belongs to the people and they should exercise it. Power is limited so that there is a degree of freedom and privacy enjoyed by all. Power is not the possession of any one class or group. It is open to all who contest for it peacefully through elections. Governments should be in the hands of civilians and so long as they remain within the bounds of the constitution, they contest for power on the basis of programs and ideas and the quality of the leader they support for elected office.

The military rulers have uttered very few words about the rights of the people in the 1947 constitution, rights were absolute, protected by the state and placed at the front of the law; under the 1974 constitution, rights were placed in the middle of the document and were not absolute. They were limited by the goals of the state and tied to duties.[11] Under the new constitutional principles adopted at the National Convention, individual rights will be available only according to ordinary law. They will be available to "all citizens" but not to all people and again, duties will be tied to rights.

From the brief examination of some of the principles, it is clear that the two sides are far apart. If they are to achieve the goal of democracy, they have much to discuss and many compromises to make before they can establish a basis for democracy in Burma.

II.

The prospects for democracy turn on whether or not the military rulers really want to transfer power to the people; if they do they must take four important steps, end the internal wars, free all political prisoners, allow the rule of law to be restored and create the conditions so that a national informed dialogue can begin.

The prospects for democracy turn on whether or not the military rulers really want to transfer power to the people; if they do they must take four important steps, end the internal wars, free all political prisoners, allow the rule of law to be restored and create the conditions so that a national informed dialogue can begin.

The internal wars must end! The government must call a national truce and combatants on all sides must draw back so there can be no accidental return to fighting. The military and many of the cease-fire groups have experience of living with each other while both retain arms but do not use them. This must be broadened and apply to all groups, especially those still at war. The latter must be given evidence that the ceasefires are genuine and the international community should be asked to provide peace observers with authority to report where and why there have been breakdowns and recommend ways to repair them quickly. Only in an environment, free of fighting can the three sides begin to hold talks and shift the

nation from war to peace.

If the military rulers want to signal the others that they are ready to find real solutions, the best way would be to follow the cease-fires with the release of all political prisoners; the government must give a full accounting of the prisoners it holds and, for any, whom it wants to continue to hold, it must prefer charges and allow the courts to decide. Nothing will say more and receive a quicker response than doing this. It will say loud and clear that the military no longer is judge, jury and jailer and the process of moving from dictatorship to government under law has begun. The military rulers must follow the release of political prisoners with an end to all restrictions on the people which are not based on laws which conform to the International Declaration of Human Rights, which Burma signed in 1948 in the UN General Assembly and with international treaties on human rights and freedom which it carried over from the colonial period and newer ones adopted following independence.

The military rulers must end the use of the elaborate surveillance system which it erected and used for four decades to control the people and deprive them of their basic rights and freedoms. The rulers must make it possible for the people to assemble, communicate and travel freely throughout the country and interact with anyone they wish either through direct conversation or the use of a restored popular press. Such a change will go a long way in reestablishing a civil society.

In anticipation of tripartite talks, all individuals should be encouraged to begin to hold discussion with one another about the future constitution and political system of Burma. In this informal way, dialogue can help evolve ideas and recommendations which can be passed on to the representatives in the formal dialogue process and thereby make the people realize that they are participating in the creation of the new constitution and the political institutions by which they will live.

The military rulers must end the use of the elaborate surveillance system which it erected and used for four decades to control the people and deprive them of their basic rights and freedoms.

Once change is underway and people begin to communicate with one another, meaningful and successful dialogue can begin and thrive in the new emerging environment. Peaceful and serious discussions between the three leading forces— Daw Aung San Suu Kyi and the NLD leaders, the military leaders and the ethnic minority leaders— can begin by building confidence between the participants from all sides. With real confidence in dialogue partners, talks can begin to be fruitful and will deepen the emerging process of change. The three sides must come as equals and all must be ready to listen to the others and look for ways to harmonize the different points of view they hear and they represent. There will be no peace or political changes unless all three can be satisfied that the talks

will be based on the principle of equality. No one group must try to impose its will upon the other two. A spirit of give and take must prevail and all three sides must give the others reason to believe that all are there to create a lasting and peaceful union, therefore, the ideas put forward, modified and adopted must have meaning to all three and not just one.

Finally, as the nation moves away from war to peace and local police replace armed soldiers in maintaining law and order, the environment at street level really will change. If all three of the major groups want to see Burma move from war to peace, the time to begin is now.

The military rulers seemed to have missed the opportunity to change the political environment following the release of Daw Aung San Suu Kyi; it appeared as though the nightmare of military rule will continue into the indefinite future. But the window of opportunity may still be open. If it is, the protagonists may still have a chance to introduce political change; but if they miss the opportunity the present will continue into the future and political change may never come in the lifetime of the present generation.

Note:
This article was originally given as a speech at the Democratic Voice of Burma's (DVB) 10th anniversary celebration at Oslo, Norway.

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Endnotes

* Professor Josef Silverstein is an academic from the United States of America. He is a well-known Burma expert with a long history of involvement in the issues of Burma. The Professor witnessed political changes in Burma from democratic regime to dictatorship in 1962, as he was teaching at Mandalay University in central Burma during that period. He has written and edited several books and articles on Burma. His book entitled "Burma: Military Rule and the Politics of Stagnation" (Cornell University Press, 1977) is a well- known text.

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Proposed Mass Media Law

BLC Concept

Explanatory Statement on the Proposed Mass Media Act

The Burma Lawyers' Council is committed, from a legal perspective, to the efforts of transforming society into a just, free, peaceful and developed one. Freedom will be strengthened only when the independent Media emerges from the background of a society where the individuals are enabled to exercise the right of freedom of expression. However, we must be mindful that this freedom may need to be reasonably regulated and grounded within the framework of democratic principles; as absolute freedom of expression by people or news agencies may damage the liberty of individuals or the welfare of the society.

BLC ardently believes, in spite of the aforementioned paradox, that the emergence of the Mass Media Act based on the promotion of individual rights, will benefit the future society of Burma. The efforts for this purpose will certainly contribute to the current democratic movement of Burma and democratic transition from dictatorial rule to democracy. Furthermore, this Act will certainly favor Burma when a long-term democratic society has been established.

Freedom in a society will be strengthened only when the independent Media emerges from the background of that society where the individuals are enabled to exercise the right of freedom of expression.

The people of Burma and the international community solidly wish for a peaceful transition from the rule of the military dictatorship to a democratic society. A formal dialogue process between the leaders of ethnic groups, the leaders from the National League for Democracy, led by Daw Aung San Suu Kyi, and military leaders will require an overview of the existing laws in Burma. It is important to note that a greater number of administrative laws, specifically those related to freedom of information, publication and Media have been drawn up by the military junta.

They have in fact suppressed the rights of individual liberty to promote, support, and to prolong their power. There is very little hope in establishing a democratic foundation without efforts to reform these laws.

The ruling military junta needs to be mindful that oppressive laws are to be eliminated during the transitional period. They may refuse this proposal, however, and claim that a future Parliament should have sole responsibility over such reforms. Additionally, we must be mindful of the fact that army personnel may attempt to take positions in a future Parliament. This can pose a great danger to Burma since the rule of dictatorship will continue to prevail if the existing oppressive laws are not repealed or reformed. In spite of that, the forces struggling for democracy in Burma, including the National League for Democracy and the ethnic resistance organizations, might not demand that all the existing laws be repealed immediately simply because those laws are unjust. Rather, they can better highlight laws that deprive individuals of their fundamental freedoms. Therefore, the struggle of the reformation of oppressive media laws, which prohibit the freedom of expression, can be expected.

The Media and the efforts of the people for dissemination of information play a crucial role in the transformation of a society from the rule of dictatorship to a democracy. The news agencies working for Burma, outside the country, are relatively strong while the internal news organizations are weak as a result of the oppression created by the military regime, which fears that the Media supports the efforts of people who seek the truth. The military has succeeded in the cessation of information and takes severe action against Media personnel. This is the result of oppressive laws that prohibit the function of the freedom of the Media. Therefore, in order to improve this situation and to resolve this problem, a legal perspective needs to be approached.

It is evident that the people of Burma believe that these laws have been manipulated by the successive military regime as oppressive instruments. To reverse this injustice, laws should be enacted based on the promotion of individual rights and approved by the people. The law making process is of paramount importance for this to come to fruition. Laws should only be enacted through a formal procedural mechanism by the attendance of members of parliament that constitute a quota for official sessions. Therefore, before the commencement of a law enactment procedure a public debate should take place and people should be allowed to make suggestions to parliament. It is common enough practice to issue green or white papers that may contain a draft bill, so that the public can have access and input. Their suggestions may be based on whether the bill in question may deprive individuals of their rights, or whether it may

The Media and the efforts of the people for dissemination of information play a crucial role in transformation of a society from the rule of dictatorship to democracy.

damage the freedom, justice and peace of the society, etc. A strong society is created when individuals are allowed to provide suggestions to their lawmakers. The emergence of this Mass Media Act should follow such a process.

We are mindful that the proposed Mass Media Act (draft) will not be perfect. There will certainly be weaknesses and flaws. The BLC intends to revise it and produce a more informed one that encompasses the suggestions and comments made by the people, respected journalists, organizations, academicians and political leaders.

The BLC simply recommends that there should be a Mass Media Act (draft) and preparation should be made within our democratic movement of Burma for this purpose. However, we are not suggesting that the process should only be continued and promoted based on the BLC proposed draft. Individuals or organizations can contribute to the process by the way of recommendations to the proposed draft or by the creation of a new document. The BLC welcomes such contributions and will cooperate in the continuance of the consultation process.

As mentioned in the beginning of this explanatory statement, the BLC is sincerely committed to and hopes to contribute to the promotion of Mass Media work, albeit with our limited experience of parliamentary process. The BLC has prepared a draft of the Mass Media Act, mindful that our respected Members of Parliament, political leaders, journalists and lawyers cannot enjoy this opportunity as a result of the injustice that is taking place inside Burma by the military regime. We welcome any criticism and comments on our proposed draft. We would like to learn from those with expertise in the area of media, media law and law making and welcome further cooperation. We respectfully agree to respond to any inquiries that may arise from this proposal. We also take this opportunity to acknowledge the professional support of Internews.

Burma Lawyers' Council **July 17, 2002**

Burma Mass Media Act
(Proposed Draft)

Introduction

The establishment of a democratic society does not indicate that individuals have unlimited rights to freedom of expression. Similarly, notwithstanding governmental reasoning that democracy should be exercised with limitations, it does not mean that the established government should have full discretion over the rights of its citizens.

Pursuant to the Article 29 (2) of the Universal Declaration of Human Rights, provisions can be made by law solely for the purpose of:

- Securing due recognition and respect for the rights and freedoms of others, and;
- Meeting the just requirements of morality, public order and the general welfare in a democratic society.

Accordingly, it is evident that the ruling government cannot limit the rights of individuals for the sake of prolonging its power. Such limitations can be made solely to prevent that the exercise of one's rights does not deprive another individual of his or her rights. The limitation on the right to freedom of expression should also be applied on the same principle. In light of such controversies and in order to compensate the victims whose rights are violated it has become necessary to enact a law.

Freedom of expression, however, has been frequently criticized as controversial because its exercise is viewed as damaging to the morality, public order and general welfare of a society.

Article 29 (2) of the UDHR establishes a proper fundamental principle to be applied in a democratic society. Freedom of expression, however, has been frequently criticized as controversial because its exercise is viewed as damaging to the morality, public order and general welfare of a society. Moreover, ruling governments use it as a justification for limiting the right to freedom of expression more than it is deemed necessary.

Acknowledging the fact that the right to freedom is to be exercised with limitations, a reasonable principle to utilize is that limitations should be

minimized and the right to freedom of expression should be promoted. Once a law is enacted on this principle, the right to freedom of expression shall be protected under the rule of any government.

Preamble

In order to establish a just, free, peaceful and developed society, it is of paramount importance to allow the free flow of information as a crucial component of the right to freedom of expression. Article (19) of the Universal Declaration of Human Rights, which has become international customary law, enshrines the fundamentals of the right to freedom of expression, i.e., the right of a person to seek, receive and impart information and concepts through any media regardless of frontiers. As such, this Mass Media Act is enacted with the aim of ensuring the exercise of the right to freedom of expression by individuals in accordance with the Constitution of Burma as well as International Human Rights Laws, and is to be applied in the Federal Union of Burma, effective from — .

Chapter (1)

Section (1) Objectives

The objectives of the Burma Mass Media Act are as follows:

(1) To protect individuals and collective groups in the exercise of their right to freedom of expression;
(2) To make efforts for the emergence of dignified newspapers, journals, magazines and radio television programs which meet the international standards and which observe fundamental human rights, and the journalists who are qualified in those areas; and, to provide protection for their performances in accordance with the law;
(3) To establish a mechanism through which the victims, whose rights may be violated by the newspapers, journals, magazines and radio television programs in exercising the right to freedom of expression, can seek remedy for their grievances peacefully, and;
(4) To support the efforts of the people in establishing a society in which justice, freedom, peace and development are promoted by

Article (19) of the Universal Declaration of Human Rights, which has become international customary law, enshrines the fundamentals of the right to freedom of expression, I.e., the right of a person to seek, receive and impart information and concepts through any media…

the professional newspapers, journals, magazines and radio television programs.

Chapter (2)

Section (2) Definitions

Mass Media - Mass Media means dissemination of information among the public through newspapers, journals and magazines as well as radio and television programs.

Press Agency - Press Agency is an enterprise, which has registered pursuant to the Mass Media Act and works for information collection and dissemination.

Official Secrets - Official Secrets refers to the secrets of the government or the state, which are deemed to be national security matters that should not be publicized, as provided for in the Official Secrets Act.

Commission - Commission is a body formed in accordance with the Mass Media Act, aiming to resolve the issues regarding information, newspapers, journals and magazines.

Chapter (3)

Publication

Section (3) Fundamental Freedom

(a) Every person shall have the right to freedom of expression, publication, distribution and collection of information in accordance with the constitution.
(b) Censorship is prohibited in printing, publication and distribution of periodicals.

Every person shall have the right to freedom of expression, publication, distribution and collection of information in accordance with the constitution.

Section (4) Board of Editors

A Board of Editors shall be formed in every newspaper, journal or magazine in accordance with the law.

Section (5) No Relevance to Official Secrets Act

Every citizen shall have the right to know the performances of the governmental institutions. However, the exercise of this right shall not apply to official secrets of the state, as provided for in the Official Secrets Act.

Section (6) Compliance with the Code of Conduct

The news agencies, reporters, journalists and editors shall comply with the Code of Conduct regulated by the Commission for Mass Media.

Section (7) Establishment of a Press Agency

(a) Every citizen shall have the right to independently establish enterprises for periodicals and press agencies.
(b) In affiliation with citizens, foreigners shall enjoy the right to the establishment of enterprises for periodicals and press agencies.
(c) Every agency shall have to register in accordance with this law.

Section (8) Cessation of the Press Agency

The Attorney General shall indict the news agency for its regular violations of the Mass Media Act. The functions of the press agency shall be terminated only by the judgment of the Court.

Section (9) Exemption of Tax and Receiving Donations

(a) Agreed upon by the relevant Ministry of Government, the State shall provide assistance to the enterprises for periodicals published for the welfare of the children. Those periodicals shall be exempted from tax.
(b) The periodicals and press agencies can apply for the exemption of tax, partly or wholly, in accordance with the law.
(c) The periodicals and press agencies can receive charitable donations, by means of money or materials. Financial donations shall be deposited in the bank account(s) of the periodicals and press agencies. In addition, the name of donors and the amount of funds and materials shall also be publicly reported in the newspapers, journals or magazines. Any violation shall result in the cessation of periodicals and press agencies.

Every citizen shall have the right to independently establish enterprises for periodicals and press agencies.

Section (10) The Particulars to Be Mentioned

(1) In every periodical and news bulletin, the following particulars shall be mentioned:
- (a) The name of the Publication;
- (b) The founder (publisher);
- (c) The name of the editor-in-chief or managing editor;
- (d) The serial number and date of printing;
- (e) The price of a copy;
- (f) The addresses of the editorial board and printing office; and,
- (g) The number of copies (distributed?)

(2) Each publication that omits any of the particulars provided for in Sub-section (1), shall be prohibited.

Section (11) Documentation

(a) The periodicals and press agencies are obliged to deliver every copy of their publication, free of charge, to the Registration and Documentation Department of the State for its record.
(b) The periodicals published by the State shall be delivered to the Government designated organizations, institutions and libraries.

Section (12) Accountability for Publication

Chief Editors and Heads of the News Agencies shall be accountable for the facts (information) mentioned in their newspapers, journals, magazines and news bulletins. If a reference from any other bulletin is made, the name of that reference bulletin and source shall be mentioned accurately.

Section (13) The Judgment of the Court

In order to report in the periodicals and news bulletins, reporters and journalists shall have access, without delay, to the Court. Additionally, they shall receive information relevant to the judgments free of charge.

