Legal Issues on Burma

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Special Issue: Rule of Law in Burma

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Preface

Peace, freedom and justice are the basic qualities of life which all peoples around the world art seeking to enjoy. These qualities are inter-related. The absence of peace and justice will inevitably lead to civil disturbance and conflict. There can be no peace without freedom and justice.

Justice must be based on respect for the people, their freedom and their rights. Our challenge is to ensure that justice is fair and applied equally to all people in every community regardless of colour, religion, race, social status, language, culture, origin and historical background.

In seeking justice, the Rule of Law plays a pivotal role. In spite of that the dictatorial rulers In various parts of The world misapply the term "Rule of Law"; they make unjust laws to protect their own power and benefits; they instruct the people to obey the law; while they are above the law. The laws are only for the people to obey. This is not the Rule of Law and is in fact the Rule of the Dictators. In such a society, justice is only for the rulers while justice for the people will ultimately fade away. Freedom and peace will be out of the question.

The Burma Lawyers' Council is an organisation which is seeking peace, freedom and justice for all people inside Burma without discrimination. We believe that peace, freedom and justice for all people will never be achieved unless the principle of the Rule of Law is genuinely applied in Burma. We wish to share the experience of the international community in developing the rule of law, the theory and practice of civil society, the independence of the judiciary, checks and balances on state power, self-determination and equal rights among different ethnic, with the people inside Burma by various means.

This second publication of 'Legal Issues on Burma' is an attempt to inform the international community about the situation of the people in Burma who are suffering due to the absence of the Rule of Law. However

due to limited resources and time of the BLC and restrictions by the ruling military government, this publication is not intended to be a complete guide to the problems in Burma. However it will provide a glimpse of Burma to encourage the international community to continue monitoring the situation from the perspective of the Rule of Law.

In conclusion, the BLC would like to firmly request the international community particularly the international Bar Association, lawyers' organisations, legal institutions and legal academics to support the struggle of the people in Burma to achieve peace, freedom and justice.

Presentation by U Tin Oo and the Central Legal Committee of the National League for Democracy

Introduction

U Tin Oo, as Chairman of the National League for Democracy and Daw Aung San Suu Kyi. The General Secretary of the NLD, were placed under house arrest in July 1989 while actively campaigning for the restoration of democracy in Burma following the 1988 student uprising. In December of 1989 U Tin Oo was arrested by the military authorities arid sentenced to three years imprisonment, which was later extended to five years. Following U Tin Oo's imprisonment. U Aung Shwe became the Chairman of the NLD, a position he continues to hold today. While U Tin Oo was being held in Insein Prison, the NLD won a landslide victory in the May 1990 elections.

In March 1995, U Tin Oo was released from Prison and re-elected as the Vice Chairman of the NLD in October 1995. U Tin Oo later became Chairman of the Central Legal Committee of the NLD. The Central Legal Committee provides advice and assistance to NLD members who are arrested or harassed by SLORC/SPDC officials, and provides advice to the NLD leadership on compliance with Burmese law and international human, rights law.

In November 1997, a conference of the International Bar Association, was convened In New Delhi, India, which was attended by over two thousand lawyers, including representatives of numerous Bar Associations from all over the world. During the IBA conference, A message from U Tin Oo, on behalf of the of the NLD's Central Legal Committee, was presented to the Chairman of the IBA together with a legal analysis paper entitled "Rule of Law in Burma under SLORC". This message and paper highlights the situation in Burma from the perspective of the Rule of Law. The NLD is also seeking the assistance of the international legal

communities, especially the International Bar Association, to provide legal expertise to support the democratic movement of Burma.

Address by U Tin Oo to the International Bar Association

May I, on behalf of the Central Legal Committee of the National League for Democracy, say what a pleasure and an honour it is to have this opportunity to send this message to the International Bar Association.

I hope that through this statement I shall be able to contribute towards a better understanding of the sorry state of the rule of law, judicial independence and human tights in Burma today.

As Chairman of the Central Legal Committee of the National League for Democracy, the political party that received the unequivocal mandate of the people in the only democratic elections held in Burma within the last thirty seven years, I have a duty to inform you of the malfunction of the rule of law, of the repeated violation of human rights and of official practices detrimental to the independence of the judiciary. The people of Burma are by nature law abiding, peace loving and gentle but under the present military government, known as the State Peace and Development Council (formerly the State Law and Order Restoration Council), they have been subjected to deplorable treatment.

The present military regime took power in 1988 after a ruthless suppression of a nation-wide pro-democracy uprising. After two years of rule by martial law a general election was held. The National League for Democracy won an overwhelming eighty two per cent of the parliamentary seats contested. Today, the results of the elections remain unacknowledged by the military government which continues to rule the country through arbitrary and draconian ordinances and laws.

SLORC/SPDC promulgated a judicial law, 2/88, which sought to create a new hierarchy of civilian courts. Although the new law contained formal guarantees of independence for those courts, in practice they are subjected to tight control, by the authorities at all times. Judges do not enjoy tenure and are under clear instructions to take the lead from the military authorities in the discharge of their functions. Thus although martial law courts have been abolished, political prisoners still do not receive fair trials. As has already been noted in the 1991 report of the International Commission of Jurists, most cases are tried in an arbitrary manner and verdicts are determined in advance of the trials. The administration of justice at present has become a casualty of the military regime. Not only are democratic activists charged unjustly under various laws and military

decrees and denied fair trials and due process of law, the judicial system has been emasculated over the years. Court proceedings are not open to the public and defendants are very seldom allowed access to counsel. Moreover, they are presumed guilty in advance and not given a fair chance to prove their innocence. There is no effective right of appeal to an independent higher forum due to the systematic interference of the military intelligence authorities. There has not been a single case where a political prisoner has been acquitted or given a lesser sentence by higher courts. Trials are a mere mockery of justice and punishments are far in excess of the so-called crimes. Moreover, most of the legal action taken against political prisoners falls into the *ultra vires* category.

Members, Supporters and sympathizers of the National League for Democracy are kept under close surveillance as though they were habitual offenders. Intimidation, harassment, oppression, violation of basic rights and perpetual persecution are daily fare for us. Legitimate democratic activities are deemed to be against the law. Political prisoners are detained for indefinite periods before charges are brought against them and they are not given the dignity of a proper trial. They are kept in unhygienic, crowded cells without adequate water or food and medical care is almost non-existent. Due to lack of required treatment, the spread of HIV in the prisons is alarming. There have already been a number of deaths and all prisoners can be said to be endangered to some degree. Worst of all, political prisoners are at times beaten and tortured cruelly and made to languish in solitary confinement at the whims and fancies of the jailers, who usually operate in accordance with the instructions of the military authorities.

To sum up, the rule of law is in dire straits in Burma today. Ii, the attached statement I have given explicit instances of the ways in which the independence of the judiciary is eroded, human rights violated and justice rendered farcical under military rule. Our struggle for democracy is a struggle for a system which will ensure that the law is the protector and not the persecutor of the people. We shall continue in this struggle until democracy has been established and basic human rights guaranteed it, our county. May I urge all readers to do their utmost to promote the cause for democracy, without which the rule of law cannot be restored to Burma.

Thank you

U Tin Oo
Chairman
Central Legal Committee
National League for Democracy

Rule of Law in Burma under SLORC/SPDC

By the Central Legal Committee of the National League for Democracy.

Rule of Law is amongst the foremost political objectives proclaimed by the State Peace and Development Council (formerly known as the State Law and Order Restoration Council). However the military authorities habitually treat members, supporters and sympathizers of the National League for Democracy, in a arbitrary manner which does not accord with The law.

Section 2(a) of SLORC/SPDC's Law No. 2/88 provides, in respect of the Law of the Judiciary that: "justice will be administered independently according to the law'. However in cases concerning members of the NLD, judgment is delivered in accordance with the directions of the military authorities, regardless of the provisions of the law.

Although Section 2(e) of the same law provides that "justice will be dispensed in an open court unless otherwise prohibited by law", judicial proceedings are frequently held in prison precincts. The trial judge cannot even inform the accused person's family or lawyer of the sentence which has been passed, without the permission of the military authorities. The military authorities have also been known to impose sentences orally at the time of arrest, before any trial.

At, accused has the right to conduct a defence and the right to appeal against the decision of the court in accordance with s. 2(f) of the above mentioned law. Furthers S 340(1) of the Code of Criminal Procedure (Act V of 1898) provides that "any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this code, in any such court, may of right be defended by a pleader (i.e. by a

lawyer)". This is reiterated in Para. 455(1) of the Courts Manual which provides "Every accused person may of right be defended by a pleader". In the majority of cases where the accused is a member of the NLD, access to and a defence by a lawyer is denied in flagrant violation of SLORC / SPDC's on laws and proclamations.

Maximum prison sentences are imposed on members of the NLD even in circumstances where the evidence is inadequate or inadmissible under the law.

Where an appeal or revision to a higher court is desired, the convicted person is required to a sign a power of attorney in favour of the person's lawyer granting the lawyer authority to file the Memorandum of Appeal or Revision within the prescribed period of time. However, when the relevant form is submitted to the prison authorities to obtain the signature of the convicted person, the form may only be signed and returned with the consent of the military authorities.