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Section (14) Source of Information

(a) The news agencies shall not publicize the source of information without the permission of informants.
(b) The source of information relevant to murder trials and other trials of public interest shall be publicized only by the order of the Court.

Chapter (4)

Provisions Relevant to Reporters and Journalists

Section (15) The Rights of Reporters and Journalists

The reporters and journalists shall have the right to:
(a) Seek, receive and depart information;
(b) Be received in audience by government officials;
(c) Be able to produce audio-visual recordings, to film and to photograph;
(d) Attend the public meetings of courts of justice at any level; and,
(e) Have access to the zones of natural calamities, battlefields, and demonstrations and mass meetings.

Section (16) The Duties of Reporters and Journalists

The reporters and journalists:
(a) Provided that they are indicted in the court, shall be accountable for the information and facts reported and mentioned to be true.
(b) Shall not make any statements that incites hatred and would cause immediate riots or conflicts among the different races, religions, social strata or groups.
(c) Shall not make any statements that may damage the privacy of individuals.

Section (17) The Responsibilities of National and Foreign Reporters and Journalists and Termination of Their Performance

(a) The press agencies can assign foreign reporters and journalists to work in Burma in accordance with the law with the permission of the Ministry of Foreign Affairs. They shall have rights and abide by the duties similarly placed upon national reporters and journalists.
(b) The national reporters and journalists, who are recognized by this law, shall be responsible for their actions under the laws of a foreign state provided that they work in that country. (as similar as the ones under the laws of their mother land.)
(c) The Ministry of Foreign Affairs shall cease the accreditation of a foreign reporter or journalist and terminate his or her performance in Burma in the event that the foreign reporter or journalist violates this law or the Code of Conduct.
(d) The foreign correspondent shall have the right to appeal to the Court with relevant jurisdiction, if he or she is not satisfied with the decision

The reporters and journalists shall have the right to: seek, receive and depart information; be received in audience by government officials; be able to produce audio-l\visual recordings, to film and to photograph; attend the public meetings of courts of justice at any level; …

of the Ministry of Foreign Affairs.

Section (18) Prohibition

Information equipments and personal notes of the reporters and journalists shall not be confiscated. However, they shall only be confiscated as evidence by the instruction of the Court provided that the information is relevant to murder trials and public interest criminal cases.

Chapter (5)

Application for License

Section (19) Application by Citizen

The registered organization or the citizen, who seeks permission to establish an enterprise for a periodical or press agency shall register with the Commission for Mass Media, duly formed by the Ministry of Information.

Section (20) Application by Foreigners

Foreigners shall not have the right to establish a privately owned enterprise for a periodical or press agency. They can only seek application in affiliation with a citizen.

Section (21) Commission for Mass Media

(1) The Commission for Mass Media shall be formed as follows:

(a) Representatives from the organizations formed by the people who are working for newspapers, journals and magazines	9
(b) The academics teaching journalism in the Universities	3
(c) The officials appointed by the Ministry of Information	3
Total	15

(2) The Union Government shall prescribe a regulation of functions to be observed by the Commission. However, the Commission shall be independent in the discharge of its daily functions.

The Union Government shall prescribe a regulation of functions to be observed by the Commission. However, the Commission shall be independent in the discharge of its daily functions.

Section (22) Licenses for Radio and Television

In accordance with the Constitution of the Federal Union of Burma, the member States in the Federal Union of Burma shall have the authority to license radio and television

Section (23) Restriction on License

The establishment of more than two similar enterprises for periodicals or press agencies shall not be permissible by any citizen, foreigner or organization.

Chapter (6)

Supervision and Action

Section (24) Supervision

The Commission for Mass Media shall supervise whether the functions of periodicals and press agencies are in compliance with Section (22).

Section (25) Action

The Commission, upon notification of complaints by individuals whose rights have been violated by periodicals or press agencies, can take the following actions:
(a) Investigation
(b) Negotiation among the parties
(c) Instruction to mention the explanatory statement
(d) Warning
(e) Serious Warning
(f) Suspension of license with limitation
(g) Termination of license
(h) Dismissal from the relevant working field
(i) Provide guidelines for a complainant to file a lawsuit in the court in accordance with the law

In accordance with the Constitution of the Federal Union of Burma, the member States in the Federal Union of Burma shall have the authority to license radio and television.

Chapter (7)

Remedy

Section (26) Remedy

Any person who believes that his or her rights are violated by a periodical or press agency, shall have the right to take the following action or actions:

(a) Demand that the right of reply in the relevant newspaper or journal or magazine,
(b) File a complaint with the organization in question,
(c) File a complaint with the Commission formed pursuant to this law,
(d) File a lawsuit in the Court with jurisdiction and seek compensation.

Chapter (8)

Exoneration

Section (27) Exoneration

The editors, journalists, reporters, the employers of newspapers, journals and magazine enterprises shall not be accountable for the following expressions or statements:

(a) Original discussions and debates within the Parliament or People's Assembly,
(b) The statements and official documents issued by governmental authorities,
(c) Public speeches,
(d) Constructive criticism of public figures and government officials aiming to foster the welfare of the people and society,
(e) Satire on government officials by means of written materials, cartoons, photographs, or paintings in a humorous manner.

The editors, journalists, reporters, the employers of newspapers, journals and magazine enterprises shall not be accountable for the following expressions of statements: Original discussions and debates within the Parliament …

Ne Win's Family Conspiracy Trial & Some Questions

*B.K. Sen**

On March 7, Ne Win's son-in-law Aye Zaw Win, husband of his daughter Sanda Win, and three of his grand sons were arrested while dining at a Chinese restaurant with an unnamed former army commander. The charges were of planning to overthrow the military government and split the armed forces, eventually restoring the monarchy. Thus, Ne Win would be the uncrowned king with his dynasty in power for generations. The coup plan as described in court linked the kidnapping to the top three military generals on March 27.[1]

The case has been split up into two separate trials before two separate Special Courts. The courts will hear separate charges to comply with the norms of law, which prohibit clubbing of more than three charges in one transaction. In the case of the ***High Treason*** charge, the law reads "Who ever wages war…. incites or conspires…prepares by forces of arms or all other violent means to overthrow … or takes part or ***is concerned*** in or incites or conspires with any person …" Those violating the law can be sentenced to the death penalty, while the other criminal violations, under economic offences, carry long prison terms. The first question that arises is regarding the venue of the trial. It is being held in the compound of the Insein jail. However, law mandates that there must be public trial.

The first question that arises is regarding the venue of the trial. It is being held in the compound of the Insein jail. However, law mandates that there must be public trial.

OPEN TRIAL

Section 352 of the Burma Criminal Procedure and International statute require "Courts to be open." The provision has been made to provide

transparency to the trial proceedings and accountability for the trial judges to restrict arbitrariness. The object of a trial is not punishment per se. The true purpose is to unveil the truth, to promote awareness within the citizens, and to prevent the recurrence of such crimes. This is necessary in the present case, as Ne Win has written the history of the past 40 years. The Burmese public deserves to know how a man becomes debased being power-hungry. Ne Win's biography is of a man being one of the 30 comrades, to becoming the General of the Burma Army, then chosen as a Prime Minister (by the then democratically elected Prime Minister U Nu), the Chairman of the Revolutionary Council, illegitimate father of the debunked "Burmese way to Socialism," President of the fraudulent Socialist Republic of Burma, and the evil genius who said that his soldiers shoot to kill. For such a man trying to be a monarch is an interesting story for those who would be under his authority. It is also important for the army personnel to know that there are a few devils in their ranks and it is their bounden duty to improve the image of the Army. The trial can establish the alleged case of "attempt to establish monarchy" only by revealing this story of Ne Win. It will be for the Court to judge the evidentiary value as links to the events of the story. To enable the court to come to a proper decision, all the facts must be laid bare. The purpose of openness of Court will be defeated if the trial is conducted in its current manner— inside a single-story, one-roomed courthouse just outside the thick, moss-covered walls of Insein Prison.[2]

To those who say that only a few journalists are allowed to watch the proceedings and that national security justifies a bamboo curtain arrangement, the only reply in a small space of this essay is that regretfully, it cannot be justified. The apologists do not have a clear concept of open trial. A half-empty courtroom where the rattle of a generator and clatter of the reporter's typewriter make the testimony almost in.[3] Regarding national security, people will not try to rescue the accused, nor any army official try to scuttle the proceedings. The threat of national security is ridiculously imaginary. The regime can rest assured that it will get cooperation from all quarters. The regime now has yet another opportunity to add a laurel to its cap (dialogue), revamping the face of the Army by disassociating itself from the evil genius.

The purpose of openness of Court will be defeated if the trial is conducted in its current manner— inside a single-story, one-roomed courthouse just outside the thick, moss-covered walls of Insein Prison.[2]

Sanda Win left out of the case

The flaw in the framing of the case by the prosecution is that Sandar Win has been left out as a suspect. Without the prime conspirator as an accused, it is difficult for a case of conspiracy be sustained, especially for such an offence as serious as high treason. According to statements from

their colleagues, this family of five, including Daw Sanda Win, had from the past month begun to hold closed door discussions. In his Press statement, Brig: Kyaw Win made an assertion about the complicity of Sanda Win. She is under house arrest surely not under the jurisdiction of the State Protection Law, but as a potential offender in the crime put up before the Court. She is a colonel in the army, her husband and 3 sons are the prime suspects, her story of attempting to seize power to put her father as the monarch is believable, and she is a close associate of Ne Win. All these facts make a prima facie case against Sanda Win and Ne Win. According to law, if there is *reasonable* suspicion against a person being involved in the commission of crime, it is the duty of the prosecution to make that person an accused or co-accused. Whether there is reasonable suspicion or hard evidence for conviction, it is not for the prosecution to judge. A prosecutor cannot concurrently hold both these positions. If there is insufficient evidence, the court shall discharge the accused. Section 170 0f Burma Criminal Code reads "…. if there is sufficient evidence or reasonable ground the officer (police) shall forward the accused." Furthermore, three senior military commanders and the national police have been dismissed and not accused of complicity.

Section 10 Burma Evidence Act, illustration read

Reasonable ground exists for believing that A has joined in a conspiracy to a wage war against the Government.

The facts that B procured arms in Europe for the purpose of the conspiracy, c collected money in Rangoon for similar objects, D persuaded persons to join the conspiracy in Bassein, E published writings advocating the object in view at Toungoo, and F transported from Mandalay to G at Taunggyi the money which C collected at Rangoon, and the contents of a letter written by H giving an account of the conspiracy, are all relevant both to prove the existence of the conspiracy, and to prove A's complicity. However, he may have been ignorant of these acts, the persons by whom they were committed may have been strangers to him, and such acts may have taken place before he joined the conspiracy or after he left it.

This illustration strengthens the view that inclusion of Sanda Win is crucial to the sustainability of the prosecution case.

Apart from the press statement, the police diary has the records of statements of all the witnesses, the astrologer, and a host of other witnesses, including their confessions. The prosecution has made an important accused an approver. It really is puzzling how the case of high treason will be established leaving without Sanda Win as part of the case. Rule of

According to law, if there is *reasonable* suspicion against a person being involved in the commission of crime, it is the duty of the prosecution to make that person an accused or co-accused.

Law says that no one is above law. The question that arises is that this noble principle has been abandoned for reasons best known to Brig Kyaw Win, second in command of Military Intelligence, a la national security. Can this situation be cured? YES. The Court has inherent power to do so at any stage of the trial or appellate proceedings. On perusal of the police papers or the statements of witnesses, the Court can issue a warrant of arrest for the potential suspect. Ne Win and Sanda Win can be made co-accused at any stage of the trial. If the Court thinks that they should thereafter be given bail or kept under house arrest, then the Court can do so. The records of the prosecution case must be kept straight. If this course is not followed, the prosecution case is in great jeopardy. Already making a prime accused as approver and star witness in the case, prosecution has exposed its inherent weakness. The two potential accused who have been discluded are bound to come as defense witnesses and rebut the prosecution case. This will then upset the balance of evidence and credibility of witnesses. An element of doubt is bound to enter into the appraisal of evidence. According to principles of criminal law, the accused are entitled to benefit of doubt. The accused stands a good chance of being let off.

With the prosecution's case complete, the defense now has the floor, pressing ahead in the trial, of which the verdict has surely been preordained. Point by point, the testimony of military witnesses is being disputed. Payments to soothsayers and military officers are being described as gratuities, not bribes.

Significance of approver in the case

It appears that the whole case hinges on the testimony of Major Thet Myo Aung, commander of Ne Win's security. One must remember that basically, testimony of an approver is tainted. There is a presumption against him that he has been bought off by a promise of acquittal in lieu of his giving tutored evidence against the other suspects. This action is taken when prosecution lacks direct proof or any evidence on the commission of the crime. This method is also utilized when the all evidence of the witnesses cannot sustain the prosecution case. If not for that testimony, the case will fail. Testimony of an approver has to meet high standards of proof to inspire credibility. His testimony alone cannot be the basis of conviction unless there is corroboration on material particulars of evidence of other witnesses. In the present case, there have been press statements, confession applications by Thet Myo Aung, confession statements before the magistrate, and depositions in court where one will find additions, subtractions, and improvements. Motives to seek pardon will also be established. Whatever it may be, the character of a man is at the

It appears that the whole case hinges on the testimony of Major Thet Myo Aung.

root of his credibility. He has deposed that for 2 years he has been employed by the accused, leading a corrupt, manipulative life. On his own evidence, he is a man given to greed, temptation and disloyalty. For 2 years, that has become part of his life. Now when he is faced with mortal danger, the death sentence, he will be more prone to the temptation offered by the prosecution. In these circumstances it is reasonable to conclude that this was not only a bargain for treating him as an approver, but there were other inducements as well. Defense has not yet put the witness to cross-examination. It is not easy for the witness to be consistent in recalling the exact sequence of events associated with the time, and his deposition after cross-examination will shed more light on the trial. It could be that he is a decoy that the witness planted, for it sounds strange that the strong arm of Military Intelligence failed to detect his complicity in the long period of 2 years, despite his flamboyant lifestyle. If the defense can bring out evidence of Thet Myo Aung as an approver, he will fall to pieces. His testimony is crucial to achieve conviction in the case.

It appears that Brig. Kyaw Win has exposed himself by giving statements in the press regarding the case which he knew well was subjudice. There cannot be trial by media. Brig Kyaw Win has exceeded his brief by giving interpretation to the sequence of events with exhibits— uniforms, badges, berets, rubber truncheons, and radios— as evidence of a coup plot. Upon interrogations, the defendants stated "they were unhappy as they were not enjoying the special privileges."[4] The court will face a dilemma in passing an unbiased judgment. Kyaw Win will have to be a prosecution witness. Failure to do so will enable the defense to draw adverse presumptions.

This trial has put the legal and judicial systems of Burma's junta in the spotlight. The law enforcement agency and the judiciary themselves are on trial. The bulldozer of the rule of law has himself come within the dragnet of rule. Over the years, the junta has manipulated the systems against political dissidents without accountability. The trial will unmask the modus operandi.

> This trial has put the legal and judicial systems of Burma's junta in the spotlight and raised legitimate concern as to whether it will meet the same fate as the Fiji trial of George Speight.

This trial has raised legitimate concern as to whether it will meet the same fate as the Fiji trial of George Speight. That trial began with a dramatic development. Speight pleaded guilty to charges of treason. The trial was brought to an immediate end, and Speight was sentenced to death. Shortly thereafter, the Attorney General recommended to the President that the sentence be commuted to life imprisonment. Speight's sentence was reduced accordingly. Ten co-accused had their charges reduced from treason to wrongful confinement of members of the government. They pleaded guilty, and received prison terms of 18 months to three years.

Eventually, they could be granted amnesty. The entire proceeding smacked of a deal between the state prosecutor and the defense lawyer. In its editorial, Fi Ji Time predicted, "Thanks to Speight's guilty plea, the real truth will never be known."

Question sometimes cynically arise. Will it happen in Ne Win's family trial case?

Endnotes

* B.K. Sen is an Executive Committee Member of the Burma Lawyers' Council.

1. Seth Mydans, "Ne Win's Family Seem to have Lost Their Magic." Bangkok Post: July 9, 2002.
2. Ibid.
3. Ibid.
4. Ibid.

Burma's Toothless Money Laundering Law

*Legal Aid Section**

Burma's ruling junta has enacted a new "Control Money Laundering Law" (Law No 6/2002). The law's objective, listed in chapter II, is to prevent individuals from controlling assets purchased with money from illegal exchanges. Importantly, it also maps out co-operation with international and regional organizations and neighboring countries for controlling money and property obtained by illegal means.