In matters prosecuted under s. 5(j) of the Emergency Act of 4950, the accused person may be detained for long periods while waiting for the approval of the relevant authorities for the prosecution to proceed. If the approval is not forthcoming, instead of releasing the accused, he or she may instead be prosecuted under .s. 505(b) of the same Act, which prohibits statements which are conducive to public mischief", and sentenced accordingly.

Fundamental legal rights denied

Frequently an accused *is* denied hail, in circumstances in which bail would ordinarily be granted, under s. 496 of the Criminal Procedure Code by classifying the offence as *"Si-Man-Chet"* or planned". In such cases, even though the accused may not have infringed the law, the court is obliged to impose a penalty, usually of imprisonment. In such cases the appellate courts will usually take the line of least resistance and decline to rectify or interfere with the orders of the lower courts. The appeal or revision is dismissed. Consequently the Pillar of Justice is no longer a pillar of strength or a refuge for the oppressed hut is like a reed quivering in the wind.

Sub-judice speeches

In special cases, a senior judge may convene a meeting with his subordinate trial judges prior to the commencement of the trial. At this meeting

the senior judge will express his or her opinion as to why the accused person should be found guilty of the alleged offence. Such a meeting amounts to a conviction before and without a trial.

Retrospective laws

On 10 July 1991, the SLORC/SPDC promulgated law No. 10/91, which amended the *Hluttaw* Elections Law. On the same day SLORC/SPDC issued order No. 4/91 which enumerated offences in respect of elected representatives. Both the law and order were to have retrospective effect, thus violating fundamental and sacred principles of law

The judiciary under the military

The military government of Burma has not abided by its own municipal laws nor by the international norms of justice. As it is neither an elected government accountable to the people nor a popular government ruling under a constitution accepted by the people hut a government that has usurped power by military force, there can be no rule of law and the independence of the judiciary is a mere scrap of paper, a mockery of the system.

Arbitrarily arresting members, supporters and sympathisers of the NLD who are simply working for democracy out of time belief and convicting them under laws meant for common criminals contradicts internationally accepted principles and norms of justice.

Members, supporters and sympathisers of the NLD who are jailed are frequently transferred to prisons far away from their homes. As a consequence, some imprisoned NLD members are unable to see their families for months who provide important moral support as well as the essential dietary supplements and medicines necessary for survival in the penal system under SLORC/SPDC.

Some prisoners of conscience are not released on the completion of their sentence.

Pyithu Hluttaw or Parliament

The *Pyithu Hluttaw* (Parliament) Election Law defines the word *Hluttaw* as the *Pyithu Hluttaw* and s. 3 provides that the *Hluttaw* shall be formed with the elected representatives of the various constituencies in accordance with the law. However, the *Hluttaw*, which was elected in 1990,

has still not been called or convened. By comparison, the Parliaments of democratic states are usually convened within weeks of the elections. SLORC/SPDC's refusal to call the *Hluttaw* is a blatant refusal to respect the wishes of the people.

Suppression of the Rightful Activities of political Parties and Persecution of members of the NLD.

Under s. 2(b) of the SLORC/SPDC Law No. 6/88 relating to the formation of political parties, a political party is defined as a party which has a political belief upon which its activities are based. Yet members of the NLD are not permitted to engage in legitimate political activities.

Occasions such as the commemoration of the anniversary of the founding of the NLD and the anniversary of the resounding victory by the Nt1) in the 1990 elections, may be considered as ordinary activities for a legally registered party. However, members of the NLD are subject to severe harassment by the authorities on these occasions. Delegates to the commemorative conventions are detained, those who have to come from the districts are denied bus and train tickets, the delegate's spouses are detained if they leave the convention, access to the venue of the conventions is blocked, delegates arriving for the conventions are forcibly turned away or taken away by car to a distant suburb. NLD delegates who are detained are charged under various laws such as s. 5(j) of the 1950 Emergency provisions Act (the law protecting the state from destructive elements), s. 505 (b) of the Penal code, i.e. statements conducive to public mischief, and s. (1) (f) (g) of the Habitual Offenders Restriction Act (HORA) which applies to habitual criminals and thieves, vagabonds, and those who do not have an ostensible means of livelihood.

In some police stations detained members of the NLD were kept like common criminals and in some instances were subjected to inhuman treatment. Female members of the NLD were put in the same cells as prostitutes and criminals, and on occasion held together with male detainees.

The authorities subjected elected *Hluttaw* representatives of the NLD who were detained to threats and intimidation, and used various unlawful means to compel them to resign as the elected representatives of their *Hluttaw* constituencies.

The authorities constantly interfere in the international matters of the NLD and restrict its activities such as the formation of organisational committees, the delegation or suspension of duties and responsibilities. Recruitment of new members is prohibited, party meetings are prevented or restricted.

It is prohibited to open an office of the NLD or to put up NLD signboards. Signboards which were put up with the permission of the Elections Commission were forcibly removed by the authorities. It was not permitted to fly the flag of the NLD at several NLD offices and has been forcibly removed. Owners of the offices, leased by the NLD, are threatened and coerced to withdraw their leases.

The NLD is not permitted to print, publish or distribute any papers. Documents that have been seized during raids on NLD offices are not returned. Legally published directives and documents setting out the policies of the NLD are seized as exhibits and those in possession of such papers are prosecuted. The distribution of video recordings of conventions and commemorative ceremonies held by the NLD are prohibited. A law was promulgated in 1996 to make the distribution of such videos an offence carrying a stiff prison sentence.

The wearing of the (unofficial) uniform of the NLD by an organisational committee in the *Irrawaddy* division was deemed to constitute an incitement to cause unrest disturbance of the peace and tranquility of the country. Every member of the committee was prosecuted and sentenced to imprisonment. The chairman of the committee has since died in *Myaungmya* Prison from a lack of medical care.

The authorities place difficulties in the way of business and social activities of members of the NLD. Matters relating to tax and revenue, transport and communications are subject to close scrutiny and the slightest mistake usually results in prosecution and imprisonment.

Members of the NLD are unjustly evicted from state owned apartments. In some instances house owners are prevented from accepting members if the NLD as tenants. There have also been cases where guest houses were ordered not to rent rooms to members of the NLD.

Civil servants related to members of the NLD have been arbitrarily transferred to remote areas NLD members who are medical practitioners have had their licenses to practice medicine withdrawn. NLD lawyers have also had their licenses suspended and some have been struck off the roll of lawyers.

Instigation or perpetration of violence against members of the NLD

On 9 November 1996, a convoy of cars carrying U Tin U, U Kyi Mating, Daw Aung San Suu Kyi and some elected representatives was attacked

by a group of about 200 persons with various weapons in broad daylight.

A first informational report was lodged with the *Bahan* Township Police Station but in spite of the fact that some security officers were present at the time of the attack, not a single person has been known to have been arrested in connection with the incident

The NLD, with a view to bringing out the truth and preventing any similar incidents from taking place in the future, proposed to the authorities that an independent enquiry panel comprised of respectable and trustworthy citizens be formed and that their findings be published for the benefit of the general public, hut the authorities failed to give any response.

A minister of the SLORC/SPDC government, who is also a secretary of the union Solidarity and Development Association (USDA), has openly called for the "elimination" of Daw Aung San Suu Kyi. He later explained that to eliminate meant to kill. The NED made an official request to the chairman of the SLORC!SPDC [or appropriate action be taken for this blatant violation of Burmese criminal laws, however the authorities imply turned a blind eye to the conduct of its minister. (It is worth noting here that the USDA was formed under a notification that enables members of the civil services to join the association. Thus a notification has been allowed to override a law, being Law No 6/88 promulgated by SLORC/SPDC, which prohibits all public servants, including military personnel, government servants, the police and all those receiving salaries from public coffers, from joining associations.)

On 22 November 1997 the Chairman of the Mandalay Division organizational committee of the NLD, who is also art elected *Pyithu Hluttaw* representative, was attacked and robbed on the Mandalay-Rangoon Express Train. Although the incident was duly reported to the police no action has been taken.

Local authorities have made threats against the life and security of members of the NLD living in their jurisdictions. Members of the NLD have also been conscripted as porters for the armed forces and several members have lost their lives as a consequence

Forced labour

Forced labour is a daily occurrence in all parts of Burma. Action is taken under s. 2 of the Village Act against those who refuse to supply "voluntary" labour to build roads, railways, bridges, dams and other constructions when ordered to do so by the authorities. Severe terms of im-

prisonment are sometimes imposed.

It is often difficult for households to supply the labourer required of them without substantial economic loss. During the hot season and during the rains, the health of labourers often suffers from the weather and from the lack of clean drinking water. Frequently the food and shelter is inadequate. In some areas, lives have been lost due to ill health and to snake bites.

Labourers are subject to harsh treatment and often required to provide food and shelter at their own expense. At the completion of their work quota, the labourers may have to bribe the authorities before they can return home. The ILO should take steps to prevent a misuse of Labour which is contrary to the spirit and letter of the ILO conventions as soon as possible.

General

There is no freedom of thought, expression or association in Burma under SLORC/SPDC. The laws and notifications imposed by SLORC/SPDC are sometimes contradictory, as has been illustrated in some of the cases above. Law No. 5/96 represents another contradiction. After declaring openly that it was the duty of all citizens to participate in the drawing up of the state constitution, the law prohibits the drawing of a constitution by anybody outside the National Convention convened by SLORC/SPDC.