The law has eleven chapters, vague and speculative. All that it does is to form a Central Control Board. The board's composition betrays its purpose. Its chairman is the Minister of Home Affairs while the Minister of Finance and Revenue act as Deputy Chairmen. Within the nine-member committee, the Deputy Chief Justice and the Attorney General are ranked as the fourth and the fifth member respectively, in addition to the Police Director General Secretary of the Myanmar Police Force. The Control Board, in short, functions as the prosecuting body. S. 4 (b) of the Law states their role of, "supervision and directing in taking action", and S (c) states that they serve in "directing the investigation." How the Deputy Chief Justice can be a member of the Control Board, and one subordinate in rank to the Home Minister, is unclear.

The law's fatal flaw is its failure to prescribe a definite monetary and property value, which would render persons liable to prosecution. Under a law of this kind, such a specification is the core ingredient. This cannot be left to the rule-making process, to take effect later, as has been done in section 8 b (a). The law does not prescribe the formation of the operative part of the investigation body; it merely gives the power to the Central Control Board to form such a body. This delegation of power in S 9(a) of the Law is excessive and involves the delegation of an essential legislative

function, being ultra-vires of the parent statute. The tenure of the body is extended on a case-by-case, ad-hoc basis, against the norms of Rule law, and the body is bound to fall victim to corruption. Power of arrest or detention is not provided. The stipulation of a right to seizure and search without stating the procedural law is bound to lead to arbitrariness, torture, and illegalities. The law thus constitutes an attempt to create an extra-legal prosecution body.

The law is silent as to the jurisdiction of relevant courts and the application of criminal law and criminal procedure codes. There is no judicial review. Chapter II, Sec 16 says, "The Government may pass order for confirmation." Section 17 states that, "The decision shall be final and conclusive". Section 22 states, " imprisonment may extend to a maximum of an unlimited period" while Section 33 puts the burden of proof on the offender. Section 40 calls for "prior sanction of the Ministry of Home Affairs".

In short, the Money Laundering Law is a law above the law, a law unto itself, a whitewash that does not meet international standards on its own admission. It is a control rather than a prohibition, a well-crafted word for the offenders to understand. Previously, three laws covered most of the concerns now covered by the Control of Money Laundering Law. One is the Central Bank of Myanmar Law of 1990 (SLORC Law No. 16/90, finally amended as Law 7/ 94). Burma has signed the 1998 United Nations Convention, Illicit Traffic in Narcotic Drugs and Psycho Tropic Substances, at the Vienna Convention (with some reservations). The Narcotic Drugs and Psychotropic Substances Law contained all but a few new provisions, which have been introduced in the Money Laundering Law. The US Drugs Enforcement Administration (DEA) stated that the Central Committee for Drug Abuse Control CCDAC "continues to suffer from a lack of adequate resources to support its law enforcement mission." This Law will meet a similar fate. The Money Laundering Law includes other offences related to smuggling and trafficking, as well as offences related to the smuggling of women and children and cyber crimes. There also exists a Financial Action Task Force (FAT), designated in the money laundering legislation of Resolution No AGN/66/ RES/15 Article 28 ICPO- Interpol General Assembly, 66th session, New Delhi- October 1997.

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The Money Laundering Law does not address the smuggling of bulk cash into or out of Burma. "Suspicious transactions," however, should be broadly defined. Information exchange regarding cross-border financing should have been given an important place in the law. However, information sharing mechanisms and extradition procedures have not been provided for.

The SPDC held a press conference on July 18 in promulgation of this law, promising that there will not be any nationalization. Furthermore, the junta made the assurance that, "according to section 5(a) of the law, ten offences have been included," and that Burma has complied with the UN Convention and its protocols. The press conference is evidence for the motives behind enacting the law. Assurance has once again been given to foreign investors.

Money laundering has criminalized Burma and its economy. It is now beyond the junta's control, a situation to which the junta reacts by creating said legislation. The junta has apparently realized that money laundering is bad for business, investment, development, and the rule of law. The law should be seen with guarded optimism in light of the junta's contempt for matters of the law. The law states as one of its objectives, "to co-operate in the neighboring countries regarding the law." A Xinhua news agency report stated that the law was meant, "to strengthen co-operation with international and regional organisations and neighboring countries in its fight against crime." Thailand is Burma's main neighbor of concern. A currently sour relationship with Thailand means that the problem of money laundering is bound to intensify. The political situation in Burma is characterized by a lack of rule of law and ineffective law enforcement. The new money laundering law promises nothing and is likely to be seen as a hoax. Realizing this situation, the SPDC held a press conference to clarify this issue. It promised that there would not be any nationalization. Furthermore, it said that according to S 5(a) of the Law, ten offences have been included and that Burma has complied with the UN Convention and the three protocols. However, It will neither woe foreign investors nor edge on the dialogue process. The introduction of viable laws and their enforcement are no doubt necessary. More important still is the restoration of a regime based on the rule of law.

The political situation in Burma is characterized by a lack of rule of law and ineffective law enforcement. The new money laundering law promises nothing and is likely to be seen as a hoax.

Justice or Punishment: Forgiveness or Vengeance: Amnesty or Amnesia: Is There a Middle Path for Burma?

*Thein Oo & Janelle Saffin**

Scope of the article

Our contribution to the topic, transitional justice, will address some key questions and considerations about Burma's likely model of transition from its current State form of military dictatorship to that of democratic governance. We will look at the policy options generally available, commenting on their desirability, applicability, feasibility and the realpolitik that will frame decisions. It is our intention not so much as to produce a legal academic work (although we have critically reviewed much of the literature and are actively engaged in the debate), but rather to direct our observations to ways of dealing with the past in a manner that does not entrench already deep political divisions across Burmese society.

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Whilst we understand the law and its demands, we cannot and do not avoid the political dimension of the debate. Andrew Rigby's seminal work on 'Justice and Reconciliation' is a good starting point to enter, and we have drawn heavily on it to develop a comparative and historical framework to explore the idea of 'transitional justice' and how to grasp and deal with the demands of a nation in transition. Rigby's work reveals the depth of his understanding of this most vexed and confronting issue.[1]

It is our contention that, for transition to be successful and for reconciliation to 'take root' in society, the institutionalisation of the rule of law is a

priority requirement. This step is frequently overlooked, as people become enmeshed by notions of healing that tend towards individual needs. Without it, justice can only ever be a desire or demand, and cannot be realised. A constitutional settlement in Burma, based on federal principles, enshrining the rule of law, more than any other action will give 'teeth' to the goals of reconciliation.

Spain's transition experience, called 'public amnesia' by various commentators, has striking similarities to Burma's experience of inside colonisation by its military forces, and we shall contrast the dynamics of both, by looking at Spain and Burma under occupation, the nature of the transition in Spain, the transitional justice issue and how it was responded to, the success of Spain's transition and whether it is instructive for Burma.[2]

Introduction

"It should be recognized that in a perfect society victims are entitled to full justice, namely trial of the perpetrator and, if found guilty, adequate punishment. That ideal is not possible in the aftermath of massive violence."[3]

So it is with Burma, a country beset by long term conflict, including armed conflict, where the magnitude of suffering although apparent and quantifiable, is not readily translated into demands for justice.

Holocaust, Romanians Terror, Bosnia, Armenian Genocide, South Africa's Apartheid, Rwanda's ethnic slaughter, make up part of an endless list of cataclysmic human horrors well known to the world. There is as yet no description given to the horrors that the people of Burma have had to suffer at the hands of their own military, for over fifty years. All have suffered in Burma, particularly those who have stood up for political rights, and whilst there shouldn't be a competition over whose suffering has been the worst, it cannot be denied that Burma's large number of ethnic nationalities have suffered terribly.

It should be recognized that in a perfect society victims are entitled to full justice, namely trial of the perpetrator and, if found guilty, adequate punishment. That ideal is not possible in the aftermath of massive violence.

There is no sign of abatement of such horrors, and the lot of those people has been one of an absolute lack of security with Tatmadaw soldiers running rampant over their villages. Displacement, forced relocation, compulsory acquisition of possessions - house, land, food-, women suffering repeated rapes, - some ending in death -, men also raped but as yet finding it too difficult to talk about – are the terrors. There is massive internal displacement inside Burma and the main casualties of this violent conflict are civilians.

In a transition from the current military dictatorship to democratic gov-

ernance, Burma's pressing need is not only for national reconciliation with and among Burma's ethnic nationalities, but also for reconciliation among many people, the military and the broader society. It will include the rebuilding of its shattered economic, legal, judicial, educational, and health institutions, and the strengthening of the agricultural base so that current levels of malnutrition can be overcome.

It is obvious that there are basic human needs such as food, shelter and security, but the need to be afforded human dignity, the birthright of all peoples the world over, needs to be recognised and acknowledged in the case of Burma. This will require massive political reform and an individual's need for justice, where they have suffered a terrible wrong, as compelling as it may be, may not be able immediately to be afforded them, as broader societal needs will of necessity take precedence. That is the way human beings the world over organise themselves and further experience demonstrates that even those nations that institute a program of criminal prosecutions regarding human rights violations, cannot ensure justice for all. The maxim 'justice delayed is justice denied' rings true for all transition countries, but if one's country has been besieged by conflict for decades, how can justice possibly be accorded to all, other than through working to ensure basic human needs and human rights are met.

There is, and will continue to be, debate within Burma itself, from Burmese political activists living outside Burma, and from human rights organisations around the world about identifying and punishing the perpetrators of human rights violations. These debates cannot and should not be censored, as some have said. That occurred for human rights groups in Argentina where the then newly installed Alfonsin government accused them of being a threat to the national project of reconciliation and reconstruction.[4]

Democratic principles demand that people have the right to speak out and seek redress for wrongs, and political imperatives, as compelling as they are cannot be the basis for the curtailing of freedom of expression.

To some degree such claims are already being cast. Some who are promoting amnesty, expect those demanding retributive justice to drop their demands to (in their words) 'achieve transition', with those demanding retributive justice saying those who promote amnesty are capitulating to the military. Both claims are not sustainable. Democratic principles demand that people have the right to speak out and seek redress for wrongs, and political imperatives, as compelling as they are cannot not be the basis for the curtailing of freedom of expression. The advent of transition will be neither slowed nor hastened because of these demands.

Is Transition likely in Burma?

Both small, yet *potentially* significant recent political developments have

planted the seeds of hope for those desiring change in Burma. These include the release of Burma's Nobel Peace Prize Laureate Daw Aung San Su Kyi and confidence-building measures that have taken place between the National League for Democracy (NLD) and the Tatmadaw's ruling State Peace and Development Council (SPDC). The authors recognise that the confidence-building has yet to reach the next stage. That stage includes:

a) dialogue between the parties (and this must be announced publicly by parties and not only for the consumption of the regional and the international community but for the people of Burma themselves)
b) the release of all political prisoners
c) human rights violations committed with impunity by the Tatmadaw forces must cease and violators are dealt with according to the due processes of domestic law.
d) the Tatmadaw must immediately give effect to a nation wide cease-fire.
e) freedom of speech must be afforded so that the voices of the people can be heard.
f) political parties must operate freely

Some of these processes may take some time, but people must hear that dialogue has started and that the agreed number of political prisoners are to be released. These actions will help to quell growing skepticism that nothing is going to change.

Is transition in the current circumstances a probability? If yes, how, when and what form will it take? How does a society for so long closed off to outside influences, including intellectual, and each playing their own part both willing and unwilling in the State affectation of peace and unity, come out of its slumber? How do people used to being straitjacketed across all levels of society take advantage of new freedoms as they emerge?

Transitional Justice: not yet defined

The term 'transitional justice' is in common usage these days, and for those who are engaged in legal-political activism and concomitant debate, it is easily understood, but generally in its most narrow sense. It connotes law, prosecutions, trials, courts and the demand to bring to account those responsible for committing and/or causing human rights violations that amount to what we would know as 'crimes against humanity'. Such crimes have now been codified in the Rome Statute that has established the International Criminal Court. The Court is able to exercise jurisdiction with respect to the following crimes: genocide, crimes against

How do people used to being straitjacketed across all levels of society take advantage of new freedoms as they emerge?

humanity, war and aggression. (Article 5) Articles 6, 7 & 8 give some definition to the above-mentioned crimes.[5] The Court's Statute now provides the international barometer for what constitutes gross human rights violations.

Curiously enough, the term transitional justice does not yet connote the need to hold accountable those who have been responsible for food scarcity that causes widespread childhood malnutrition, for the deprivation of land and housing, for loss of reputation, for causing criminal records when there was no criminal act, simply political acts, denial of educational opportunities to those not favoured by the military, stealing of crops and forcing farmers to sell their paddy at impossibly low prices, and much, much more. Such is the experience of many people in Burma.

Yet this is changing and we note that an organisation like the New York based International Centre for Transitional Justice (ICTJ) with whom we have worked, has a broad charter for its operations and can respond to countries' agendas and needs to suit their own particular circumstances. They demonstrably recognise the multi-faceted justice needs of countries in transition, whilst maintaining an overarching concern for victims and survivors of abuse.

'Transition' has been defined as 'changing from one state or condition to another'; 'transitional' as 'a transitional period; a transitional government'; and justice as 'the fair treatment of people; the quality of being fair or reasonable'.[6]

As in every country that has had to come to terms with its bloody past, transitional justice will come to be understood within the context of its own transition. There is no universal prescription yet to be had that can be applied to all nations undergoing transition that can satisfy the sometimes conflicting demands of justice and accountability domestically and internationally. Nations or more specifically the political actors who get to make the decisions have to do the best they can. Each nation charts its own path, and it will be the same in Burma.

One of the most compelling considerations to be factored into transitional justice discussions is the means by which the transition is to take place.

Transition Type: Transformation, Replacement, Transplacement

One of the most compelling considerations to be factored into transitional justice discussions is the means by which the transition is to take place. The literature reveals that the nature of the transition, itself shaped by who has power and how tightly they are able to wield it (therefore political reality) is the key determinant of what happens to those who have perpetrated terrible crimes against their own and to the victims of these

crimes, at least short term. Rigby cites Samuel Huntington's classification of three types of transition and says that they are, "only useful to the extent that it [his distinction] throws light on the phenomena under consideration."[7] Huntington's classification does however provide us with a useful though imprecise device to speculate on the democratisation process that will ensue, based on the mode of transition. It is sui generis that transition in Burma will include the Tatmadaw-SPDC, although surprises do happen, but more so once the transition has reached the stage of irreversibility.

Huntington's three types are that of (1) 'transformation', an initiative of the elite to bring about change, (2) 'replacement', an opposition-only initiative and (3) 'transplacement', a process of change through joint action of those in power and the main opposition.[8] Following are Rigby's examples of type matching. Spain in the 1970s was 'transformation', resulting from elite to elite negotiated process that in Rigby's words "resulted in a strategy of letting bygones be bygones."[9] Eastern and Central Europe in 1989 was 'replacement', caused by pressure from below and outside, resulting in a stronger emphasis on the pursuit of justice against those who had committed human rights abuses. In Argentina, Chile and South Africa the transition type was 'transplacement', pressure from below that forced the regime to negotiate the transition, where the revelation of truth prevailed over that of justice.

As we came to know and understand about Spain's transition experience from dictatorship (of a military type) to eventual democracy, although it has had a long gestation, we were taken with its familiarity to Burma, with the caveat each country has to some degree its own unique circumstances, despite each nation thinking that their experience is so unique that no one could comprehend it or that any country's experience is in any way similar. Given this though, we would ask all involved parties to keep Spain within their purview.

There is a view put very strongly, so strongly that it has become the common sense view that for divided societies to emerge from their brutal pasts, they must do one of two things, or preferably both. They must prosecute those responsible for human rights abuses, including also those who collaborated, and to uncover the truth; have some sort of truth process, whatever it might be. Rigby concludes that, by and large, the 'strategy' as he calls it ('policy' we prefer) of Spain's ' let bygones be bygones' has worked with the roots of democracy deepening.[10] Spain is anomalous to the current thinking that all need transition nations must at least uncover 'truth'.

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Justice vs. Punishment: Forgiveness vs. Vengeance

If we discuss justice and forgiveness, we must also discuss punishment and vengeance. Some people seek vengeance. It is understandable in compelling situations and whilst it may make some individuals feel good, it does not promote nation building and, significantly, it undermines the rule of law more than any other omission or commission, amnesty or amnesia.

To extract vengeance is to do so outside the rule of law and it is our contention that if people responsible for committing crimes are to be punished it must be done according to the legal principle *nulla poena sine lege*, i.e., no punishment without law, or due legal process.[11]

Another significant way in which the rule of law can be abridged is by introducing retrospective (also called retroactive) legislation to effect prosecution of behaviour previously not caught by criminal laws. This happened notably among countries today known as model democratic States, such as Norway, Denmark and Holland. In the immediate aftermath of World War II each introduced retrospective legislation that introduced the death penalty for the most serious treason. Belgium and France still had the death penalty but they like the three countries cited changed their laws *ipso facto* to deal with various forms of 'collaboration' and the like.[12] Vengeance and retrospectivity however should not be confused, and vengeance is not to be countenanced in any situation.

When so many wrongs or crimes have been committed systemically over such a sustained period of time, how do you begin to apportion blame? Is the hungry child who gets paid a few kyats from a soldier to keep a lookout or to provide some information, guilty of a crime? Are the majority of people who stay silent in the face of their neighbour's suffering at the hands of the soldiers, guilty of crimes? Are those who don't speak out to defend their rights guilty? Are those judges who handed down sentences to those charged with crimes, but whose only transgression had been to speak out against the military regime guilty of crimes? Do those judges remain on the bench or should they be removed? Whom do we punish: the soldiers who shot the students in 1988 or the Generals who gave the orders? *It must also be remembered that within the one family it is not uncommon to have victims, perpetrators and collaborators.* Conflict not only divides societies but families and local communities. Reconciliation must then take many forms.

It must also be remembered that within the one family it is not uncommon to have victims, perpetrators and collaborators.

Reconciliation

Any discourse about Burma would not be sufficient without covering reconciliation or national reconciliation (democrats term) and national reconsolidation (military term); this different terminology itself revealing of the political divide that has rendered Burma a moribund state. At least in its narrow legal sense perhaps the debate about transitional justice that must take place between Burma's main political actors, the NLD, the Tatmadaw (Armed Forces) and the ethnic nationalities leaders, will get the parties playing the same tune. It may present itself as an opportunity for the parties to cross the divide and speak to each other with one language.

Rigby's ideal-type model for reconciliation

Rigby describes "an ideal-typical model of a phased reconciliation process, one that might be pursued in societies emerging out of division and a history of human rights abuses where the perpetrators still control significant resources that could undermine the stability and resilience of the new regime."[13]

His ideal-typical model is worthy of explanation.

It is linear and has four stages, commencing with, firstly, *securing the peace*. The prime requirement for this first stage is the cessation of the killings, arbitrary arrests, torturing of prisoners, disappearances, the illegal persecution of people and groups. This has yet to happen in Burma, despite the current cease-fire agreements between the Tatmadaw, and a number of ethnic nationalities armed organisations.

Stage two is *uncovering the truth* and this requires those who have suffered loss and pain to have that acknowledged and for their truth to be heard and validated. This can happen in a multitude of ways and does not imply prosecutions.[14]

Any discourse about Burma would not be sufficient without covering reconciliation or national reconciliation (democrats term) and national reconsolidation (military term); this different terminology itself revealing of the political divide that has rendered Burma a moribund state.

Stages three and four are *approaching justice* and *putting the past in its proper place*. Rigby says that at the very least perpetrators are to be named. The names are reasonably well-known in Burma's situation anyway and there are such degrees of complicity the naming could become endless. Importantly, though, he discusses the need to go beyond the retributive from of justice and to develop "a sustained effort at restitution and putting things right."[15] A partial example given for stage four is that of the Guatemalan President Alfonso Portillo who in August 2000 made a public statement that included the following seminal sentences. "We have recognised that

the State committed human rights abuses. We are doing this today so that the dramatic history we have lived through isn't repeated."[16] This is symbolically and politically powerful.

Constitutional settlement, rule of law, good governance the path to reconciliation

We submit that three actions will do more to confront Burma's past than can any other mechanism yet tried: They are: constitutional settlement, the reinstitution of the rule of law to legal and judicial institutions and government administration, and the adoption of the principles of good governance for whosoever is exercising power. Everyone is clamouring for national reconciliation, even the military junta, with its calls for unity and reconsolidation. However, their *modus operandi* by way of decree and the manufacturing of a culture of silence and evasion makes a mockery of their own words. They have failed to make an effort to encourage a culture of consent around agreed principles of governance. National Reconciliation firstly requires political reconciliation and this will be achieved in form at least when these three actions are implemented. Then the people can get on with the business of reconciling past matters or grievances and find new ways of living together that recognises and gives expression to their diversity, and their commonly agreed modes of government.

It is well the essence of reconciliation. "Reconciliation is an approach not an event. It should be understood within the context of national unity."[17] It is indeed an approach and not of itself an event and national unity is not to be interpreted as the winner takes all, as has been evident in Burma's case. Reconciliation can mean agreement on a way of good governance, based on a constitutional settlement in which the rule of law to prevails. Reconciliation can mean a way of knowing the truth of the past to better shape the future. If dealt with as an approach rather than an event, it becomes less daunting and manageable. That sort of reconciliation will not utterly dominate the political landscape with the attending risks, but, by taking on very practical forms, encourage faith in the process.

Burma's national unity is to be found in a federal constitutional settlement and until this happens, unity will evade all.

Burma's national unity is to be found in a federal constitutional settlement and until this happens, unity will evade all. It is only this form that will give expression to unity in diversity. National unity in Burma until today has meant one thing: a unitary structure, understandable if the military is to be in charge of governance. It is, after all, a military model. If the military can adopt the civilian guise required to be able to engage in dialogue, as their counterparts are doing in Indonesia, they too will embrace unity, but unity in diversity. Military models by their very nature

are about absolute control, no separation of powers, no power sharing.

It is time to let that model go, or at least relax it and move on. With all parties to the conflict in Burma now either at or ready to come to the dialogue table, the fear of the idea of power-sharing may be diminished.

Policy Options for Transitional Justice or Coping with the Past

In their work 'Democracy and Deep-Rooted Conflict Options for Negotiators', International IDEA characterise the policy options into five areas:[18]

1) **Amnesty**. Absolute amnesty can be granted through self-amnesty that the outgoing elite unilaterally award themselves, through negotiations between old and new leaders, or through agreement by the new democratic forces.
2) **Truth Commissions**. The main goal is to investigate the fate of individuals and of the nation as a whole, not to prosecute and punish.
3) **Lustration**. Disqualification of the agents of the secret police and their informers, of judges and teachers, of civil servants and military personnel.
4) **Criminal Prosecution**. This can be done by an international body (e. g., International Criminal Tribunal for the Former Yugoslavia), or by national courts.
5) **Compensation**. Compensation by the State (monetary reparation, free medical and psychological treatment, reduced interest on loans for education and home building) and the establishment of permanent reminders of the legacy of the past (monuments, museums, public holidays, etc.)

These five policy choices identify the main ways in which nations have chosen to come to terms with or confront their past.[19] The sixth policy option is that of 'do nothing', or, as in Spain's case manifested as a policy of 'let bygones by bygones'. The 'do nothing' option is of itself an active choice. In Spain's case some actions, albeit small, have been taken. It may have taken a long time, 60 years in fact, for the Spanish people through their parliament to finally condemn the 1935 military uprising spearheaded by General Franco, but they did. The resolution of condemnation was supported by all political parties except the conservatives, with their general secretary protesting that such action was divisive, and that the focus should be on the future not on the past. So even a nation that made the transition from military dictatorship to democracy, adopting a policy of 'public amnesia' or 'forgetting' or 'let bygones by bygones' and with no truth mechanism, still felt the need to put the past in its con-

These five policy choices identify the main ways in which nations have chosen to come to terms with or confront their past. The sixth policy option is that of 'do nothing' or, as in Spain's case manifested as a policy of 'let bygones be bygones.'

text sixty years after the event.

The influence of Buddhist Culture in choosing a policy option or not choosing

The multi-religious nature of Burmese society was acknowledged in its 1947 constitution (by amendment) and Buddhism was recognised as a major force. However, religious freedom was accorded to practitioners of other systems of belief. Buddhism remains one of Burma's major institutions, larger in fact than the Tatmadaw, and its essence remains untouched by the military, even though the Sangha suffers the same fate, controls, and repressions as do others who enter political debate. Its influence on Burmese society is quite profound. It is an intellectual tradition that has been acculturated over many centuries. To deny or fail to take into account its influence in the reconciliation debate would be foolish.

Although in a paper such as this one there is a danger of failing to do justice to the profound intellectual tradition of Buddhism, we can say that Buddhism recognises that each person will and does pay for their deeds in life at some stage or incarnation and so it will be for those perpetrators and collaborators of human rights abuses. They may not suffer criminal prosecution or have to forfeit their ill-gotten gains, or pay compensation for appropriating State property or for damage to life, crops and land, but suffer they will. The demand for prosecution and trials sits well with modern principles of justice and the rule of law, and a secular modern State, but Burmese know that even the most fervent and inspired merit making cannot put right the cruelty and criminality of those who inflicted it, predominantly the Tatmadaw.

In a modern State, the rule of law remains the best guarantee of justice and freedoms for all, and religious tradition should not be used as an excuse to either gain merit or to escape responsibility or punishment for wrong actions that constitute crimes. If an amnesty were to happen, even if shaped and instructed by Buddhist values, that amnesty must be a political act, so that the rule of law is paid heed to and the State retains its secular nature.

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Whilst it may not satisfy the real and pressing demands for immediate action such as criminal prosecutions, the Burmese approach, informed by Buddhism, may alleviate or obviate the need for therapeutic models of healing, so popularly subscribed to, especially in the West.

Amnesty

We have confined our comments largely to the amnesty policy option, making only brief comment on the other options with particular reference to compensation as it relates to land issues, a rather complicated matter in Burma, as is the case in all failed and dysfunctional States.

The National League for Democracy (NLD) leaders and ethnic nationalities leaders, the political elite, understand very well the policy choices that they are confronted with, and know that for justice to come to Burma, that is justice in all its forms and justice for all, it may be necessary to transform the country by agreeing to and perhaps even encouraging Amnesty, as unpalatable as this may be especially for those whose loved ones have been murdered. If this does eventuate those who have suffered such tragic personal loss must somehow be given the opportunity to have their grief and anguish acknowledged and validated, if such is their wish.

Amnesty is neither new nor novel in Burma. Since monarchical times amnesties have been granted. The difference today though would be that we know that the State cannot forgive anyone on behalf of the victims. This right belongs only to the victim and it is the one thing that cannot be taken from them.

In sharing his experience and thoughts with South African colleagues before their Truth and Reconciliation Commission was established, Jose Zalaquett, a member of the Chilean National Commission for Truth and Reconciliation had this to say about amnesties:

> One should begin by reconciling oneself to the idea that amnesties are possible.
> However several things should first take place:
>
> * amnesty should possibly serve the ultimate purposes of reparation and prevention;
> * it should be based on the truth, or one cannot really know what the pardon or amnesty is for;
> * there should ideally be an acknowledgement of that truth; and
> * the amnesty must be approved democratically in the sense that it must be the will of the nation to forgive.[20]

The amnesty must be approved democratically in the sense that it must be the will of the nation to forgive.

He was describing what he saw as an ideal type. However, amnesties can be granted free from any conditions. Though it may be a desirable goal, reparation may not ensue.

There is much pressure to have the truth come out at all costs, on the tenuous assumption that all victims need to have the truth to be able to heal. The extrapolation of such an assumption is that then the nation can heal. It is a therapeutic approach to suffering and perhaps it will prove to be effective, but it is hard to apply therapeutic models to State apparatus. It would seem though that for those families who had loved ones 'disappear' in times of armed conflict, for them to discover what happened would remain of prime importance.

A decision about any amnesty will be taken by the parties involved in the transition and initially those involved in the negotiations for establishing the mechanisms for the transition. Jose Zalaquett's last point that "[the] ...amnesty must be the will of the nation." is sound. The NLD are clearly in the best position to gauge the will of the nation on many matters, given that the will of the nation is that the NLD lead the country. This was confirmed in the 1990 general multi party elections in which the NLD won 392 of the 485 constituencies contested. Through such groups as UNLD (although it is still banned by the military) and the SNLD the ethnic political leaders won significant numbers of constituencies in the 1990 election, and these groups can and also should be a barometer of the people's will. Ultimately it is a decision to be taken inside Burma with reasonable and fair representation.

Due to the lack of a robust civil society in Burma and an absence of political debate and commentary, there is no other measure of the people's will, despite the signs that the military has erected country wide extolling the 'people's desire. Organisations like Burma's United Solidarity Development Association (USDA) are creatures of the military and only say what is required of them, so their occasional forays into the public arena cannot be said to be representative of the people's will.

People should be at liberty to demand justice, in all its forms. However, given prevailing political conditions with a military that has remained in power in different incarnations for well over fifty years and given the daunting state of Burma's economy; those demands will be difficult to meet.

People should be at liberty to demand justice, in all its forms.

This is a current debate in East Timor and their President, Xanana Gusmao, has pointed out that he is not calling for international criminal tribunals and wide scale criminal prosecutions but is busy getting on with

the job of seeing his country develop to provide food, shelter, transport, education, health care and to build a sound economy and an independent and credible legal and judicial system. Social justice is what President Gusmao is referring to in all but name.

Burma, we submit, will be no different. Social justice is its most pressing need.

Pros & Cons of a policy of Amnesty

Amnesty is the granting by the State immunity from prosecution. It can be absolute or partial and granted to known persons, classes or groups of people, or to all at large. It is done by an outgoing, or incoming government generally through a parliament. It neither forgives nor condones human rights abuses, but stops the clock and says that human rights abuse will not be prosecuted. It is pragmatic as politics demands. Even though it is neither a pardon nor an act of forgiveness, some victims may view it in this way, almost as an act of political forgiveness. It would be best seen as an act of political reconciliation, without which the country cannot begin to rebuild and heal, i.e. actualise reconciliation. It is frequently the policy outcome of negotiations between the old and the new leaders-governance structure and often the only key to a deadlock in transitional negotiations.

An important note of reminder is that with any amnesty care has to be given that human rights abuses committed against children and the crime of rape as a weapon of war would not ordinarily be covered in a grant of amnesty, even if left unstated. It is inconceivable that any military man or soldier with even a little vestige of honour, would seek to claim amnesty for committing such abuses against women and children.

The granting of an amnesty does not prevent the government or the people for that matter from instituting a means or mechanism that is aimed at coming to terms with one's past, for this is clearly the big question. How does one go forward is probably best answered by firstly looking backwards, but we would recommend not getting stuck on looking forever backwards. To determine what a society wants for its future it is imperative to know the past and if it is an ugly past such as it is in Burma, then coming to terms with the past can facilitate shaping the present. Burma's past and indeed its present are wracked by an absence of a constitutional settlement, the rule of law and not only good governance, but governance in any real form.

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To ensure that constitutional certainty, the rule of law and good govern-

ance become the way of the present, hence the future, it is necessary to start to deal with their absence, and this requires looking at the past. Does a State potentially on the brink of a transition possibly risk the transition itself by debating such questions, including the pros and cons of amnesties? Any leader faced with such a possibility will on balance decide on a policy that best secures a transition that is aimed at consolidating the future peace and prosperity of the nation. In politics such a risk is always present and even more so for those not directly involved in the confidence building or dialogue. Nevertheless, although formal dialogue is yet to begin, it is a debate that has begun and it cannot be avoided. However it is highly unlikely at this stage to derail any proposals for a transitional arrangement that may result in a gradual move towards liberalisation, perhaps some type of consociation model.

It is sometimes said that amnesties work to undermine the rule of law, and perhaps at a formal level they do, but political will in the first instance will more than anything consolidate the rule of law.

Truth Commissions

If the people so desired they could establish a 'truth' process, not necessarily a 'Truth Commission' or a 'Truth and Reconciliation Commission', a topic not very far removed from any discussion regarding transitional justice. The most comprehensive and powerful work on the world's Truth Commissions has been undertaken by Priscilla B. Hayner [21] UNTAET in East Timor formed a Truth Commission (see its website on www.easttimor-reconciliation.org for information) that has been endorsed by the newly independent government headed by Chief Minister Mari Alkatiri. It is currently confronting its past. Due to its immediacy it is not covered in Ms Hayner's book; however she has worked in East Timor to provide advice to them. We recommend that all actors involved in the 'Burma' debate read her brilliant work on the world's truth commissions.[22]

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Lustration

Lustration, the disqualification of people from public office, or the removal of those already in public positions has been used mainly in Eastern Europe and is immediately attractive. Yet it is also problematic. How far does one go down the bureaucratic chain to purge the State institutions of people and should it be used against all who collaborated by commission or omission? When does one begin this sort of purging and how does one know when to stop? Czechoslovakia's Vaclav Havel spoke against this even though in his country legislation was passed supporting

it. Poland's Solidarity Adam Michinik also spoke out against it. The greatest danger of lustration lies in the fact that beyond the purging of some top line leaders, it can become as oppressive as the system that the new government is trying to leave behind.

Criminal prosecution

The benefits of criminal prosecution are *prima facie* eminently desirable. You commit a crime: you should be dealt with according to law. The rule of law of course requires this, but transition periods are not normal circumstances in the life of the State and its citizens, and it may not always be practicable to comply with all that one should. If an amnesty prevails as a policy option then criminal prosecutions will be few. The amnesty may be complete or partial so that those crimes that can never go unchecked such as crimes against children and the rape of women can and should be prosecuted. Again these are crimes that even the most draconian state has criminalised and it would beggar belief if any party to transition tried to seek amnesty for such crimes.

Compensation

Compensation can take many forms. For example, it can be used to provide educational opportunities for political prisoners who were denied education; it can be for medical assistance for physical and/or psychological ill health due to State action or inaction; it can be used to pay pensions; and it can be for land compensation.