Myo Myint Nyein and the 21 Prisoners' Case

"there is essentially no freedom of thought opinion, expression or association in Myanmar. The absolute power of SLORC is exercised to silence opposition and penalise those holding dissenting views or beliefs ..." Judge Rajsoomer Lallah, United Nations Special Rapporteur of the Commission on Human Rights, October 1996.

Introduction

In 1996 Myint Nyein and 21 other political prisoners, incarcerated in Insein Prison, were tried for their alleged attempts to maintain contacts with the outside world. The political prisoners were tried under the 1950 Emergency Provision Act and sentenced to a further seven years incarceration.

This is a true story of innocent persons who are now languishing under atrocious conditions in Insein prison and who are counting their days to freedom. An examination of this case will serve to expose the true nature of the numerous politically-motivated criminal cases taking place inside Burma.

Why is the case a significant one?

The significance of the case, importantly, is that it exposes clearly to the international community the true nature of the relentless political oppression being perpetrated by the SLORC/SPDC, their contempt for the rule of law and due legal process, and their utter disdain of world opinion about political and individual human rights. The second significance lies in the fact that among the prisoners are prominent members and supporters of the National League for Democracy which won a landslide victory

in the 1990 democratic elections but were prevented from taking the reins of government by SLORC/SPDC, the military junta which continues to hold on to power illegitimately.

The political prisoners attempted to send information about the desperate situation in Insein prison to General Secretary of the United Nations. According to judgement of the Rangoon Divisional Court, that act provided a compelling mason to impose a long prison sentence.

This case should prod the United Nations and the international community to consider how political prisoners inside Burma in such needy circumstances can be protected.

The case was tried in Insein prison the judgement, dated March 28, 1996, was signed by Kyaw Htun, Deputy Divisional Judge of the Rangoon District Court (Northern District Court). That document details the evidence and testimonies presented at the trial and the judge's reasons for finding all 22 prisoners guilty.

According to the accepted procedures, as stated in the Evidence Act and the Court Manual, the judgement of the court is a public document and people concerned in the case should have the right to access that judgement. SLORC/SPDC's obstruction, however, has acted to make it extremely difficult for ordinary folk to get any concrete information about cases tried in Insein prison. In spite of SLORC/SPDC's interference, information, about this trial was secretly smuggled out of the prison by supporters of the All Burma Students Democratic Front (ABSDF) who published the details in a paper, "Pleading not guilty in Insein".

This is the first time since 1988 that detailed information about the unjust trials in Insein prison have been exposed before the international community. That exposure is based directly on primary evidence - the original judgement of SLORC/SPDC's on court.

While the 1996 case was being tried, one of the prisoners, U Hla Than, passed away in the prison. U Hla Than, a lawyer, won the seat of Coco Islands for National League for Democracy led by Daw Aung San Sun Kyi in the 1990 May elections. He was arrested by the military junta for attempting to form a provisional government and was sentenced to 25 years imprisonment.

Without adequate medical attention, his health deteriorated in Insein prison and tuberculosis weakened his condition. Only when the situation became hopeless did the prison authorities allow him to be sent to Rangoon General Hospital where he died on August 2, 1996.

Another of the prisoners, U Win Tin, is a prominent journalist in Burma and is secretary of the Central Executive Committee of the National League for Democracy.

What was the charge?

The prisoners were charged on March 20 1996 under Section 5 (E) of the 1950 Emergency Provision Act which states. "… if a person aims to disseminate false information and has committed such an act or is in the process of doing so, knowing the news is not correct or there is enough proof that the news is not correct…"

The alleged punishable action was that the accused prisoners engaged in writing and distributing seditious literature and drawing cartoons and illustrations aimed at discrediting the State Despite knowledge and proof that information contained in these documents was false.

Allegations based on the Information of police Lieutenant U Khin Htay;

First Allegation:

That in 1996 Myo Myint Nyein and accomplices secretly wrote the "New Blood Wave Magazine' which contained news items critical of the State, in commemoration of the founding of Rangoon University, and that they distributed the document in Insein prison.

Second Allegation:

That the prisoners wrote a paper entitled "The Presentation of the Prisoners of Conscience Unjustly Detained in Insein Prison and Request and Demand on Human Rights and Politics in Burma" addressed to the Secretary-General of the United Nations.

Third Allegation:

That the prisoners brought radios secretly into the prison, and acted to redisseminate information despite knowledge that it was false. That they compiled news records and distributed them.

To support the allegations of the plaintiff, the following statements were made by the plaintiffs' witnesses upon Myo Myint Nyein.

(a) Myo Myint Nyein smuggled Time and Newsweek magazines into the prison by unlawful means and distributed them for other prisoners to

read.

(b) Myo Myint Nyein took responsibility for the layout of the magazine which contained seditious literature against the State, and which was written in commemoration of the Diamond Jubilee of the founding of Rangoon University.

(c) Nyunt Zaw, Kyi Pe Kyaw, Zaw Min, Phyo Mm Thei and Myo Myint Nyein discussed collecting information on events within the prison and presenting this information along with their demands, to the Secretary-General of the United Nations.

(d) Myo Myint Nyein held discussions with Phyo Min Them and Kyaw Min Yu (aka) Jimmy about a conference to be held in Vienna, Austria [UN Human Rights Conference] As a result, Phyo Min Thein wrote a paper in English on a short-sleeved prison shirt and smuggled it out of the prison.

(e) Myo Myint Nyein wrote "New Year Greetings for Aung San Suu Kyi from her Colleagues" on a white cloth and asked 107 prisoners to sign their names on it.

(f) Myo Myint Nyein collected news from visitors during prison visits and distributed this information in a news bulletin every Sunday.

(g) U Hla Than received from Myo Myint Nyein the pieces of thin Ajinomoto plastic bag on which U Win Tin had written a letter to the United Nations. U Hla Than concealed this letter in the handle of the plastic basket he had made.

Legal discussion

(1) Section 340 (1) of the Code of Criminal Procedure, in force inside Burma, provides as follows: "Any person accused of an offence before a criminal Court, or against whom proceedings are instituted under this Code in any such Court, may of right be defended by a pleader."

Article 455(1) of the Court Manual states: "Every person charged with an offence shall have the right to be defended by a pleader"

It is clear that in this case, however, the prisoners lost their access to legal defence guaranteed as a right by the Code and the Manual.

(2) The Court relied heavily in its judgement on the statement provided

by the police lieutenant U Khin Htay. According to Article 162 of the Code of Criminal Procedure, however, the statement of the police alone cannot he considered by the court as evidence to convict the accused.

Article 62 states: "No statement made by any person to a police officer in the course of an investigation under this chapter shall, if reduced into writing, be signed by the person making it, nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used as evidence (save as hereinafter) provided at any inquiry or trial in respect of any offence under investigation at the time when statement was made

U Khin Htay, the plaintiff in the case, was a police officer. The High Court of Burma has determined that the statement of a police officer cannot he admitted as evidence (U Seen Htun vs. The Union of Burma, 1980 Ruling of Burma (7); Mating Soe Myint vs. The Union of Burma, 1981 Ruling of Burma (28))

(3) The other statements which the court referred to in their judgement were those made by prison officers. They could on]y testify how and where they made a search of the prison cells, which materials were confiscated, and from whom. They were unable to testify that how the prisoners committed a crime.

With regard to a legal starch, the section 103 (1) of the Code of Criminal Procedure includes the following provisions:

i. Before making a search under this chapter, the officer or other persons [are] to attend and witness the search and may issue an order in writing to any inhabitant of the locality in which the place to be searched is situated so to do.

ii. The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses, but no person witnessing a search under this section shall be required to attend the court as a witness of the search unless specially summoned by it.

iii. The occupiers of the place searched, or some person on his behalf, shall be permitted to attend during the search, and, if present, shall be required to sign the list prepared under sub-section (2) in taken of the correctness thereof, and a copy of the said list shall be delivered to such occupier or person by the officer or other person making the search.

iv. When any person is searched under section 102, sub-section (3), a list of all thing taken possession of shall be prepared, and a copy thereof shall be delivered to such person at his request.

v. Any person who, without reasonable cause, refuses or neglects to attend and witness a search under this section, when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under section 187 of the penal code.

The prison officers' searches were, in this case, therefore, illegal because:

a. There was no attending witness while the searches were made.

b. The occupiers of the place searched were not permitted to attend during the search: the search was made only after the prisoners were taken outside their cells.

Moreover, the court accepted, considered and admitted the statements of the prison officers as evidence. This action was wrong in law. 11941 Rangoon Ruling (552):

(4) Time and Newsweek magazines are hardly illegal documents. They are freely available for everybody to purchase and enjoy reading outside the prison. Taking the magazines into the prison is not a criminal offence. According to accepted international practice as well as that specified in the Jail Manual, still in-force inside Burma, it is the right of the prisoners to enjoy such privileges. The action of taking such magazines into the prison, does not violate the provision of Section 5(E) of the Emergency Provision Act.

(5) Myo Myint Nyein stated that he wrote a paper on the rights and grievances of the prisoners to be presentcd to the United Nations through the International Committee of the Red Cross (ICRC) during their proposed visit to the prison. Because the SLORC/SPDC rejected the request of the ICRC to visit Insein prison, Mw Myint Nyein's intended action was frustrated. Consequently, along with other prisoners, he determined to attempt to present information directly to the United Nations.

It could be argued that had the SLORC/SPDC permitted representatives of the United Nations or the ICRC to visit the prison and to interview the prisoners, the desperate action of seeking secretly to take the papers outside the prison would not have ken necessary. Although such an action by Myo Myint Nyein and other prisoners may have violated the discipline imposed in the prison, it could hardly on that basis have warranted

such a severe and unmeasured punishment from the authorities.

The criminal law contains various rules which art meant to guide those determining whether any given conduct by a person is, or is not, a crime. The most fundamental of these rules is the general principle that a crime is constituted by:

(a) certain conduct by an accused person
(b) which causes a proscribed effect (such as death); and
(c) which is done with a guilty mind - with intention, recklessness or negligence. This principle is derived from the ancient maxim actus non facit reum nisi mens sit rea.

(6) The crime alleged against the prisoners is that of "Writing and distributing seditious literature and drawing cartoons and illustrations aimed at discrediting the State despite knowledge and proof that information contained in these documents was false".

Section 101 of the Evidence Act provides as follows: "Whoever desires any Court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist…"

When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. Accordingly, the burden of proof that the information contained in these documents was false, lies with the plaintiff.

The documents submitted by the plaintiff as evidence were:

1. A magazine in commemoration of the Diamond Jubilee of the founding of Rangoon University,
2. The testimonials of Prisoners of Conscience From Lnsein Prison Who Have Been Unjustly Imprisoned; Demands And Requests Regarding Human Rights Violations In Burma,
3. New Year Greetings for Daw Aung San Suu Kyi from her colleagues,
4. The news bulletin in 1994 and 1995.
5. A paper to present to Professor Yozo Yokota, former UN Special Rapporteur on Burma,
6. The New Blood Wave Magazine.

The plaintiff was bound to prove that, with reference to the specific paragraphs or sentences, the information contained in the foregoing documents was false. In the judgement the court was entirely unable to identify the false information. Myo Nyint Nyein and the other prisoners in

this case testified that they wrote the documents mentioned above except the last one, "The New Blood Wave Magazine".

The information contained in those documents before the court was unchallenged and was true. That is why, with the charge of the violating section 5 (E) of the 1950 Emergency Provision Act, the court could not properly move to punish the prisoners.

(7) In page No (7) of the original judgement, it was stated that a New Blood Wave Magazine" was found between the lake and the barrack of the jail staff. However, anybody, including the prison authorities, could have left any material there It was altogether obvious from the evidence, that the "New Blood Wave Magazine" was not found in the possession of the prisoners.

Myo Myint Nyein testified that he saw the magazine only in the court and he had never seen it before. Win Thein also made a statement that it was known that the chief prison officer, U San Ya, found the "New Blood Wave Magazine": that it was not taken from his possession and he was not involved with the magazine. No evidence to connect him with the publication was found in his room.

Aung Myo Tint also attested that, after being tortured, a book was shown to him and he was asked whether he wrote it or not. He denied it. Htay Win Aung also denied that hand writing in the magazine was his writing. Kyaw Min Yu also stated that he saw the magazine only in this court. U Win Tin also denied that he wrote anything in the magazine. Law Myint Maung testified that he had never heard about the existence of the New Blood Wave Magazine and had not seen it before he caught sight of it in the court, although in the magazine his name was mentioned as the author of some of the poems and articles.

In reality, the magazine was written by the investigators.

(8) The action which the prison authorities took against the prisoners was untenable. The actions of the prisoners were not crimes against either the 1950 Emergency Provision Actor any other criminal law.

If the prison authorities asserted that the prisoners offended against prison regulations, they should have acted under the provisions of the "Jail Manual", a direction still in force for the administration of prisons in Burma. It appears, however, that SLGRC/SPDC is not keen to advertise the existence to prisoners of the provisions contained in the Manual which are more liberal than the SLORC/SPDC's practices. The international community should exert more pressure on the SLORC/SPDC

now that it is clear that the SLORC/SPIJC is knowingly suppressing implementation of the regulations contained in the "Jail Manual" and substituting oppression of political prisoners by harsh and illegal practices which deny basic human rights in the prison.

(9) According to the provisions of the "Standard Minimum Rules for the Treatment of Prisoners", adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, contact with the outside world is a right of prisoners.

Section 39 provided as follows: "Prisoners shall be allowed under necessary supervision to communicate with their family and reputable fiends at regular intervals, both by correspondence and by receiving visits ... Prisoners shall be kept informed regularly of the more important items of news by the reading of newspapers, periodicals or special institutional publications, by hearing wireless transmissions, by lectures or by any similar means as authorised or controlled by the administration."

Despite those internationally-recognised provisions, the 22 innocent political prisoners remain incarcerated in Insein prison in Burma, convicted of the "crime" of attempting to contact the outside world, and are being detained by the *SIORC/SPDC* authorities.

Conclusion

The Myo Myint Nyein cast is a telling example for the international community to help people to understand the extent of the deprivation of human rights among the ordinary citizens of Burma.

Article (10) of The Universal Declaration of Human Rights provides: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in The determination of his rights and obligations and of any criminal charge against him..."

On the contrary, in Burma judges are appointed by the illegitimate SLORC/SPDC junta. The judges are not independent and not subject only to the law. They have to observe also the wishes of the SLORC/SPDC generals.

In cases of a political nature, there are no public hearings. Myo Myint Nyein's case was tried, devoid of public scrutiny, inside the walls of Insein prison.

All the prosecution witnesses were SLORC/SPDC officials. Documen-

tary evidence against the prisoners was fabricated. The assistance of the legal council for the defence was denied. Some prisoners were tortured and forced to give the false statements.

In this illegal context, Myo Myint Nyein and 21 prisoners were sentenced to seven years imprisonment, Seven years imprisonment is a long term for an innocent person to remain within brick walls. During that time, for a student, the opportunity for education will evaporate; for a business man, customers will be lost and business will collapse; for those previously in government service dismissal from employment follows; and, a person who suffers illness may die in prison. That was the fate of U Hla Than an experienced advocate and elected MP who was left to die while the case was being tried in the prison. Even the strongest and most committed person might buckle under the oppressive and hopeless conditions.

In a similar way to those involved in the Myo Myint Nyein case, every day. suspected people are being taken before the SLORC/SPDC's unjust, biased and hopeless tribunals. Throughout the whole county of Burma, thousands have been sentenced to long-term imprisonment for actions which, in a free democracy, do not constitute a criminal offence. Many have been tortured and many have died in the SLORC/SPDC's cells. These yet-to-be-told crimes by the SLORC/SPDC underline tragically that, inside Burma, there is no "rule of law".

The SLORC/SPDC junta and their usurping regime place themselves above the law, for tie will of the SLORC/SPDC generals has now become "law" in Burma. Judicial systems in Burma do not act for the protection of the rights of the people, but for the retention of SLORC/SPDC's power to rule.

Until the seven years sentence is up, Myo Myint Nyein and others will be counting their days for freedom, daily facing hardships, and suffering atrocities in the notorious Insein prison. This situation should convince the international community that, without the 'Rule of Law" in Burma, human rights' violations will continue unabated inside that country.

The Rule of Law and the Advocate's Role

It has long been recognised that a fundamental principle of the rule of law is the right of The accused to hire an advocate or a lawyer to defend them. The United Nations General Assembly resolution (No. 43/137) of December 9 1988 provides basic protection to those arrested, detained, or jailed. Paragraph 17 of that resolution makes two points. The first is that the accused must have an access to lawyers. Soon after the arrest the authority must inform the accused of this right. The second is that if the accused cannot afford to hire a lawyer, the prosecutor or other responsible authorities must arrange to hire a lawyer for the accused.

The current Burmese law also stipulates that the accused has the right to a lawyer. Article 340(1) of the Burmese Penal Code states that "Anyone being prosecuted at criminal court has the right to defend oneself with the help of a lawyer."

The Burmese Court of Law Manual in section 455 (1) reinforces the principle that each accused person has the personal right to mount a defence with the help of a lawyer.

Although the accused's right to hire a lawyer is beyond dispute in international law and in Burmese domestic law, the SLORC/SPDC have blatantly ignored this principle in the many cases that come before them. National League for Democracy (NID) Chairman, U Aung Shwe, in his publication (ABSDF) Letters to the SLORC Chairman, provides overwhelming proof, if it were needed, or this denial of justice.

Mr. Ko Khin Htun, Division's Youth Organiser

The situation of Ko Khin Htun provides the best illustration of this point.

Ko Khin Htun was arrested on November 6, 1995 by the then SIORC authorities for visiting a jailed friend, while this friend was working at a

plantation outside the jail. Ko Khtn Htun was accused of violating Article 5(g)/42 of the Prison Code. Since the time of his arrest, he has not been permitted to contact his family. Also, since he was first taken to court he has not been permitted to hire a lawyer. It was 70 days between arrest and sentence.

On the last day of the court hearing, January 17, 1996, the prosecutor was unable to produce any evidence (an alleged roll of camera film which was claimed to be the main evidence) against him. The prison officials who were supposed to he the eyewitnesses were never summoned to testify, but Ko Khin Htun was also not permitted to defend himself properly. The court decided that he was guilty of violating two Articles and jailed him for 4 years and 3 months.