Many people either individually or as a community have had their land compulsorily acquired and on unjust terms, frequently by forced removal and forced relocation, and the State have appropriated the land for its benefit and again not on just terms. Most countries that have undergone transition have had to grapple with difficult land law regimes and unfortunately it is not always possible to give back land to some people, even though they have a legitimate claim to the title.

Compensation can take many forms. For example, it can be used to provide educational opportunities for political prisoners who were denied education; ... and it can be for land compensation.

With the advent of transition but not before it would be wise to seek from, say, the World Bank a land compensation fund by way of grant (*not loan)* so that this matter at least can be addressed in the most equitable way possible. Otherwise it will remain a major political problem for whichever parties are in power. There should also be a statutory body established to deal with such matters. It should exercise administrative power but with appeals to be had to the court. There are various models in existence. Some would also argue that those who got rich through their privileged position as State leaders should be made to pay.

Does Burma have domestic and-or international obligations to prosecute human rights perpetrators?

This is a vexed question. Those who want to see perpetrators prosecuted will argue the case that as nations have obligations not to cause human rights abuses; the corollary is that the obligation then exists to prosecute. Others will equally argue that obligations of themselves do not incur corresponding duties to prosecute.

It is quite clear that Burmese domestic law already provides for crimes that are akin to human rights abuses, but do not carry with them the gravity that attaches to crimes against humanity, even though the acts may be the same. The difference would be the extent to which some of the abuses are covered by domestic law, but assault, rape, abduction, stealing, larceny, murder, and the like are crimes that perpetrators could now be charged with and prosecuted according to Burma's penal code and criminal procedures code.

To attempt to address this issue it is necessary to look to the international treaties that Burma has acceded to and also to sources of international law, including customary international law. Renowned international law expert, Brownlie, correctly in our view tells us that these sources "provide the basic particles of the legal regime."[23]

- Burma has not acceded to many treaties but has done so to some important ones such as: the Universal Declaration of Human Rights (UDHR); [24]
- the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; [25]
- the Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea; [26] the Geneva Convention Relative to the Treatment of Prisoners of War; [27]
- the Geneva Convention Relative to the Protection of Civilian Persons in Time of War; [28] commonly called the Geneva Conventions;
- the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention); [29]
- and in more recent times the Convention on the Rights of the Child (CROC) and The Convention on All Forms of Discrimination Against Women (CEDAW).

It is quite clear that Burmese domestic law already provides for crimes that are akin to human rights abuses, but do not carry with them the gravity that attaches to crimes against humanity, even though the acts may be the same.

Burma did sign the Convention on The Political Rights of Women in 1951 but never ratified it.

Treaty obligations are of course, *prima facie*, compelling. For example, the Genocide Convention says that States have an obligation to "prevent and punish". Article 1 says *inter alia* that "Genocide...is a crime under international law which Contracting Parties undertake to prevent and punish." However, if we are searching for authoritative law we must as is the case with international law go beyond the treaty obligations. They signify, albeit importantly, that States have an obligation and as Brownlie tells us, "treaties are as such a source of obligation and not a source of rules of general application." [30]

Genocide is singularly important given that a large number of the human rights abuses committed in Burma have been upon the ethnic nationalities, referred to internationally as minorities (but not so in Burma). The military junta has been accused by Burma's ethnic nationalities of having committed acts of genocide against them. We cannot in this article speculate on how a court would deal with this matter but the Genocide Convention assists to clarify the discussion regarding the obligations that a State has.

To some degree it is for now a moot point, as the politics of the situation will determine whether prosecutions are effected or not in the first instance; however as lawyers we would be remiss not to give cognizance to any legal obligations that may be present, even if they are not to be accorded. Such obligations can be recognised in a grant of amnesty, to give effect to the principles of the rule of law and honour the suffering of all whose human rights have been violated, so in effect a small but maybe significant step towards rebuilding the culture of the rule of law.

"While analysts agree that governments confronting a legacy of State violence should comply with established rules of international law, they have generally demurred on the question of what, precisely, the law requires."[31]

The debate then is one to be had more over whether such obligations arise under international law, with an arguable case that States have the dual obligations not to inflict human rights abuses and to prosecute when such occur. However what and when these crimes should be prosecuted and which perpetrators should be brought to account is not so clear.

While analysts agree that governments confronting a legacy of State violence should comply with established rules of international law, they have generally demurred on the question of what, precisely, the law requires.

Spain's Transition Experience: General Franco's Fading Influence

The experience of Spain is one of occupation by its own military under the rule of General Franco. It involved everyone to some degree, as it is not possible for dictators to maintain power and control without varying

degrees of collaboration and complicity of the populace. It is a fact that if the populace did not "live within the lie" as Vaclav Havel so eloquently and correctly phrased it, dictatorships would be denied the sustenance that prolongs their life.[32]

The Spanish transition experience as told by Rigby describes the occupation period, the complicity, the transition period and beyond. It so clearly speaks to the general and in some cases the particular experience of Burma.

Spain: After Franco's death the need to secure a transition to parliamentary democracy was subordinated to all other considerations. There was, Rigby, contends an unwritten pact that the Franco past should stay in the past and not be in the public domain.[33]
Burma: General Ne Win's power is on the wane He has achieved political death and approaching physical death. There appears to be a growing climate of 'let bygones be bygones' developing, let the past go and move on, and focus on securing a transition.

Spain: During the civil war Franco's Nationalists executed thousands, some for simply being found carrying a membership card of a socialist trade union
Burma: Many have met the same fate, for regular political matters or activity. The 1988 military massacre of civilians stained the military and is still fresh in people's memory. The fate of many in both situations is still unknown.

Spain: Official history was rewritten and imposed in very deliberate ways on the people, and in the words of Paul Preston, "History under the Francoist dictatorship was a direct instrument of the State, written by policemen, soldiers and priests, invigilated by the powerful censorship machinery. It was the continuation of war by other means, an effort to justify the military uprising, the war, and the subsequent repression."[34] The war that was to 'free' the citizens brought with it a regime hell-bent on revenge and repression that was to last with varying degrees up until General Franco's death in 1975.
Burma: The military coup in 1962 was according to the military view, somewhat one-sided, to prevent the country from disintegrating, due to federalist and insurgent activity and to install a pure socialist regime. The arguments used today by Burma's same military still at the helm of the State, are unchanged, with the same debates being had and yet to be settled. The repression of the years immediately following the military's ascension to power has not abated, in fact since the 1988 military *coup d etat* it has intensified under the rule of the Tatmadaw's State Law and Order

It is a fact that if the populace did not "live the lie" as Vaclav Havel so eloquently and correctly phrased it, dictatorships would be denied the sustenance that prolongs life.

Restoration Council (SLORC), now called the State Peace and Development Council (SPDC).

Spain: Those who had joined hands in supporting General Franco's rebellion and had benefited from his patronage feared what would happen to them. This group remained opposed to the opening up of the political system to the end.[35]
Burma: There are military diehards who equally have benefited most and have the most to fear and they remain implacably opposed to the transition.

Spain: How to get enough to eat, rather than how to resist the regime, was the enduring preoccupation of much of the population." [36]
Burma: With malnutrition widespread in Burma, particularly among the children, paddy shortages due in essence to military led policy, with a bankrupt economy and failed State, getting food is a major preoccupation for the people of Burma, as much as they do not like the military regime.

Spain: People retreated into a culture of fiction and fantasy to escape the horror of daily life under General Franco's regime, with bullfighting, football, and other entertainment media, becoming an almost cultural movement. [37]
Burma: The same could be now said of Burma where people have developed their own ways of dealing with the horror by pursuing similar pastimes, such as sport and cultural activities. Thus the political is muted and personal is paramount.

Spain: Political rights and freedoms were seriously eroded; military courts dealt with serious 'political' crimes, and the State apparatus intimidated the people through administrative means.
Burma: It is ranked as one of the world's most repressive regimes with a Freedom House score of seven, the lowest possible rating, for both political and civil liberties. Its partners in severe repression equally ranked at seven in Freedom House's 2002 scorecard are Afghanistan, Cuba, Iraq, Libya, North Korea, Saudi Arabia, Sudan, Syria, Turkmenistan, Chechnya and Tibet. [38]

Spain: How to get enough to eat, rather than how to resist the regime, was the enduring preoccupation of much of the population. Burma: with malnutrition widespread in Burma, particularly among the children, paddy shortages... getting food is a major preoccupation for the people of Burma…

Spain: A division existed between those who saw the need to reform to ensure the survival of the regime (*aperturistas*) and the members of the bunker (*immobilistas)* who saw the beginning of the end of the regime if reform was to happen. [39]
Burma: It is well known that the Tatmadaw has its own *aperturistas* and *immobilistas*, hence the slow pace of change, as the *aperturistas* work to either bring the *immobilistas* with them or at least neutralise them. This di-

vide is not limited to repressive regimes and has to be responded to within so-called oppositional forces as well.

This descriptor brings us up to Spain's transition years, where not long before General Franco's death the opposition parties working in a broad-based coalition, called for a clean break with the past (*ruptura democratica*). That included complete political amnesty, legalisation of political parties, a neutral army, independent judiciary, etc. These were to come to pass but only after a, "slow and careful expansion of political liberties, alongside an equally cautious program of political amnesty." [40] culminating in a negotiated means of transition called *reforma pactada*, which is as its name implies, a pact or compact for reform. The Spanish experience speaks more to Burma, than do other's experience, in as much as anyone's can.

There is much more to be said about Spain's transition (the subject of a future paper) and the ensuing years which brought a consolidation of democracy, the re-establishment of parliament, the reinstitution of the rule of law through the legal and judicial systems and the adoption of the principles of good governance. The conclusion to be drawn from their experience is that they managed a peaceful transition from dictatorship to democracy, without adopting a policy of criminal prosecutions or creating a mechanism, such as a truth commission, and have done so successfully. They have taken their place in the international community with a great degree of activism and pride and have been quite successful in developing an educated and prosperous nation. They do not seem to have suffered too much trauma that is visible. They did not go down the therapeutic path of truth finding. We illustrated Spain's experience to put on the table a case study of one nation that belies current conventional wisdom of the transitional justice language that one must always come to terms with one's past by adopting at least a process of truth finding and healing.

> The most likely transition for Burma is that of transplacement … that is able to both recognise the 1990 election in a creative way, gives its imprimatur to a policy of amnesty … but in either case not for crimes against children and women…

Conclusion

The most likely transition for Burma is that of transplacement with the possible adoption of a consociation model of government, that is able to both recognise the 1990 election in a creative way, gives its imprimatur to a policy of amnesty (not necessarily by de jure means), or it may be a policy of 'let bygones be bygones', but in either case not for crimes against children and women in particular, and a cautious process of change in governance structures. How democratic these are can only be revealed over time, but they will be an improvement on governance by military dictatorship. We see that this is not only likely but it may be necessary given Burma's political history and its colonization from within. It may

also be necessary to secure a transition that is aimed at long term peace that does not see endless years of trials, purges and commissions that *could* further drive a wedge into a long and already deeply divided society.

The best outcome for the people is to have a transition to a federal constitutional system with democratic governance, to re-establish Parliament, legal and judicial systems, economic systems, health and education, road building and rural and regional development and to have a strong civil society that can act as a buffer to and against if needed to those elected to govern. In all of this matters such as the reclamation of and compensation for land, reclamation of reputations and good standing, expungement of political prisoner's criminal records, recognition of suffering through a variety of means including national days, State days, monuments freely erected and honoured will occur. It is important to honour those who suffered, particularly those who paid with their lives.

Our view is that as Burma, its diversity of people, and the nation itself has suffered so much for so long, and is seen as one of the world's pariah's, with transition, there has to be a focus on rebuilding relationships and institutions, so that all members of society can again become participants in public life instead of bystanders. In other words learn to be interdependent. Rigby cites John Hooper's most telling observation about Spaniards during Franco's rule, where he could equally have been speaking about Burma, when he said, "Franco's rule made Spaniards more reliant on themselves and on the state. But not on each other."[41] How true.

We are both lawyers and politicians and our contribution cannot help but consider this issue within those traditions. If at times we strayed carelessly from one into the other, we offer no apology. We understand both law and politics in all their glory and limitations. The decisions at the outset regarding the transitional justice policy options will be political decisions. This is as it should be and as for the future and legal developments, we could only begin to speculate.

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Acknowledgements

We wish to thank firstly our senior colleague Mr B.K. Sen for encouraging us to write this article, when time was severely against us and for his patience, and Dr Jim Gallagher for his editorial suggestions which we gratefully accepted.

Endnotes

* The authors are Executive Committee Members of Burma Lawyers' Council.

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2. The authors have long been concerned with the justice needs of Burma and some years ago secured a legal student researcher, Mathew Deighton, to research and prepare a case study of Burma that we called "Confronting the Past". We wish to acknowledge him for his timely and rigorous work and also his Lecturer and Supervisor Associate Professor Sam Garkawe of Southern Cross University Lismore NSW Australia for the support for this work and their subsequent joint publication in the SCU's special edition vis-à-vis Burma referred to below.
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       The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
        (a) The crime of genocide;
        (b) Crimes against humanity;
        (c) War crimes;
        (d) The crime of aggression
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32. Rigby pp 90 & 97
33. Rigby p 39
34. Rigby p 42
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Forgotten: Political Prisoners in the Context of Transitional Justice

*Danya Marshman**

As Burma strives for democracy, the society must facilitate a process of reconciliation by resolving divisive issues that have impeded its growth for the latter half of this century. Specifically, the crimes of humanity committed since the State Law Restoration Council (SLORC) and State Peace and Development Council (SPDC) assumed power need to be addressed and accounted for. Transitional justice refers to this process, the fair and just treatment by an incoming government of crimes committed by the previous regime. Currently, there are a diversity of ideologies revolving around the concept of transitional justice and its bearing on a modern democratic Burma. Encouraging an expeditious shift to the new government, one school of thought supports a system of general amnesty and forgiveness for the military's transgressions. Other critics see considerable value in publicizing the crimes against humanity and reproaching criminals for the victims' benefit, as well as an impressionable society aching for new axioms of civil guidance. Although legally complex and morally arduous, much of the continuity, success and prosperity of Burma's democratic nationhood depends on the proper treatment of this delicate issue.

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The debate of political imprisonment and transitional justice encompasses a broad range of ideas and is a topic of immense fervency for those implicated in the cruelties of the former regime, as well as advocates for democracy and human rights defenders. As this article continues, the stories of many political prisoners will be told, bringing into the open the severity of the crimes and the need for a legal revision of these atrocities. The necessity for the crimes to be considered on an international scale

will also be discussed, as well as the hypocritical Burmese laws which have allowed the violations to occur for decades. Although general amnesty may offer a simpler, more expedient means of addressing the SLORC and SPDC, and their behavior over the past forty years, the success and prosperity of the new government depends on the adherence to democratic principles in prosecuting all those involved in the junta's crimes against humanity. Burma's transitional justice depends on the implementation of fair, yet severe penalties and assessment of adequate retribution policies that will help both to heal victims and disassociate the incoming democracy from the outdated dictatorship.

What is a Political Prisoner?

> "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers."
> - Article 19, Universal Declaration of Human Rights

A political prisoner, often referred to as a prisoner of conscience, is one who has been penalized for peacefully demonstrating an ideology or set of beliefs contradictory to that of the government to which the individual may or may not subscribe. This includes possessing uncensored publications, videotapes, leaflets, and other popular forms of media and leading or participating in activities supporting viewpoints contradictory to the government. There are an estimated 2,500 political prisoners being held in jails throughout Burma, suffering as a consequence of their involvement in the Burmese struggle for freedom and democracy. Those sentenced have received trials that fall short of international fairness standards. Many have been denied legal counsel and the majority have been sentenced under vaguely worded and arbitrarily applied security legislation, which subjects rights and freedoms to greater restrictions than are necessary to meet requirements of morality, public order, and general welfare.[1] Many have been detained without trial or charge for several years. Others who have completed their sentences remain in detention, held there by executive decree under administrative detention laws and without recourse to legal appeal.

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Transitional Justice

Political scholars and civil officials worldwide have advocated that while the democratic government is in a rudimentary stage and struggling for sure footing, issues of the past should be avoided. More effective is an op-

timistic outlook, focusing on future development. Energies should be devoted to building the new government, not assessing blame to those who may have been involved in past misconduct. They see the military junta as a continuing threat even when democracy has been established, a bomb of rebellion ready to detonate once identified and abashed. Prosecution would only fuel the junta's resentment, encouraging their remobilization and eminent revolt.[2] As a fledgling government, Burma's new democracy would find difficulty maintaining their supremacy, collapsing under the grips of a tyrannical rule. In addition, supporters of this belief continue to advocate that any system of arrest and prosecution of junta officers will inevitably stretch over a long span of time, causing a general unrest and lack of confidence in the new society. Within this delay, the government will appear inefficient, losing the respect of an eager society laden with expectations. In a more philosophical context, there also exists a moral dilemma in the regards to the prosecution process. Specifically, many of the human rights violations occurring in the prisons were carried out by officers responding to the orders of a higher authority. An ethical decision is inevitable in determining exactly where the fault lies— within the leader who issued the barbaric acts, or the officer who followed their command.[3] Separate statutes will have to be arranged according to the opinion of a trenchant legal counsel, though there exists no objective medium in which to judge the fairness and integrity of their verdicts. Furthermore, after years of oppression and misrule, it is certain that some factions of this emerging, patriotic union will possess a sense of vengeance in some capacity, along with an expectation for justice and retribution. Acting on this emotion would nearly parallel the ill-conceived punishments which the military generals themselves have consummated.

This lengthy catalogue of threatening scenarios has experts asserting impunity as the most sensible policy concerning political prisoners and their captors. The general amnesty would eliminate any premise that could place obstacles in establishing the strong democratic government, envisioned for years by Burmese civil society. In critics' eyes, moving on from the past towards a strongly secured future will ensure sovereignty and stability for Burma's democratic leadership. They emphasize an onward effort, unclouded by a past that cannot be altered.

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Opponents of this argument adamantly stand for the broad representation of all human rights violations committed by the SLORC and the SPDC, and the just punishment of all conduct violating international laws. This prosecution, they feel, retains and enforces democratic ideals and principles necessary for the success of the new government, and provides an early example and standard for civil society to follow. The disciplined adherence to democratic decrees needs to be evident in manifesting a

schism from the old regime. To acknowledge past injustices is to set a benchmark of law enforcement that will be perpetuated once the installation of the democracy has been completed.[4] Burmese civil society craves a visible symbol of a new order entirely independent from the past administration. From experience they are completely cognizant that an altered name does not necessarily result in progressive reform. The failure to make an immediate assessment of foregoing abuses of law and life will leave an opening in which history could potentially be altered by those whose barbaric policies were the cause of this brutal era. Supporters of the past regime will seize on the opportunity to manipulate and modify the accounts of their time in power, weakening the legitimacy of the new government and their reasons for assuming leadership. Human rights violations need to be publicized in order to distinguish right from wrong and reasonable from preposterous, to stand as reminders of the dangers of misrule, and to prevent such horrors from repeating themselves.

In acknowledging the illegitimacy of the past government, bureaucrats and members of the public administration aligned with the SPDC must not be neglected, incurring treatment in accordance to their record of involvement with the policies of the dictatorship. Within these public evaluations, it is crucial that the government exercise extreme caution, acting in complete objectivity so as not to violate the very democratic ideals they claim as their foundation. The importance of this refinement process cannot be understated, as conflict is probable in the installation of democratic leaders to work with public officials that are sympathetic to past tyrannical principles.[5] Perhaps the most compelling motivation to reach a just settlement is for the well-being of the victims, as well as the friends and family forced to watch their loved one's suffering, helplessly sidelined by a manipulative military intelligence force. At the pinnacle of any efficacious society is an a devoted community of active individuals who take pride in their leadership and its impetus. Unhealed and deceived, victims have no reason to participate in a government that is so ineffectual towards the pain and struggle that they, their family, and their friends have endured for many years. A fair trial, conviction, and sentencing of the perpetrators would commence and carry on the healing process for many, affirming these victims' faith in the new democracy to which they have subscribed. The identical treatment is expected if a victim has died while imprisoned. Fault should be assessed, the guilty aptly sentenced, and the victims' families offered adequate reparations. This arrangement guarantees the families that justice has been served while offering a path on which closure can begin.

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Imprisonment through the Eyes of the Dissident

As Burmese Military Intelligence has extremely strict guidelines for information entering and leaving and the country, there are no definite statistics on the number of prisoners currently serving sentences for crimes of conscience. While many human rights organizations estimate that a modest 1,300 prisoners are being held in Burma's prisons, many activists inside Burma insist the actual figure is nearly twice as much. Currently there are 36 penitentiaries operating within Burma, 20 of which house the 2,500 political prisoners advocated by sources inside the country.[6] Many international statutes exist detailing proper prison treatment for inmates—the *Standard Minimum Rules for the Treatment of Prisoners*, the *Basic Principles for the Treatment of Prisoners*, and the *Body of Principles for the Protection of All Persons Under any Form of Detention or Imprisonment*. However, the routine torture, harassment, and health risks posed within their containment fall disgracefully short of these guidelines. It is because of these widespread violations-- and the extent to which they are committed—that transitional justice has become such a significant issue.

> Torture: The deliberate, systematic, or wanton infliction of physical or mental suffering by one or more persons acting alone or in order of authority, to force another person to yield information, to make a confession, or for any other reason.
> – Tokyo Declaration on Torture, October 1975

U Zaw Min[7], a prominent activist with the Assistance Association for Political Prisoners-Burma [AAPP(Burma)] and a former prisoner himself, attributes the use of torture not exclusively to cause physical trauma to an individual, but also to destroy the human's soul. "Torture is designed to break down the identity of a strong man or woman, turning a union leader, a politician, a student leader, a journalist, or a leader of an ethnic minority group into a non-entity with no connection to the world outside of their torture chamber."[8] National monitoring of accommodation and treatment in Burmese Prisons began in 1999, when the International Committee of the Red Cross (ICRC) was allowed unrestricted access to all prisons, detention centers, and labor camps. Their findings were beyond belief. Torture, prolonged constraint, insufficient conditions of living, and inadequate medical care were common and widespread. Through personal accounts and interviews, prisoners revealed the varying ways in which they were tormented during their indefinite stay at the prison. Soldiers were witnessed to have used their boots, fists, and rifle butts, as well as metal pipes and bamboo sticks to beat prisoners, often while forcibly restrained in vulnerable positions. Casualties from these barbaric sessions were frequent and often long-term. Internal bleeding,

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fractured skulls, dislocated limbs, paralysis, and death have all been reported as a result of the unrestricted beatings. Prisoners who have endured similar treatment and have since been released have reported severe joint pain, hypertension, afflictions of the respiratory and digestive systems, difficulty in walking or standing for long periods of time, and parapalegia.[9] It is particularly these victims for whom reparations are indispensable. Damaged for life, nothing exists to restore their vision, hearing, or ability to walk, though with appropriate compensation, accommodations can be made to ensure their lives are as comfortable as possible. Punishment to those who inflicted such pain must be assessed to give the victim a sense of equity and reduce any potentiality of this savagery reappearing in the future.

Perhaps the most complicated cruelties to assess are those which leave no scar on the victim's skin, no impediment in the manner in which they walk. After the cuts, bruises, and bones are healed, the effect the torture has had on a prisoner's mind is immense. Psychological torture begins upon the arrest of a victim. They are hooded, then transported to prison, where a painstaking, often violent interrogation period begins. There have been several reports of rape and other sexual offenses during this time, as both officer and prisoner are isolated from the central compound. For many, experiences such as these induce guilt and humiliation that cannot be verbalized. Once released, their shame prevents them from recalling events or expressing their emotions. In 1990, Tin Tin Nyo, a well-known womens' leader, spent her interrogation period enduring the abusive behavior of the Military Intelligence officers, having been beaten after she was forced to remove her clothing. She refused to discuss any details of this event, nor did she seek psychological counseling upon her release. Harassment and other nuisances involving Military Intelligence and their post-release stalking followed, making her attempts for employment and further education futile. On December 31, 1993, she swallowed a bottle of insect repellent and died soon after.[10] Instances of severe depression are widespread within the Burmese prison system, occurring as a response to environmental factors causing psychological and physical trauma. The severity of the prisoners' psychological state goes unnoticed as prisoners are abundant and can be replaced very easily. Statistics from one jail indicate that the death toll was approximately 300 per month. Suicide accounted as the cause of death in over 60% of the cases.[11]

Instances of severe depression are widespread within the Burmese prison system, occurring as a response to environmental factors causing psychological and physical trauma.

While inmates are suffering through the harsh treatment of prison guards, they must also cope with deplorable living conditions. Jails are subjected to severe overcrowding, reaching rates which are unacceptable by international standards. Cells measuring 8 x12 feet hold a minimum of 3-4 prisoners on a regular basis. Prisoners eat and sleep in their cells and are

allowed to leave for only four hours per day. Their daily food allowance usually includes 1-2 servings of bean soup or vegetables, supplemented by a weekly serving of dried fish and a meager supply of water. Prisoners are forced to defecate in the cells, as there are no formal facilities provided for this purpose.

Political prisoners are not allowed to speak with one another. Reading and writing is also forbidden, as the possession of a simple scrap of paper is grounds for solitary confinement. When punished by this method, prisoners are forced to sit or stand astride in congested holding rooms, an iron bar placed between the shackles on their ankles restricting any movement. Although a chamber pot is available for personal needs, it is rarely emptied, leaving prisoners captive in their own urine and feces. The worst conditions reported were of confinement situations where prisoners were crammed into cells standing upright, their hands tied above their heads. In this position, they were forced to sleep and defecate while standing back-to-back with other prisoners.[12] Mats, blankets, and other basic conveniences are denied-- if prisoners have the freedom to move into a sitting position, they have only a contaminated concrete floor to sleep upon. The solitary confinement period lasts between one and three months, though some political prisoners have been restrained indefinitely. One of the worst cases reported was of Nyunt Zaw, a 24-year-old member of the All Burma Students' Front (ABSDF), placed in detainment in 1991. While in solitary confinement at Tharawaddy Prison, Nyunt Zaw had pleaded with prison authorities for the opportunity to see a doctor, but was repeatedly refused this basic right. In fact, he had developed heart disease and was suffering needlessly. In 1999, Nyunt Zaw died of a heart attack. Prisoners who peacefully complain or ask for redress in regards to the abuse they are enduring are severely punished and given additional prison terms. Currently, 50-year-old Myo Myint Nyein, a former political editor, is serving a fourteen year sentence in Tharawaddy Prison for smuggling reports of human rights abuses in Myanmar prisons to UN officials. Although he has developed several ailments in prison, he remains detained and untreated, suffering from gastritis, migraines, hypertension, and neurotic behavior.[13]

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Doctors are rare among the prisons, many lacking the credentials necessary to justify their title. In 2000, Insein Prison was documented as having one doctor per three thousand prisoners with a similar shortage of medical equipment. Kyaw Zwa Moe, a former inmate at Insein Prison, tells of his experience at the health clinic. "Two hundred or so patients would go to the outpatients' clinic every day, only to find a notice reading, "Only 10 needles and 5 syringes available today."[14] Medical treatment is provided only when the illness of a patient has reached an acute

stage. Even at this point, an officer makes the final assessment on the needs of a prisoner. Officers rarely heed the advice of doctors who recommend cases to be sent to outside hospitals for further care. The most common diseases among the prisoners are gastrointestinal diseases (amoebic dysentery, bacillary dysentary, and diarrhea), jaundice (viral and amoebic hepatitis) and multiple forms of skin infections— all ailments which are nearly non-existent when the most simple of sanitary standards are followed. However, the unclean, semi-cooked foods, dirty kitchens, polluted surroundings, and poor water supply welcomes the transmission of infectious bacteria. Recently, HIV has become extremely prevalent and a cause of the rising death rate. A report in 2000 documented the health arrangements in Mandalay prison:

> "There were 15 special cells (single and double rooms) for prisoners . . . infected with communicable diseases. There were many [venereal disease] and HIV positive patients, as well as some patients with leprosy. Many of these patients were forced to stay to gether. The hospital did not use disposable syringe needles. . . Mandalay prisoners also had to work at farms fertilized by urine and feces."[15]

Even health officials admit the danger and negligence inmates experience. At Insein Prison, Toe Tun, a member of the Democratic Society for a New Party (DPNS), was examined by the detention center's Doctor Soe Kyi. Toe Tun believed that he was suffering from dysentery and had requested special meals of porridge and boiled water. Dr. Soe Kyi's responded, "It is impossible to provide boiled water. We don't even have boiled water to clean the needles at our hospitals.[16]

Though Mandalay Prison does have the luxury of officials who visit individual jail cells to assess the prisoners' health, the practice has long been considered insufficient. "Our blood pressure and heartbeat were never tested and we never saw a doctor with a stethoscope," reported one prisoner. Often, they are treated with the same medicines, irrelevant of their complaint or prognosis. Usually, the "antibiotics" consist of a low-cost, commercial pain-killer which offer little relief to ailments and allow more serious diseases to spread. Health officials have been inattentive and unheeding, minimizing afflictions that often require more attention. In February 1991, a prisoner recalled a Rangoon student's treatment when the student had a toothache. "The doctor asked him, where does it hurt? The student replied, "my lower left jaw." Doctor Soe Kyi smiled and said, "Okay, use your right side to eat food."[17] This type of behavior demonstrates a conscious negligence, and a continued laxity through the sarcasm that followed. The student was most likely one of many denied care

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who continued to be ridiculed after presenting their vulnerability. After they are refused treatment for serious conditions, these prisoners are further mocked and insulted.

Due to the lack of adequate medical care within their confines, prisoners depend on outside assistance, usually friends and family, for medical supplies. Technically, medications are allowed to be delivered during a family's visit to their ailing loved one. However, even in this regard, Military Intelligence becomes implicated, aggravating the situation so that the families' ability to reach the prisons is seriously hindered or prevented. "The regime intentionally tries to break the spirit of political prisoners by sending them to remote prisons far away from their families so that they suffer psychological misery and lack of support from their family."[18] Strategic military intelligence officers assign prisoners to jails in areas that their family cannot visit, due usually to the distance of travel and their financial restrictions. Wreaking emotional havoc on the families, they suffer without reason while their next of kin's health deteriorates without the proper medication. Distanced and poorly informed, families face immense difficulties in maintaining contact with their imprisoned brother or sister, daughter or son.

> "My heart was pounding when I walked through the main jail gate and as soon as I stepped through the gate my preconceived notion disappeared. I was greeted by a very distressful scene— women in shabby, dirty, patched clothes, carrying entirely naked children. From the look of these women it was obvious that they had been exposed to the sun, rain, and cold weather. I thought that their sun burned hair must never have been touched by any type of oil. These women, in fact, were there to visit their husbands who remained in the prison."[19]

The regime intentionally tries to break the spirit of political prisoners by sending them to remote prisons far away from their families so that they suffer psychological misery and lack of support from their family.

Disconnected and helpless, these families continue to be harassed by military officers. Having already stripped the family of several fundamental rights, officers have additionally been witnessed committing serious criminal offenses. Breaking and entering is commonly reported while instances of robbery are also very prevalent. The military also places obstacles in the families' lives by intervening in their educational, professional, and social spheres. Under the military's threats, schools bar the families of prisoners from their institutions and employers must force such workers to resign. Families lose their jobs and opportunities for financial stability in the future, as well as any hope of providing their loved ones with the simple medical supplies their lives depend on. Intentionally impeded, the family must bear the frustration of being sidelined while their loved one's health deteriorates. Simply stated, the prisoners die, needlessly, be-

cause of the military's merciless antagonism. This cruel practice entitles all implicated families to justice— compensation for the heinous practices committed by the military, as well as the physical and emotional pain the family has endured in striving to support the prisoner.

Once an inmate is released, they remain imprisoned within their daily lives. They are no longer being physically held captive, but their movements and activity are closely monitored by Military Intelligence. Officers wait for any incidence in which the individual, a continuing political threat, may be persecuted again. On especially momentous holidays and anniversaries, former prisoners are often detained and interrogated. The SPDC has many different ways of isolating the victim from society, especially within the economic and educational realms of their lives. The difficulty of one's assimilation into a new life has had dire consequences. Ma Khin Myo Myat was 24 years old when she finished her prison term, convicted and sentenced for participating in a peaceful rally for Aung Sang Suu Kyi. While her younger brother continued to work instead of going to primary school, Ma Khin searched for employment herself. Due to Military Intelligence surveillance, she was unable to obtain a job. She and her future employer were both threatened when she was offered any sort of financial opportunity. Meanwhile, she would be visited randomly by other officers, forcing her through interrogations which demanded personal information and encouraged her willing partnership and participation within the Military Intelligence agency. In 1992, the same year she was released from prison, Ma Khin Myo Mat committed suicide.[20] Cases such as these are directly attributable to the SPDC, making it simple to develop legal cases and prosecute specific offenders under international law. Ma Khin Myo Mat had many friends that suffered as a result of her death, including a mother who was mentally ill herself. Compensation for her daughter's disdainful supervision could be used to cure her own illness, symbolizing the recognition of the military's serious misconduct.