Mr. U Win Tin and 22 other cases

Mr. U Win Tin and 22 other political prisoners who were serving long jail terms in Insein Prison were accused, on February 26, 1996, of violating various articles of the Prison Code and, subsequently, all were sentenced to 7 years additional jail terms on March 26,1996. The appeals from their families to the court, to the Chief Justice, and to the ruling SLORC members to allow the accused to defend themselves with the help of lawyers, were all ignored.

One of the alleged violations was the writing of a letter to the Secretary-General of the United Nations.

Mr. U Thein Htun and 3 other cases

U Win Them Htun the National League for Democracy Vice-Chairman for the Organising Committee at Insein Township, U Myint Kyoi, and U Win Naing, were all accused of violating Article 5(g), were prosecuted on April 2, 1996. The family members and lawyers who duly arrived at court were told that they would be informed by letter when they would be allowed to defend die cases. They were not permitted to see the accused. However, the next day on April 3 1996 the court continued to process the cases and sentenced each of the accused to seven-year jail terms without allowing them any chance to defend themselves with the help of any lawyer.

The Burma Lawyers Council has determined to expose the case examples of accused who have been denied access to legal support in the courts of Burma, so that the international community can understand what is happening and what a county ruled by military dictators without the rule of law is like.

Given the persistent practice of the courts under the SLORC/SPDC to deny independent lawyers access to the accused, and given that the decisions of the court arc based solely on what the SLORC/SPDC prosecutors forward as evidence, one can only imagine how far and how long it will be before justice will again prevail in the Burmese legal system.

Countless numbers of people all over Burma have been sentenced to long-term jail terms without having any access to a lawyer. Mid the number is rising. This indicator is a human tragedy and represents clear evidence of lack of the rule of law in Burma.

The Burma Lawyers Council appeals to the international legal community to advocate for a Burmese legal system based on the rule of law, for as long as they are deprived of the rule of law, the Burmese people will continue to suffer without redress from widespread human rights violations.

The Protection of Law for the Rule of Law

According to what we know about the history of human civilisation, human beings first lived in families. Later, they formed villages, towns, cities, and states and today live as larger groups based on geographical, racial, religious, political factors or other common purposes.

Individuals and groups of individuals in any society relate to each other through a set of broadly-agreed understandings defined as rules and laws. The same is true of the relationship between nations

Consider what might occur if there should be no respect for the rule of law in our society. Speculate if you will about what might be the outcome if the formal rules and laws which govern the relationships within civil society were to be overthrown. Without the rule of law, the mot~ powerful are always right while the weaker ones always wrong. We can find many examples throughout history where the more powerful safeguard their personal, family or junta interests at the expense of the powerless by might of arms. In society where the rule of law is replaced by armed might, individuals have no access to the protection of law.

The importance of rule of law for civil society is clear and beyond question.

This is exactly the situation in today's Burma under the SLORC/SPDC. The country and its people suffer because the rule of law has been replaced by the domination of the military junta who cling to power illegally and who continue in power by perpetrating acts of cruel suppression on the people who dare to challenge their right to usurp government. One incident which demonstrates the abuse of power and the fear which is engendered in a community by the use of "bully boys", follows. It may only be regarded as a minor matter to some, but it is indicative of the day to day harassment of political opponents at a local level.

The NLD party signboard, erected at the NB) party's Northern Shan State office in Lashio township, was destroyed unlawfully by the Local Law and Order Restoration Council Chairperson and his collaborators on February 22, 1997.

On that day, NLD MP U Sai Myint Maung from Lashio constituency, officially informed both the SLORC/SPDC's Shan State Administrative Commission in Taunggyi and Lashio Townships Administrative Commission that he intended to erect an NLD signboard at his home (used as NLD party's Northern Shan State office). A legally registered political party has the legal right to open a party office and to erect a party signboard. MP U Sai Myint Maung was exercising his rights as a member of legally registered political party, the NLD).

At ten a.m. on the day in question, SLORC/SPDC's Local Law and Order Restoration Chairperson Mr. U Ba Aye, together with other local officials, arrived at MP U Sai Myint Maungs office and demanded that the NLD signboard be removed, gave the reasons cited 1 - 4 below, and promptly left. Those reasons were:

(1) As a SLORC/SPDC local administrative chief, he had no authority to permit the setting up of the NLD signboard,
(2) (Local residents) did tot want to see the signboard in the area,
(3) The setting up of the NLD party signboard was not acceptable to local residents,
(4) He could not be held responsible if local residents who opposed the setting up of the signboard created problems for the NLD.

Chairperson U Ba Aye returned four times to demand that MP U Sai Myint Maung move the party signboard.

U Sai Myint Maung is an MP, a legally and democratically elected peoples representative. In democratic countries, MP's are always highly respected by government officials of all levels. In a country ruled by military dictators like Burma, it is totally the opposite. A provincial SLORC/SPDC official, such as the local administrative chief, could assert considerable power, not law, over an MP.

Although U Sai Myint Maung tried to reason with U Ba Aye, the SLORC/SPDC's local chief, his reasoning fell on deaf ears. Although the SLORC/SPDC agent was not able to sustain his objections, he would not agree to back down. All U Sai Myint Maungs reasons and explanations failed to convince the SLORC/SPPC's local chief.

When NLD MP U Sai Myint Maung asked those local administrative officials who came with U Ba Aye about the signboard issue, they admitted that they were only told by U Ba Aye to go with him and knew nothing about it and that they had neither heard nor seen any local resident who opposes the NLD signboard being set up in area.

At exactly 11:15 a.m. on the same day, the SLORC/SPDC's local chief came back with a gang of 15 "bully-boys" to U Sai Myint Maung's office and, shouting and cursing loudly, they started to throw bricks and stones at the NLD party signboard and destroyed it completely. U Sai Myint Maung immediately telephoned the local police, the local investigation unit, and the special investigation unit for help.

But no one came.

SLORC/SPDC's purposeful violation of U Sai Myint Maung's political and personal rights is no aberration on the part of a provincial operative who was over-zealous. Rather, such behaviour stems from a military dictatorship which is determined to hold on to power at any cost, and this attitude is reflected in their treatment of all those MPs elected in the 1990 election. For it is the democratically elected members of parliament who stand with Aung San Suu Kyi as the one great threat of all the usurping military junta represent.

In a country ruled by the oppressive regime like SLORC/SPDC that monopolists not only administrative, but also legislative and judicial power, who can people like U Sai Myint Mating turn to for justice and the protection of law?

The clear answer is that there is no-one in the administration or in the judiciary who can stand with them. Their recourse is to the people who suffer under the military tyrants, and to the international community.

Superficially, readers may view this case as that of an angry mob simply destroying a signboard set up at a house - a petty offence that has little or no significance. However, the action of the SLORC/SPDC-inspired mob was clearly politically motivated. The signboard itself is not the target. The motive of the mob was obviously not just to destroy the signboard, but to harass the NLD party's activities, and to intimidate the on-lookers who then kept their silence though fear of similar retaliation or worse.

In a country completely lacking the rule of law like Burma, all that the NLD party can do is to send a letter of a complaint. NLD Chairman, U Aung Shwe, sent one such letter to SLORC/SPDC's Chairman, who simply ignored it. SLORC/SPDC's lackeys continue to do whatever they

want to destroy the vulnerable NLD party.

The official view of BLC is that as long as the rule of law has not returned to Burma, harassment of the NLD party and its supporters will continue at the hands of the SLORC/SPDC's lackeys.

Rule of Law or Rule of the Military Regime?

The whole purpose of law is to allow human societies to organise themselves in an orderly manner and to have rules that are just and clear for everybody to understand.

Essentially, "law" deals with rules sanctioned by Parliament for the regulation of human society. Generally speaking, though social, religious, cultural, economic and political "rules" are important to a society or a culture, not all are translated into laws. Laws come to exist only when sanctioned by the Parliamentary process, and arc proclaimed.

The basic and natural disposition of law is noble. Law is essential for human society, and human beings create individual laws according to the diverse objectives, necessities, and desires which prevail in a particular society. While varieties of laws may come to exist, the foundations of civil society require strong criminal and civil legal systems.

Criminal law and penal codes are stated negatively in that they prohibit certain behaviours by codifying them as crimes, such as murder, rape, robbery, theft etc. Moreover particular criminal laws are promulgated with a specific intention in view, such as laws relating to gambling or narcotics.

Civil law is a systematic way to address the resolution of disputes between citizens, generally, hut not exclusively, over possessions. In modern States, issues such as boundaries between properties, loud noises etc are also matters around which civil laws built. Other aspects of the legal system in modern State address a range of areas such as consumer law, industrial law, company law, and anti-trust laws

These allow society to organise its business, trade, labour, investment and other aspects of a modern democratic State in a systematic way and in a manner which produces certainty for its citizens.

The Rule of law in a society depends for its integrity on more than the respect of the citizenry. It will be eroded seriously if the administrative authorities subvert the process by undermining and destroying the rule of law and by enacting "laws" which motivated by self-interest, ideology or the manipulation of people, turn the legal process into one of suspicion, distrust and fear.

The Burma Lawyers' Council has analysed the situation in Burma. The only conclusion that they can come to is that there is now no rule of law in Burma. The rule of law has been replaced by rule of military by means of dictatorship. The dictatorship use power as their main tool to govern through fear, not law.

There is no legal criminal, civil, commercial nor administrative certainty in Burma. The law, as it is applied, is ad hoc and a hotchpotch of expediency.

The purpose of law in any society throughout all of humankind has always beet, for the common good and for harmony. The faults, where they exist, is not with the law itself but with the rulers.

Nelson Mandela the President of South Africa, is someone who trusts and respects the Rule of Law and therefore publicly accepts the absolute independence of the judiciary. As President, he recently made a proclamation regarding an electoral boundary matter. This was challenged in the Highest Court, the Constitutional Court. The Court decided that the President's proclamation was unconstitutional and that the president had exceeded his power.

That very night President Mandela in a public media conference told the nation that he honestly believed that the Parliament had given the President the power of proclamation, but as the Constitutional Court found this not so, he respected the decision of the court. He further said that "This decision clearly demonstrates that in the Republic of South Africa, even the President is subject to the law."

In Burma, there have been many ruling scenarios: all to varying degrees have not respected the rule of law. The current mien, SLORC/SPCD often express their disregard for law and claim their superiority over the laws. An incident which occurred in Burma in November, 1996, clearly demonstrates their disdain for the rule of law.

The Union Solidarity and Development Association (USDA), an organisation collaborating with the ruling military regime in Burma, held a

ceremony for submitting the applications for the membership of SPDC in the compound of a Primary School in Inn-Daw township. During the ceremony, the minister, U Win Sein (The Ministry of Rail Transportation) attended and furiously provoked the public by saying that "Daw Aung San Suu Kyi should be exterminated". Do you understand the meaning of 'exterminated'? "Daw Aurtg Sm, Su Kyi should be exterminated" means she should be killed.

Those spoken words from the loud speaker were clearly heard by villagers and monks with their own ears, who attended the ceremony.

If such an incitement is made in a county where the Rule of Law is observed, the perpetrator, in all probability, would have been charged. Section 153(A) of the Penal Code, the criminal law in Burma, states that:

"…Whoever by words, either spoken or written, by signs or by visible representatives or othenvise, promotes or attempts to promote feeling of enmity or hatred between different classes of (persons resident in the Union) shall be punished with imprisonment Much may extend to two years, or with fine, or with both..."

Section 107 which is also relevant to the military Ministers actions, is a provision for abetment of a thing. It states inter alias A person abets the doing of a thing, who first instigates any person to do that thing"

In spite of the foregoing provisions in the Penal Code, U Win Sein, one of the most supreme military authorities, was riot subject to any action.

He would in fact be aghast to think that he could or should be subject to the law of the land. That circumstance provides a start contrast with a civilised President like Nelson Mandela who not only recognises and acknowledges that in South Africa the President is subject to the law, but actually rejoices in it.

In Burma, there is no legal mechanism to enable the authorities to prosecute U Win Sein for what is prima facie an offence. There is no corresponding mechanism to enable a victim to take either criminal or civil action. The Burmese law is clear, but it is really only decorative, existing only in books.

One can imagine that a leader like Daw Aung San Suu Kyi would embrace the rule of law in the same humble way that President Mandela has.

This day will come, and it is then and only then that the Burmese people will truly have freedom.

The Rule of Law and Unjust Laws and Orders

In a country without the rule of law, or in a county where its citizens no longer respect or obey the promulgated laws, no one in that country can expect to live in peace, prosperity, and with personal security. The citizens of such a county have to live a life of constant fear, at all times of the day and night, watching out for people in authority and surveying fellow citizens with distrust, like the Burmese saying "a frighten crow eating its dinner," they feel they have to be constantly vigilant for any danger while carrying out the day-to-day basic functions of life.

The "frightened crow" condition of the country of Burma is due to two things. Firstly, there is an ineffective system of civil government that has weakened the rule of law. Secondly, in order the prevent their grip on power from being challenged and eroded by the people, the ruling group of generals have issued unjust laws, orders, or decrees and forced the people to conform at the real and perceived threat of gun-point. When that happens, as it has in Burma and indeed wherever such a situation occurs, the people lose all freedoms and rights and have to live in constant fear of the ruling junta and their collaborators, and the rule of law, if it ever existed, disappears in a country like that.

All citizens of a nation therefore have an obligation to examine, study and understand what the law is and especially what the rule of law means to them. This obligation can only be realised, however, if there is a government that also provides opportunities and services to build an informed and educated citizenry

One of the first things that citizens need to ask or discuss is: Does anything drawn up and put into force by a group of people or organisation really become a law? How do laws and decrees differ? These understandings must be studied and assessed carefully. Citizens also need to consider for themselves how they should and can act in the face of unjust laws, orders, and decrees.

In the light of this discussion. let us now look more closely at what is happening in Burma by looking at a particular issue which centres on the military dictatorships assertion That there is a legitimate government in Burma which has a "legal fold" governed by them.

SLORC/SPDC issued a decree No.3/89, dated November 3, 1989, declaring that the four minority armed groups in that country were outlaw groups. The decree read:

"…The SLORC/SPDC's Chairman believes that the objectives and actions of the following groups, their subordinate groups, and other groups that have a relationship with these groups are harassing and endangering the rule of law of the Union of Burma, law and order maintaining activities, and The peace and prosperity of the people."

The Kachin Independence Army (KIO)
The Karen National Union (KNU)
The New Mon State Party (NMSP), and
The Karenni National Progressive Party (KNPP).

During the same year, the SLORC/SPDC also approached the armed national minority groups and proposed a cease-fire to them. The SLORC/SPDC's cease-fire strategy was and is aimed at persuading the armed national minorities to abandon the path of armed struggle and to return to their so-called "legal fold". What the SLORC/SPDC really want to convey is that they, the SLORC/SPDC, are somehow inside the legal fold, while the armed minority groups are outside. If they were able to demonstrate to the world that the armed minority groups are returning to the legal fold, the SLORC/SPDC would reinforce their claim that, although they usurped power from the democratically elected majority, they are the legitimate government of Burma.

Thus the words "returning to legal fold" is what the SLORC/SPDC eagerly wants to hear from the armed national minority groups, and repeatedly claims that it is occurring.

The Karen National Union's news release (page 34) on the KNU-SLORC/SPDC cease-fire negotiations, however, is revealing in that it generally exposes what can only be called the lies and propaganda of the SLORC/SPDC.

…After verifications with each of the armed groups. KNU have discov-

ered SLORC/SPDC's outright dishonesty regarding their claim that the 15 armed national minority groups have abandoned the armed struggle and returned to legal fold. The KIO and NMSP, for example, have confirmed that they have never entered any agreement with the SLORC/SPDC to abandon the armed struggle and to return to legal fold. However, in the cease-fire ceremonies, the SLORC/SPDC made a one-sided and false publicity that these were the ceremonies of KIO and the KMSP abandoning armed struggle and returning to legal fold. Similarly false publicity were made by the SLORC/SPDC in the cease-fire ceremonies with all other armed minority groups, saying that all IS armed national minority groups have fully understood the SLORC/SPDC's good intentions and [have] abandoned the armed struggle and returned to legal fold. The SLORC/SPDC'S employing such an unscrupulous means to secure the political gains is truly regretful, and the KNU have never accepted the SLORC/SPDC's manipulations by using the words "return to legal fold."...

In another publication the Burma Lawyers' Council has given a detailed account of the SLORC/SPDC's claim to legitimacy and their attempts to do this through legal and political means.

If they truly believed their own claims, it is surprising that the SLORC/SPDC have not revoked Decree No.3/89 which outlaws people they now call legitimate.

According to the 1908 Outlaw Act of Burma, anyone making contact with an outlaw group is liable to punishment. This law allows the SLORC/SPDC to prosecute anyonemaking contacts with KIO or NMSP, despite the cease-fire agreements, because these groups are still outlaw groups according to the 1989 decree. The reality is that the SLORC/SPDC manipulate the situation to their own advantage. They may adjust their relationship with time cease-fire groups to suit their purposes. At times, the SLORC/SPDC choose to ignore any civilian making contact with the cease-fire groups, whilst at others they arrest and prosecute civilians making such contacts. Countless civilians have been jailed for periods up to three years for making contacts with the cease-fire groups. The rule of just law for the people of Burma remains a goal, while the SLORC/SPDC rule with their "laws" which are deliberately and objectively unjust.

The Burma Lawyers' Council is therefore committed to doing all it can to restore the rule of law in Burma, so that the people can live without fear.

The Rule of Law and Retrospective Laws

The rule of law acts to deter those who have power in society from abusing their power.

However, one insidious abuse of power where the rule of law is cast aside, is when those who usurp the role of law-making issue a "law" with retrospective effects. Retrospectively as a principle in law-making is to be avoided in civil society, where the rule of law remains paramount. When retrospectively is used as a powerful weapon by those who usurp the law-making process to entrap political opponents and their supporters, people who are targeted in such a society are condemned to live a life of total insecurity and constant fear of being arrested and punished.

Through the operation of retrospective "laws" which reach into the past to encompass actions which were at the time legal, their past deeds in the pursuit of the good society have now been proclaimed to be illegal.