Ex-prisoners incur a variation of political discrimination in their new society, unable to receive employment once they reveal their former political prisoner status. Those who choose self-employment to avoid this bias continue to face barriers. Visiting the workplace frequently, military officers deter business and physically distract and frustrate the individual while working. Often times, officers suggest the prisoner write pro-SPDC literature in regards to the prisons in return for freedom from the constant irritation of their surveillance. This behavior places an obvious divide between the SPDC officers and the civilian population. Removing the leadership from power and expecting immediate assimilation is a preposterous notion, resentment running deep. Given what the prisoners and families have been forced to endure, it is not surprising they remain embit-

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tered. "In this case, I am not a very good Buddhist," admits Aye Chan, a professor in Burma and former prisoner. "I am supposed to get wisdom and I am supposed to forgive those who tortured me. Well, I'm sorry. I can neither forgive nor forget what I suffered in prison. My standpoint may be different than a young student leader. But I cannot forgive or forget."[21]

Injustice and Arbitrary Imprisonment

As has been the practice of the military regime since its beginnings, the SPDC has not allowed any opposition to their authoritarian rule, and has maintained an extensive network of Military Intelligence, police and government officials ready to detain anyone suspected of such dissent. The military in Burma has established and enforced laws curtailing civil and political freedom and utilized laws that allow it to crush any political threat. The SPDC's laws and regulations criminalize freedom of thought, the dissemination of information, and the right of association and assembly.

The most outdated, frequently abused law is the *1950 Emergency Provisions Act*, threatening a seven year imprisonment sentence for any individual who "infringes upon the integrity, health, conduct and respect of State military organizations and government employees, spreads false news about the government, or disrupts the morality or the behavior of a group of people." Furthermore, if that individual is found to "intend or cause sabotage or hinder the successful functioning of the State military organizations and criminal investigation organizations," they may be imprisoned for life. By means of this statute, the SPDC detains, arrests, and violates anyone whose beliefs challenge those of the military government. Hundreds of political activists have been arrested and imprisoned under this premise, often for relatively insignificant activities. Ye Htut was a student with friends within ABSDF, though he himself was never a participant in the group's activities. In 1995 he was found guilty by virtue of association, having sent copies of Burmese publications to friends abroad. He was imprisoned for seven years. In the same year, nine students began serving seven-year sentences for singing partial lyrics to a pro-democracy anthem. In 1998, U Nay Win was arrested for allegedly giving restricted information to the BBC and served 8 years for the crime.[22]

The most outdated, frequently abused law is the 1950 Emergency Provisions Act.

In addition, the Emergency Provisions Act violates international standards on multiple levels. Article 5 of the International Covenant of Civil and Political Rights asserts that,

> "There shall be no restriction on or derogation from any of the fundamental human rights recognized or existing in any State Party to

> the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent."

Similarly, in Article 29, the UDHR affirms that the fundamental tenets of jurisprudence are equally protected:

> "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations."[23]

The Emergency Provisions Act fails to elucidate a definitive stance on an individuals' rights and liberties. The law's draconian parlance leaves many opportunities for the junta to use this language in its favor, offering no veritable protection to an individual's freedom.

The 1975 Law to Safeguard the State Against the Dangers of Those Desiring to Cause Subversive Acts, often referred to as the State Protection Law, is perhaps the most criticized statute, inhibiting a citizen's axiomatic rights. The broadly compounded law grants the junta freedom to

> "pass an order, as may be necessary, restricting any fundamental right of a person if there are reasons to believe that any citizen has committed or is about to commit any act which infringes upon the sovereignty and security of the State or public peace and tranquility."

Coincidentally, this law was was promulgated following a series of riots by students and workers. This law is best known for its implementation in the arrest of Daw Aung San Suu Kyi in July, 1989. Granting the junta a license to violate the rights of citizens, the law has been widely condemned for its broadly sweeping policies. In their criticism, B.K. Sen and Peter Gutter dissect each article to reveal the contradictions and hypocrisies that lie within. They highlight the law's illegality under international standards, systematically violating the Universal Declaration of Human Rights.

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> "In restricting the fundamental rights of citizens, the following principles shall be strictly adhered to: The restriction order shall be laid down by the Central Board only; Only necessary restriction of fun-

> damental rights shall be decided; The duration of such restriction shall be kept to a minimum; In addition to regular review of the restriction order, earlier review of the order may be done as necessary; If sufficient facts for filing a lawsuit have been gathered, the person against whom action is taken shall enjoy the fundamental rights as provided in the Constitution, in so far as these rights have not been restricted; When any threat as described in Article 7 has ceased to exist, the restriction order shall be annulled immediately; Any person detained under this Law shall, after being released, not again be arrested and imprisoned on the same charges."[24] However, in Article 11, the UDHR assures for everyone a presumption of innocence until they are proven guilty in a public trial. Furthermore, as Sen and Gutter point out,
> "It is argued that if there is no full fact, the person against whom action is taken has to be released, not kept under detention— but this appears nowhere. In the absence of provision, natural justice applies. That which cannot stand trial, i.e. insufficient evidence, how can it be given legality by alternative of detention? The State Protection Law gives insufficiency of evidence a premium to hold a person's liberty to ransom."[25]

They conclude in making the additional point that, although the State Protection Law includes a clause entitling an individual to the rights in the Constitution, this body of standards was suspended over 25 years ago. As a result, there are no additional privileges granted to the individual.

The *Printers and Publishers Registration Law of 1962* was enacted soon after Ne Win seized leadership of Burma, granting the government the power to limit and control media entering and leaving the country. This law continues to be the primary means of censorship in Burma, requiring all books, magazines, periodicals, songs, and films to pass strict standards before they are released to the public. Accurately dubbed the Press Scrutiny Board (PSB), this agency also has the power to limit the amount of copies legally published and distributed. The decisions of the PSB are final and are not open to appeal. In 1975, the BSPP tightened restrictions once again, issuing specific guidelines in an attempt to lessen the uncertainties inherent in the system. The materials banned by the PSB include: anything detrimental to the Burmese Socialist Program, the ideology of the state or the socialist economy; anything which might be harmful to national solidarity or unity, security, the rule of law, peace, or public order; any incorrect ideas or opinions which do not accord with the times; any descriptions which, though factually correct, are unsuitable because of the time or circumstances of their writing; any obscene (pornographic) writing; any writing which would encourage crimes and unnatural cruelty

Although the State Protection Law includes a clause entitling an individual to the rights in the Constitution, this body of standards was suspended over 25 years ago..

and violence; any criticisms on non-constructive types of government work, any libel or slander of any individuals.[26] Included within these statutes is the threat of a blacklist for those writers whose work is judged to be critical of the government. Fines and prison sentences for those found in violation of the law are particularly stringent— perpetrators can face anywhere up to 7 years in prison and be fined in excess of 30,000 kyat. The law continues to be amended on a regular basis or whenever its scope needs to be widened.

The Printers and Publishers Registration Law is in stark contrast to Article 19 of the Universal Declaration on Human Rights, which states:

> "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive, and impart information and ideas through any media and regardless of frontiers."

Within every modification made since its original inception, the Printers and Publishers Registration Law has increased the extent to which it defies international law. This generalized ignorance which has pervaded many sectors of the regime has prompted the United Nations to condemn the arbitrary arrests and detentions which display a profound disregard for international law:

> "…the absence of an independent judiciary, coupled with a host of executive orders criminalizing far too many aspects of normal civilian conduct that prescribe enormously disproportionate penalties and authorize arrest and detention without judicial review or any other form of judicial authorization, leads the Special Rapporteur to conclude that a significant percentage of all arrests and detentions in Myanmar are arbitrary when measured against generally accepted international standards."[27]

Truth and Reconcilement

There has been an increasing amount of political activity worldwide that indicates a global consensus on perpetrators of crimes against humanity. The establishment of the International Criminal Court and ad hoc tribunals for Rwanda and Yugoslavia are modern examples of the world's sentiment that those guilty of gross human rights violations must be held responsible, even if their violations were committed in the distant past. For this to take place in Burma, the truth of the past forty years must be overtly displayed and those involved prosecuted. In order to extract the truth, Burma can model itself after other transitional governments that have constructed a means by which all the human rights violations are made evident and punished.

Within every modification made since its original inception, the Printers and Publishers Registration Law has increased the extent to which it defies international law.

Guatemala, South Africa, and Cambodia all have experienced legal situations which are valuable in assessing current circumstances within Burma. The transitional governments of Guatemala and South Africa are particularly relevant, as both were involved in the creation of truth and reconciliation commissions to aid in the peace negotiation process. Through lengthy discussions, the agencies were created which ended in one case, the apartheid regime, and in others, civil wars. These cases have contextual conditions comparable to those of Burma. The Burmese military regime lies somewhere in between South Africa's apartheid regime and Guatemala's ruling government because of its ongoing military campaign against various resistance groups while heightening repression against urban based student and pro-democracy forces.[28] In the study of both these countries, the basic goal was to favor national reconciliation. The working methods adopted by the two commissions were very different, but the spirit in which both worked and the considerable impact they had on their respective societies could inspire a process for truth and reconciliation in Burma.

South Africa

In the negotiations between the African National Congress and South Africa's ruling party, the Truth and Reconciliation Commission was established on July 26th, 1995. Its mission was to bring peace and reconciliation between the peoples of South Africa and help with the reconstruction of society. Dull ah Omar, the Minister of Justice articulated a vision which offered several guidelines for the country's reconciliation. Among them were the idea or reconciliation instead of revenge, knowledge and acknowledgement instead of forgetfulness, acceptance by a compassionate state rather than rejection, the restoration of moral order and not violations of human rights, and the respect of the law.

The objective of the commission was to promote national unity and reconciliation in a spirit of understanding that transcended the conflicts and division of the past. The commission suggested several methods in catalyzing the process:

The Truth and Reconciliation was established on July 26th, 1995 (South Africa). Its mission was to bring peace and reconciliation between the peoples of South Africa and help with the reconstruction of society.

1) Establishing a complete picture of the causes, nature and extent of the gross violations of human rights which had been committed since March 1969 by conducting investigations and holding hearings;
2) facilitating the granting of amnesty to persons to make full disclosure of all the relevant facts relating to acts associated with a political objective and the order to comply with the requirements of this act;

3) determining and publicizing the fate of victims and restoring their human and civil dignities, allowing them the opportunity to voice their accounts of the violations, being sympathetic to their needs while assessing reparations
4) Making recommendations of measures to prevent the future violations of human rights, documenting this information as well as all activities and findings of the commission [29]

Conducting a thorough and intensive investigation of the case, the Truth and Reconciliation Commission spent two and a half years presiding over hearings for the victims, the perpetrators, and the accomplices. In addition, over 20,000 witnesses were heard, projecting a broad perspective of experiences and opinions. The painful examination of conscience provided a catharsis for the society, offering an opportunity for the victims to publicly speak out, vocalizing the pain and suffering they endured. The investigation also allowed the individuals under prosecution to reveal their crimes, explaining their motives and periodically offering justification for their actions.

Guatemala

In Guatemala, officials modeled a commission after the Oslo Peace Accords. United Nations officials supervised an 18 month investigation of the crimes committed against humanity, questioning both victims and witnesses of human rights violations. Their accounts were complemented by a wide range of research, including CIA documents made available by the United States. Their goal was as stated:

> "to clarify with objectivity, equity, and impartiality the human rights violations and acts of violence connected with the armed confrontation that caused the suffering among the Guatemalan people. The commission was not established to judge- but rather to clarify the history and the events for more than three decades of fratricidal war."[30]

On February 12, 1999, "The Memory of Silence," a 3,600 page report was made public at a ceremony attended by tens of thousands of emotional victims and their sympathetic supporters. The establishment of this formal account, recognized by the United Nations, created a space in which the victims' stories and humiliation were told. The truth became exceedingly apparent, restoring a collective remembrance of Guatemala's brutal past. The community was finally offered a path on which to re-establish relationships and begin their healing process. The authors of the account were aware of the shock the nation would suffer as a result of

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hearing the depth and extent of the past violations, nevertheless, released the explicit history to create an indispensable awareness. In order for reconciliation to occur, the truth must be revealed. Only then could Guatemala establish a democratic state created by authentic justice.

Cambodia

In an attempt to facilitate the healing process for its civilian population, the newly elected government chose a totally different method in dealing with the Khmer Rouge. Though some of the leaders were placed on trial, there was an ineffectual activity within the prosecution and sentencing in the case. In an attempt to accelerate the country's reconciliation process, the government did little in the way of bringing back the past, representing the victims, or punishing the perpetrators. In lessening the significance of the barbaric events occurring while the Khmer Rouge held power, the government left an open avenue for which the same crimes could happen again. Intimidated by threats of Khmer Rouge rebellion and re-assumption of power, the government contained the issue within the state, reluctant to involve international mechanisms within the case. As a result, most of the leaders were released, the Khmer Rouge maintained a stronghold in Cambodia, and the majority of the population continued to be unhappy. Even with the transition of leadership to Hun Sen, Cambodians remain dissatisfied. The implications of his past with the Khmer Rouge keep him from representing the genocide on a national or international scale. When the United Nations recently initiated an effort to prosecute the mass murderers involved in the "Killing Fields," the Cambodian government suspended the trials and has disallowed any further action to begin.[31] Until the government changes its policy of impunity for the crimes committed during the Khmer Rouge regime, the prospect of reconciliation will remain grim, further delaying any meaningful transition.

Remedy and Reparation

"A person is "a victim" where, as a result of acts or omissions that constitute a violation of international human rights or humanitarian law norms, that person, individually or collectively, suffered harm, including physical or mental injury, ...

> "A person is "a victim" where, as a result of acts or omissions that constitute a violation of international human rights or humanitarian law norms, that person, individually or collectively, suffered harm, including physical or mental injury, emotional suffering, economic loss, or impairment of that person's fundamental legal rights.
> A "victim" may also be a dependant or a member of the immediate family or household of the direct victim as well as a person who, in intervening to assist a victim or prevent the occurrence of further violations, has suffered physical, mental, or economic harm."
> - United Nations Economic and Social Council

Once fair and just trials have ensued and guilt has been admitted and assessed, the door to emotional healing will begin to open. The rate and extent to which recovery takes place may depend largely on the retribution offered to the victims. Reparations are offered in many different forms, their gravity largely dependent on the decision of the courts in regards to the violations and the suffering they have endured. The construction of the reparations from perpetrator to victims can play a critical role in the healing process of victims and societies as a whole, and is a factor in preventing future violations.[32] Reparation continues to be an essential element in the administration of international justice.

Many standards have been created for the retribution of victims of human rights violations over extended periods of time, and it is imperative that each victim is compensated individually with respect to the affliction(s) they have suffered. In many cases, money and other forms of reparation are useless— victims who have had the luck of emerging unscathed from their experience seek simply the perpetrator's verbal declaration of wrongdoing, or their conviction of guilt and ensuing punishment. In other situations, the mental or physical damage incurred requires substantial monetary compensation for the treatment and rehabilitation necessary for the victim to resume a normal life.

The United Nations Economic and Social Council has outlined a set of guidelines specifically to be applied in the reparations and compensations of political prisoners and other victims of crimes against humanity. Among these standards are recommendations for those whose difficulties are not a result of physical or mental trauma. Due to their prolonged imprisonment, most victims holding jobs before their incarceration can no longer work in their former position, or even continue within their trained or previous profession. The social stigmatism revolving around political imprisonment is so prominent that employers will not hire ex-prisoners, causing financial repercussions for the prisoner and their families. Worse yet is the shame this provokes in the victim. A political prisoner under the dictatorial regime gets a pride of place only in the roles of heroes among democratic activists. In the specific case of Burma, the junta has convicted and sentenced the political prisoners under draconian laws and unfair trials. When the convictions are reviewed and set aside, it will be repudiation of these unlawful acts and vindiction of innocence that will restore the dignity of political prisoners.[33] In order to ensure this integrity, conscious steps must be taken to represent the arduous plight of the victim. Society needs to realize that the victim jailed for years was doing so to uphold basic principles, to liberate themselves and those around them, and to establish a life for everyone that is governed by democratic ideals. For these reasons, the victims should be celebrated among their

The United Nations Economic and Social Council has outlined a set of guidelines specifically to be applied in the reparations and compensations of political prisoners and other victims of crimes against humanity.

communities, while appropriate measures, including social reforms, also need to be implemented so that a more heroic view of the ex-prisoners is promoted. Perhaps these are the most difficult cases, as the reparations deemed necessary for a prisoner's personal justice are out of their, or any court's, control.

As Burma continues this plight towards democracy, it faces fundamental issues that must be resolved before the rule of the country is successfully handed over. The leadership needs to begin by addressing the human rights violations committed over the course of the junta's rule. The challenge lies in finding the delicate balance between satisfying the families of victims but not provoking a negative military response. A judicial system must be set up to account for the prolonged, massive violations and respond to legitimate claims on the part of the victims. The continuity of a successful transition depends on bridging the gap between military and civil society. Many victims of the past atrocities have become convinced that among the causes of the continued violations is the fact that many of the perpetrators of the past crimes have not been held accountable for their actions, and that the actuality of their crimes remains hidden. In this way, the truth of the past 40 years has been denied, allowing the continued practice of unfair arrest and inhumane containment.[34] It would be ludicrous to expect a victim to live alongside those they know to be responsible for their atrocities, yet have not acknowledged their guilt nor shown any sign of repentance.