In all human societies where the rule of law prevails and provides certainty about such matters, the decision to punish a person should be based only on the laws existing at the time he or she has committed the alleged offence. This is an important principle of the rule of law.

The principle that a law is not to have a retrospective operation is well-know., within the legal profession in Burma and it has been strongly supported in the legal system of Burma during the time of democratic government. The military take-over of the government in 1962 saw the beginning of its demise, and it has vanished completely under the regime of the SLORC generals who freely issue new laws with retrospective authority. SLORC's notorious abuse of retrospective legal power to punish the politicians who oppose them and the multitude of political prisoners is a well-known and well-documented

Retrospectively and the Election Law

The way in which the SLORC dictators abused the 1990 election results by changing the 989 Election Law to suit their purposes, is an example of how they have abandoned the rule of law.

On July 10. 1991, SLORC, issued the 1991 Election Law (to amend the 1989 Election Law). Of course amending a law is an accepted practice in every democratic society, but it is accepted also in those same democratic societies that amendments will not make the amended law retrospective in its scope. In This case, however, the SLORC generals acted to make a law retrospective by amendment to suit their own purposes.

Article 2 of the 1991 Election Law stated that:

"This law is deemed to take its effect starting on May 31, 1989, the date the parliamentary election law was enacted."

The retrospective power of the law is thus obvious.

It soon became evident that the SLORC were also amending the 1989 Election Law retrospectively so that they could punish some opposition MPs, particularly those from NLD patty, and claim that their actions were lawful, therefore legitimate. After the election of 1990, the SLORC concluded also that the 1989 Election Law failed to provide them with enough power to subdue or control opposition MPs. With the amended and retrospective law, they gained the power to suppress any opposition MP and claim legitimacy.

Included in the amended version of the 1989 Election Law is a complete inventory of offences, so that it is easy to implicate any MP by one means or another for what they have done in the past. Many MPs for the NLD patty have suffered and continue to suffer under the retrospective election law, and this retrospective law by SLORC is the true symbol of the complete lack of the rule of law in Burma.

Announcement No. 1/90

Announcement No. 1/90 is treated as a law since the SLORC have always said that their Announcements have the fill force of a law.

According to the 1989 Election Law, the SLORC have no choice but to convene the
National Assembly and to hand over their power to NLD party, which gained a landslide victory, By the Announcement No.1/90, the SLORC

decreed that the elected MPs have the duty to draft the national constitution only, not to rule The country.

Even though this Announcement was issued long after the election was over, the SLORC made it retrospective thus avoiding the transfer of power to NLD party.

Order No. 5/96

Announcement No.1/90 specified that an MP has a duty to draft the national constitution. According to this Announcement MPs would be participating in constitution drafting. Also, NLD MPs would have made up the majority of the MPs who were drafting the constitution, because of their landslide victory at the polls. On the contrary, only a minority of the MPs carefully selected by SLORC were permitted to participate in the Constitution Drafting Assembly.

Now, without warning, the SLORC have changed their minds again, and replaced their Announcement No.1/90 with Order No.5/96 (issued in 1996) to stop all MP's from participating in drafting the National Constitution, Law No.5/96 might replace Announcement No.1/90, but it had to rely on the despised concept of resorting to retrospective power in order to prevent the MPs from participating in the drafting of The National Constitution.

Daw Aung San Suu Kyi

The case of Daw Aung San Suu Kyi who was put under house arrest for six years under the SLORC's Law To Protect And Safeguard The Nation From The Danger Of Those Who Want To Harass And Destroy It further illustrates the SLORC's contempt for the rule of law.

According to Article 14 of this law, an accused could be detained only for a period of 6 months for each arrest, and up to maximum of 3 years. When Daw Aung San Suu Kyi had been under house arrest for 3 years, the SLORC, rather than set her free issued a retrospective law to extend her detention to 2 more years.

In a country where generals in power are freely issuing and amending the laws to suit their own purposes, there can be no rule of law. The use of retrospectively in lawmaking is evidence of the complete lack of the rule of law in Burma.

Just Law Required for the Rule of Law

When speaking about the rule of law, what kind of the rule of law are we talking about? Does it mean any "law" will do, no matter what kind of law it is? Are we required to respect and accept the rule of that law?

The common understanding of the rule of law really means the rule of just law, not unjust law. Unjust laws subvert the peoples aspirations and the rule of law while they prevail. Nelson Mandela, for example, denounced the legal system apartheid in South Africa as one which served to protect racial discrimination, not the rights of people under the law

The kind of law emanating from closed-door discussions by a handful people in power whose sole objective is strengthen or perpetuate their grip or, power totally ignores the peoples desires and is far from being a just law.

Although promulgated during the British colonial period, the Burmese Criminal Laws, Criminal Proceedings and Civil Laws are believed by most people in Burma to be systematic, correct, just, and acceptable. Those laws have been used frown the time of independence throughout the era of parliamentary democracy until today.

The Burmese Criminal Proceedings contain provisions regarding arrest, request for detention, sending to court, prosecution, release with re-arrest option, unconditional acquittal, and interrogation. The police can make an arrest only with an arrest warrant properly issued by the court, except in exceptional cases hut, even then, according to law. The police can detain a person for only 24 hours after arrest. If the interrogation cannot be completed within 24 hours and further detention is needed, Article 167 of the Burmese Criminal Proceedings states that the police must bring the accused before the court and petition the court for a detention order. If the court decides that further detention is warranted, up to 30 days of further detention can be imposed on an accused person whose alleged of-

fence incurs a jail term of 7 yean and above, and IS days for those who receive less than 7 years sentence. Detention beyond these periods is not permitted. If not prosecuted after the detention period, the accused must be fired.

Being arrested is, of course, the ultimate deprivation of a persons liberty and the law is very strong on the subsequent prohibitions. While the law authorises the police to arrest and detain people, the law also authoriscs a fast release of those arrested without sufficient evidence.

During the period of rule by the Burmese Socialist Program Party, contrary to the aforementioned principles, the military dictators issued a Law Of Protection Against The Danger Of Disturbance And Destruction Of The Nation. The real objective of that law was to empower the ruling military junta to arrest and detain anyone suspected of plotting' against them. A separate law for dealing with the cases of rebellion against the nation was not needed as Article 121 of the Criminal Law already contained such a clause. The ruling juntas have continued to abuse their power by using this law for over 20 years. They arrest and jail anyone on the slightest suspicion of opposition, regardless of evidence.

The 1975 Law Of Protection Against The Danger Of Disturbance And Destruction Of The Nation, issued by the Burmese junta clearly conflicts with the Criminal Proceedings. The 1975 law provides the police with the power to continue to detain the accused beyond 24 hours without the need to obtain a further detention order from the court. It is in breach of the rule of law and constitutes a serious violation of human rights. Any decision to detain an accused person beyond 24 hours should not one for the police, but a determination for the court.

An order from the three-person Central Committee (consisting of interior minister as the chairman, and defence and foreign ministers as members) who oversee this part of the law, provided the police in effect with a standing order to enable them to detain suspects for a period of 3 years without formally charging them and bringing them before the court. As the Central Committee is made up of the top echelons of the ruling Junta, the police can obtain a detention order easily and quickly whenever they want to arrest and detain anyone.

This "law" is implemented. The police can and do detain suspects for up to 3 years without allowing them access to a lawyer. Daw Aung San Suu Kyi has been put under house arrest by the same law and the same Central Committee. From the time of BSPP junta to the SLORC junta (now SPDC), thousands and thousands of innocent Burmese have been arrested and detained under this same law and the same Committee author-

ises their detention.

Documentation exists to demonstrate that people arrested and detained under this law arc subject to more torture than ordinary prisoners. Countless of people have died, many have suffered mental breakdown, and innumerable others (particular female detainees) have had their futures completely ruined from tortures while in detention.

This is not the rule of law.

The rule of law devoid of justice is not the rule of law at all, and in Burma's case, it is the rule of the militant.

As long as the rule of law is absent from Burma a tragic situation for the Burmese people will be perpetuated, as uncontrolled violations of human rights by the ruling junta continue to persist at this present moment.

The Independence of the Judiciary:

The Need for Judicial Independence in a Future Democratic Burma

The recognition of judicial independence by the international community

The principle of judicial independence has been recognised and endorsed by the international community a, both traditional proscriptive international instruments, such as international conventions, as well as various international normative-Setting texts.

The *Universal Declaration of Human Rights (1948)* recognises that: "Everyone is entitled in fill equality to a fair and public hearing by an independent and impartial tribunal, *in* the determination of his rights and obligations and of any criminal charge against him." (Article 10)

The *International Covenant on Civil and Political Rights (1966)* reaffirmed the importance of judicial independence in Article 14(1) as follows: "… in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

These international proscriptive instruments embody the international community's basic acceptance of the principle of judicial independence.

The United Nations General Assembly in Resolution 40/32 of 29 November 1985 and 40/344 of 13 December 19&5 ut~anin1onsly endorsed the basic principles of the independence of the judiciary".