The solution to this is to give victims and families a place to express their grief, humiliation, and stories of suffering causing the truth to be told and a collective remembrance to be established. Until this takes place, the search for justice will continue to divide the community of Burma rather than re-establishing relationships and contributing to a process of healing. Until and unless the truth is told and those who have committed human rights violations are held accountable, or unless those directly responsible and their accomplices confess their guilt, ask for forgiveness and give concrete signs of repentance, there can be no healing, justice, or real reconciliation. Without this, there is little hope for the future generations of Burma to survive in this moral crisis. "Forgiveness" in a political context is an act that joins moral truth, forbearance, empathy, and commitment to repair a fractured human relationship.[35] Such a combination calls for a collective turning from the past that neither ignores past evil nor excuses it, that neither overlooks justice nor reduces justice to revenge. It insists on the humanity of enemies even in their commission of dehumanizing deeds, and values the justice that restores political community above the justice that destroys it.

The continuity of a successful transition depends on bridging the gap between military and civil society.

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Seeking Justice for Previous Human Rights Abuses and Democratic Transition in Burma

*Zulma Niranda**

As a political transition unfolds after a period of violence or repression, a society is often confronted with a difficult legacy of human rights abuse. In attempting to come to terms with past crimes, both judicial and non-judicial accountability mechanisms have been considered to seek justice for such violations. One common concern, is whether there is a proper mechanism that will facilitate a transitional period towards democracy, reflective of the collective consensus of a society plagued by atrocities and cruelties that will accomplish justice for previous human rights abuses without damaging the possibilities of reconciliation? In seeking to prosecute individual perpetrators, offer reparations to victims of state sponsored violence, convene truth commissions, implement institutional reforms, or remove human rights abusers from positions of power, a society in political transition often confronts extremely difficult challenges when addressing its past. Burma will have to face this reality: of a democratic transition without neglecting the injustice that victims suffered under its current oppressive regime.

In attempting to come to terms with past crimes, both judicial and non-judicial accountability mechanisms have been considered to seek justice for such violations.

Justice is a fundamental component of the human rights cause. Without a measure of respect for the victims of serious abuse, the society will lack stability and thus a weak ground to lay the law. Without justice the next generation would be unable to accept the past and move forward. It would be unfair to those individuals who have suffered atrocities and have been misplaced from their homeland seeking refuge from a regime that denies individuality, neglects ethnicity, withholds freedoms and oppresses humanity. It would be unjustified to those who long for the peace

and freedom that has been robbed from their lives. This is one reason why it is necessary to deal with previous human rights abuses. Justice should not be abandoned as a realistic option. Many believe that seeking justice may harm the democratic transition and that the current regime may not relinquish power in fear that they would be humiliated. Perhaps an ideal approach to retrospective justice would be one based on a collective understanding of the past and some form of reconciliation where political needs may dictate. One thing remains certain; blanket amnesty for perpetrators of human rights abuses in Burma will place the society at risk of falling under such abuses again.

Military Rule:

In 1962, the Revolutionary Council, under General Ne Win, created the Burma Socialist Program party (BSPP) and published its first ideological statement entitled, "The Burmese Way to Socialism."[1] This publication, expressed opposition to the Constitution because, "it had defects, weaknesses, and loopholes that kept the nation from realizing its goals of socialism and national unity among all of the people."[2] With this as a premise, a new constitution was adopted in 1973 with additional centralized powers that securely established BSPP's position as the only legal political party in the country.[3]

This period of military rule faced popular unrest. Workers often staged violent strikes during 1974 and 1975 and students stood up in opposition to the regime.[4] As a result, the military government launched a campaign against the forces of ethnic minorities, the Burma Communist Party, and curtailed freedom of association, press, and assembly under the one-party government.[5] In March 1988, students and local people in Rangoon united in protest against the military government seeking political change from dictatorship to democracy. This was one of the most serious protests of the times, which resulted in the death of students from the Rangoon Institute of Technology (RIT). The riots lasted twelve days, and the government closed the universities and promised to investigate the deaths.[6] When the students returned in June, they requested answers about their missing colleagues and demanded the arrests of those responsible for the deaths and injuries.[7] The police and the military responded to the protest with force, which resulted in the arrest of hundreds of students and the deaths of many.[8] Once again the universities were closed.

The students knew, however, that "democracy" implied the right to choose the next leadership and thus, the end to the oppressive military rule.

The sentiment is that many of the young students who rose and chanted for democracy did not really understand its meaning or the implications of such a transition. The students knew, however, that "democracy" implied the right to choose the next leadership and thus, the end to the op-

pressive military rule. This movement of resistance and social unrest led the military to declare martial law and to establish a new dictatorship, called the "State Law and Order Restoration Council" (SLORC). As its leader, General Saw Maung suspended the 1974 constitution.[9] This move was justified by the military as a temporary need to restore law and order, improve economic conditions and organize multiparty elections.[10] When the elections did take place in 1990, however, the National League for Democracy Party defeated the SLORC, by approximately 82% of parliamentary seats.[11] This party was founded by Daw Aung Suu Kyi, who was placed under house arrest for six years after the election was declared void by the SLORC. They were surprised by the election results and began to kill, torture, imprison, and chase away all NLD party members.[12] Additionally, they continued to oppress the minority groups and many innocent people into forced labor in the war zones.[13]

The military government refuses to turn over control to the elected party until a new constitution is drafted. In 1993, to aid the NLD in this process, SLORC established a convention entitled, "Convening of a National Convention."[14] The convention was initiated with 702 delegates of whom 106 of the participants were elected representatives.[15] The remaining members included peasants, intellectuals, national races, and service personnel selected by SLORC.[16] Even after years of periodic meetings since 1993, a constitution is yet to be written. To improve the image of the military regime, in 1997, the SLORC was renamed the State Peace and Development Council.[17] In spite of its name, the SPDC continues to be the world's worst human rights violator. The United Nations Human Rights Commission has condemned their acts of torture, murder, rape, forced labor, and political imprisonment.[18]

Today a new generation of Burma still waits for the government to allow a parliament to form and for a peaceful transfer of government to take place. This transition, however, cannot occur without addressing the issue of seeking justice for previous human rights abuses. The debate on transitional justice can support or damage the current dialogue process of Burma. The main concern is whether a genuine national reconciliation can be achieved without seeking justice for the victims.

Experience of Other Countries and Lessons for Burma:

It is important to note that the experience of every transitional society is different. It is imperative, however, to examine other countries that have set procedures to deal with the question of impunity. The human rights movement has made real progress in dealing with perpetrators of the most heinous crimes. International criminal tribunals have been estab-

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lished to prosecute authors of genocide in Rwanda and the former Yugoslavia. It was also not so long ago that General Augusto Pinochet was arrested for crimes against humanity. It is on these pillars of national and international action, that Burma should examine the question of why it is necessary to deal with previous human rights abuses and not grant blanket amnesty for perpetrators.

If Pinochet had not been arrested in England in 1998, democracy may still be only a dream for the Chilean society. His arrest by the British police renewed debate about the legacy of the military government and awakened hopes of justice for many victims.[19] Those who collaborated under his dictatorship began to come forward and shed light on the horrific events. Although Pinochet was sent back to Chile for health reasons the legendary immunity had been totally shattered.[22] The Chilean court disregarded the 1978 military self-amnesty and ruled that the prosecution of ongoing "disappearances" were not barred, because the crime continued as long as the fate of the victim was concealed. The court lifted Pinochet's senatorial immunity and found him liable for prosecution for his role in the "Caravan of Death," a military group that executed and "disappeared" seventy-five political prisoners after the 1973 coup. Ultimately, Pinochet was formally indicted and placed under house arrest. This case serves as inspiration to those who have been victims of human rights abuses to challenge transitional justice arrangements that allow crimes to go unpunished. After the creation of the United Nation tribunals for Yugoslavia and Rwanda, and the 1998 vote to establish an International Criminal Court, Pinochet's arrest in London reflected and strengthened the international movement to end impunity.

Unfortunately, transitional societies have not always been successful when addressing the issue of retrospective justice. South Africa serves as a good example. The successive government preoccupied with dealing with the problem of the crimes committed by its predecessors, failed to give adequate attention to international law and proceeded to punish or, conversely to forgive in the context of international law alone.[23] South Africa had two options when confronted with the question of amnesty for perpetrators of human rights abuses: conditional or unconditional amnesty.[24]

Unfortunately, transitional societies have not always been successful when addressing the issue of retrospective justice.

Apartheid was recognized as a crime against humanity by resolutions of the United Nations General Assembly, the 1973 International Convention of the Suppression and Punishment of the Crime of Apartheid, and the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.[25] In spite of this recognition, South Africa's response to crimes of apartheid was approached from

a peculiar perspective. The situation was no longer a threat to international peace and the establishment of an international criminal tribunal under Chapter VII of the United Nations Charter was unjustifiable.[26] As a result, the negotiators opted for conditional amnesty and an interim constitution was drafted after months of negotiations.[27] This draft contained no provision for amnesty, until a postscript to the constitution on the subject of amnesty was drafted.[28] This addendum institutionalized a policy of reconciliation and a need for understanding:

> In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offenses associated with political objectives and committed in the course of conflicts of the past. To this end, Parliament, under this constitution, shall adopt a law determining a firm cut-off date, which shall be a date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty will be dealt with at any time after the law has been passed.[29]

In 1995, the Promotion of National Unity and Reconciliation Act 34 that enforced this policy of conditional amnesty was enacted.[30] This act identified reconciliation, amnesty, reparation and the search for truth as its principal goals and provided for the creation of a Truth and Reconciliation Commission.[31] The Commissions scope of inquiry was limited to acts constituted to be criminal under the law of apartheid. This decision was attributed to two separate factors. First, a desire to avoid suggestions that South Africa was engaged in a form of "Victor's Justice" directed exclusively at the vanquished and secondly, that the new government was determined to demonstrate a commitment to legality and the rule of law by avoiding the retroactive invalidation of apartheid's offensive laws.[32] The "gross violations of human rights" in respect of which amnesty was to be granted included the international crimes of torture and crimes against humanity.[33] Thus these crimes would remain unpunished.

The process of the Truth and Reconciliation Commission have been challenged as a political compromise between the broad amnesty that the apartheid leaders sought and the desire of the African National Congress to promote a peaceful transition. The problem with the South African model was that although it merits respect for bringing perpetrators forward it fell short of any "real" justice. However, the international community embraced the democratically elected government of South Africa and the abandonment of apartheid and accepted its "Truth Commission" as a substitute for justice.

The process of the Truth and Reconciliation Commission have been challenged as a political compromise between the broad amnesty that the apartheid leaders sought and the desire of the African National Congress to promote a peaceful transition.

The laws of apartheid have been recognized as expressions of power that failed to comply with the inner morality of the law. South Africa's truth and reconciliation model avoided denunciation of these laws and thus failed to restore faith in the legal process. Truth commissions provide exposure of past occurrences and prevent perpetrators from being unconditionally exonerated. The disadvantages, however, seem to tip the scale against this mechanism. Dictators have often justified human rights violations in their pursuit of power or in the implementation of a political ideology premised on the perceived advancement of a people's welfare.[34]

Prosecutions:

Prosecutions for human rights abuses raise many difficult questions. Although truth commissions can be viewed as a mechanism for seeking justice, the prosecution of perpetrators may be the best response. However, for practical reasons or on the basis of sound policy this may not always be the best option. Trials of government officials and military regimes can help to lay a foundation that no one is above the law and to demonstrate that democracy does not condone such behavior. Prosecuting human rights abusers can enhance the establishment of the rule of law and can serve to create a tradition of respect and adherence that will aid in the development of a democratic institution.[35] Prosecutions can also function as a deterrent for future oppressive behavior.[36] It can facilitate for the compensation of victims since their identity, the nature of their injuries, and their perpetrators are disclosed.[37] Most importantly, prosecutions can help to heal societal wounds by creating a mechanism where victims can seek justice.

The argument against prosecutions has been motivated by practical considerations.[38] Some countries do not have the power, popular support, legal tools, or conditions necessary to prosecute effectively, while others are too weak to prosecute powerful defendants.[39] Thus, the lack of an adequate judiciary or the interposition of a suspect military justice system may taint prosecutions that do go forward or delay prosecutions for such extended periods as to undermine their credibility or popular support. One possible remedy is to ameliorate these problems by focusing on fixing the judicial mechanism of a society. Perhaps they will understand that in their context of their experiences this process may be unavoidable.

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The current debate of transitional justice in Burma and its consideration of amnesty for perpetrators are a fragile topic. Refusal to grant blanket immunity can lead to opposition in the transition to democracy and reinforce the continuance of the military regime. Avoidance of reparations and justice to victims can create significant damage to a transitory coun-

try. A successor government in Burma has the obligation to deal with the legacy of human rights abuses. Prosecution is an ideal approach to seek justice, however, it should not be viewed as the only means to end impunity. Burma must not ignore other important initiatives designed to aid victims, rebuild societies and defend democracy.

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* Zulma Niranda is from the Law School of New York University, USA.

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Collapse of Transitional Strategy

*B.K. Sen**

The Israel-Palestine scenario has undergone a dramatic change. The Palestine Authority established under the mandate of the UN is being demolished. The State of Israel itself had emerged from a territory into Statehood after a grim struggle and supreme sacrifice over several decades. Ironically, its sworn rival, the Palestine Authority, coming almost on the threshold of statehood has swung back into wilderness, chaos and confusion. Out of 8 cities, 7 are under the occupation of Israel. Palestinian leader Yasser Arafat, himself, is within Israel's grasp. Within the Palestinian territories, there is internal turmoil and power struggles. The U.S. has declared unilaterally that it will no longer deal with Arafat. Bush has stated that there will be no move towards creating a Palestinian State until new leaders are elected under the government and sweeping democratic reforms are implemented.

The dialogue process between Israel and Palestine has been taking place for decades, notwithstanding jerks and breaks. It occupies a place of pride within the UN's history of peacekeeping efforts. The sudden U-turn and collapse of the dialogue process has caused deep concern amongst the protagonists of negotiation. It is intriguing as to why Rule of Law has become elusive in the given conditions of the Israel-Palestine conflict. A question arises, in the strategy of negotiation, in conflict resolution— has it lost its validity? Or, is this a graphic illustration of the failure of the international community in its commitment to the Rule of Law. Case studies are necessary, on this very topic, that is dialogue strategies and the role of the Rule of Law. Without sufficient obeisance to Rule of Law authoritarianism will continue to prevail. This has been the case in a number of ASEAN countries, and most particularly Burma. Whilst the junta is paying some regard to "talks" and "dialogue" it will instinctively oper-

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ate in ways that it could be accused of trying to scuttle the dialogue process it has to confront. Its modus operandi has for too long been anti Rule of Law and it will have to challenge itself to overcome this.

Endnote

* B.K. Sen is an Executive Committee Member of the Burma Lawyers' Council.

International Criminal Court

*B.K. Sen**

The International Criminal Court (ICC) Statute has been signed by 139 countries and ratified by 76. USA has not ratified the Rome Treaty The treaty establishing the ICC took effect on July 1, 2002, perhaps being the most important new human rights institution in fifty years. But hopes raised in that the principle of universal justice had been established were only momentary. The USA submitted a proposal to the UN in respect of the peace-keeping mandated in Bosnia. The Security Council rejected it. Hopefully the goals of the Court— prosecuting future Poll Pots and preceptors of war crimes, genocide, and crimes against humanity, have not foundered.

The matter arose out of US concern for its citizens engaged as peacekeepers being exempted from the Court's jurisdiction for an initial period of one year. The exemption would remain effective until the Security Council votes to lift it. It means that any permanent member could veto prosecution inevitably. Under Article 16 of the Treaty, the Security Council may request the Court to suspend any "investigation or prosecution" for a one-year renewable period. But as this is subject to vote after one year, it is subject to veto as well. The result can be a continued deferral. The US proposal suffers from another defect. Article 27 of the Treaty has provision for "irrelevance of official capacity." This means that the official capacity of peacekeepers could not be invoked as that would violate the principle that no individual is above the law. If perpetrators escape punishment in their national territory, Only ICC can hold the individuals accountable. Subsequently this situation was dramatically reversed and a unanimous Security Council resolution voted for exemption for one year. The fundamental principle that nobody is above the law has been violated and two classes of people under International Law have been cre-

The ICC is not only a forum of justice for victims, but could also act as a deterrent for the impunity with which these crimes were committed.

ated. Canada argued than it was illegal to allow the Security Council to interpret an international treaty.

Burma has been plagued by civil war and dictatorial regimes committing massive violations of human rights. Despite reports of massive violations, there has been no prosecution, not to speak of conviction, for the transgressions the government has committed. The ICC is not only a forum of justice for the victims, but could also act as a deterrent for the impunity with which these crimes were committed. For Burma it has an immense amount of relevance.

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