More recently, in the context of the Asia-Pacific Region, the Sixth Conference of Chief Justices of Asia and the Pacific was held in Beijing in 1995 and adopted the "Statement of the Principles of the Independence of the Judiciary" (known as the "Beijing Statement of Principles")

The Beijing Statement of Principles embraced the notions contained in Article 10 of the *Universal Declaration of Human Rights* and Article 14(1) of the *International Covenant on Civil and Political Rights.* The Statement asserts that an independent judiciary is indispensable to the achievement of the fundamental human right of a fair trial and public hearing by an impartial tribunal.

The Statement recognizes that a necessary component of an independent judiciary requires that a tribunal must decide matters "in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source and that the judiciary must have jurisdiction, directly or by way of review, over all issues of a justiciable nature"

The Statement emphasis that an independent judiciary is a necessary component for the attainment of the rule of law in any society and further states in paragraph 8: "To the extent consistent with their duties as members of the judiciary, judges, like other citizens, are entitled to freedom of expression, belief, association and assembly."

The Statement recognises that persons appointed to the judiciary must be the "best qualified for judicial office" on the basis of "proven competence, integrity and independence".

The Beijing Statement concludes with the recognition by the Chief Justices and judges of Asia and the Pacific that the standards contained in the Statement "represent the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the judiciary".

The doctrine of separation of powers

The principles embodied in the above international agreements and instruments affirm the need for the powers and jurisdiction of the judiciary to be separated and independent of the legislative and executive branches of government. This is known as "the separation of powers" and is the foundation of judicial independence.

The requirement of judicial independence is most apparent in its relation-

ship to the executive arm of government. The origin of the doctrine of the separation of powers in the English common law system was founded in 1607 when Chief justice Coke reminded King James I that the King was "under God and the law". Although an independent judiciary was notionally established in England in 1688, judicial appointments remained subject to the approval of the monarchy until 1701 when the Act of Settlement introduced the concept of judicial tenure and removal from office only for impropriety or misbehaviour.

In the case of the legislature, its ability to impact upon the judicial process is generally curtailed in modern times by various entrenchment procedures contained in constitutional provisions to restrict and control the power of the legislature to undermine or reduce the powers of court, its jurisdiction and judicial flirtations.

The concept of security of judicial tenure

Security of judicial tenure is the most elementary requirement for preserving judicial independence. This is recognised in the Beijing Statement which emphasises that judges must have security of tenure and that such tenure "must not be altered to the disadvantage of the judge during her or his term of office" (paragraph 21). Paragraph 22 of time Statement declares: "Judges should be subject to removal from office only for proved incapacity, conviction of a crime, or conduct which makes the judge unfit to be a judge"

The importance of security of judicial tenure is again reflected it the provision of paragraph 29 which provides that the abolition of a court of which a judge is a member must not constitute a reason or occasion for the removal of a judge. The paragraph provides that all members appointed to a court which is abolished or restructured must be reappointed to another judicial office of equivalent status and tenure or be fully compensated if no alternative position can be found.

The Beijing Statement also requires any removal of a judge from office for reasons *of* judicial misconduct to be subject of a fair hearing and that any judgement following from such hearing must be published. In this respect, the draft Universal Declaration of the Independence of Justice, recommended to the member countries of the United Nations by the Commission on Human Rights at its 45th Session in 1989, adopted the following principle at paragraph 26(b): ''The proceedings for judicial removal or discipline ... shall be held before a coon or board predominantly composed of members of the judiciary. The power of removal may, however, be vested in the legislature by impeachment or joint address, preferably

upon a recommendation of such a court or board."

Practical considerations to ensure judicial independence

Obviously, complete judicial independence from the other two arms of government is not theoretically perfect given that most judicial appointments and all judicial funding comes from government sources. However, it must he understood that the key to judicial independence is it, providing various constitutional and legislative safeguards and maintaining respect for long standing traditions for the appointment to the judiciary of persons of independence and integrity. Further protection can be ensured by upholding security judicial tenure subject only to removal for proven misconduct or incapacity and by institutionalising the processes upon which a contested removal from judicial office may occur. Without such safeguards, there can be no guarantees form, independent judiciary.

There ate also certain practical features necessary for an independent judiciary to enable a satisfactory degree of freedom from all forms of interference, whether government or otherwise. This can partly be ensured by guaranteeing that the judiciary is provided with appropriate statutory immunities and protections in the discharge of their duties as well as by the payment or adequate salaries and allowances. Failure to ensure suitable remuneration for judges can of itself weaken judicial independence and the proper functioning of the judiciary as has been highlighted in Cambodia in recent years.

The concept of judicial independence cannot be taken for granted. In Australia, judicial independence was seriously weakened by the removal from judicial office of Mr Justice Angelo Vesta from the Supreme Court of Queensland in 1989. The incident represented the first known occasion in the common law world where a sitting judge was removed by parliament without any finding of judicial impropriety. A Commission of inquiry established by the Queensland Parliament found that certain conduct (unrelated to the performance of Mr Justice Vesta's judicial duties) warranted his removal from office. However, there were several aspects of the matter which called into question the processes and procedures adopted by Parliament both in formulating the Commission's Terms or Reference and in later accepting the Commission's recommendation to remove the judge from office without any compensation for the cost of his legal expenses in conducting his defence. Further, in 1994 in Victoria, the State Government abolished the Accident Compensation tribunal arid effectively removed all member judges from office without reappointment to another judicial office and without proof of misbehaviour or by the exercise of any proper parliamentary procedures.

The absence of judicial independence in SLORC/SPDC's Burma

After independence from Great Britain in 1948, Burma's High Court judges were nominated by the President and approved by Parliament. Those judges have been described by Silverstein as follows: "The Justices of the Supreme Court and the High Court established an enviable record for independence of action and created respect for their jurisdiction. During the first decade of independence, when the union and the constitution stood in danger of being overthrown, and afterward, the Supreme Court worked unremittingly to establish a tradition of due process of law in Burma. Despite the grave conditions at the time, the courts worked to protect the individual against arbitrary actions by the government." (Joseph Silverstein, *Burma; Military Rule and the Politics of Stagnation,* 1977).

Prior to the 1962 military coup, Burma's judicial system at Its appellate levels managed to still maintain a high degree of independence from the government and played a significant role in defending basic human rights. After the 1962 coup, the Revolutionary Council abolished the Supreme and High Courts and replaced them with a single Chief Court of Burma. In 1972 the Chief Court was renamed the Supreme Court and became the Supreme Peoples Court after the adoption of the 1974 Constitution.

Generally, the courts after 1962 were staffed by retired members of the Judge Advocate-General's office or other individuals who had the support of the military. The Ministry of judicial Affairs assumed control and management of the court system as well as law enforcement. The restructured legal system therefore served as an aspect of military rule and the courts became another instrument for maintaining political control. There was no judicial independence either in name or practice.

After 1988 when SLORC/SPDC assumed power, any possibility of achieving a semblance of judicial independence vanished. Immediately upon taking power in September 1988 SLORC/SPDC decreed Judicial Law No. 2/88 of 26 December 1988 which established a Supreme Court and provided for the creation of civilian courts at trial level. The Judicial Law stated: "Judicial proceedings shall be independent and in accordance with the law" and "shall contribute to the restoration of peace and tranquility and law and order".

In reality however, there is only the pretence of any judicial independence. All courts are subservient to the directions of SLORC/SPDC and there is no protection for a judge In terms of tenure or other provisions

regarding dismissal from office. Martial Law Order No. 1/89 issued on 17 July 1989 empowered the military tribunals to conduct summary trials of civilians. Fifteen military tribunals were established by SLORC/SPDC under its Martial Law Order and the tribunals were presided by officers of the rank of lieutenant colonel with its other two members comprised of junior military officers. Only three sentences were imposed for alleged martial law offenders, namely;
(i) Three years imprisonment with hard labour;
(ii) Life imprisonment; or
(iii)Death sentence

There is no reported instance of any acquittal by a military tribunal. There were no rights of appeal by virtue of Martial Law Order No. 2/89 which also provided that witnesses could be dispensed with and convictions could be obtained without hearing prosecution witnesses.

Asia Watch reported *(Human Rights in Burma (Myanmar),* 1990) that 62 civilian judges were relieved of their duties in 1989 for refusing to sentence political offenders to terms longer than the legal maximum sentence. Further, all judicial officials have been required to attend training courses to assist them in fulfilling their duty to assist SLORC/SPDC in producing necessary changes in the system arid in implementing state policies. *(Summary Injustice: Military Tribunalsin Burma,* Lawyers Committee for Human Rights, 1991).

The absence of judicial independence in contemporary Burma and its continued violation is of great concern to the international community. Burma is not a party to the International Covenant on Civil and Political Rights. Civilians were frequently tiled before the military tribunals in violation of generally recognised principles of international law. SLORC/SPDC has however shamefully maintained the false notion that the Burmese judicial system "is based on universally recognised basic norms arid principles" (see for example a letter from Khin Maung Win, Director, Ministry of Foreign Affairs to Lawyers Committee for Human Rights dated 19 February 1991 quoted in *Summary Injustice: Military Tribunals in Burma,* supra).

Such pronouncements are made by SLORC/SPDC despite clear evidence of the following:

(i) All hearings are summary proceedings and are closed to the public;

(ii) Defendants have little, if any, opportunity to prepare their defence or meet with their legal representatives and witnesses;

(iii) Sentences imposed by the tribunals are not sanctioned by law, they are not rendered publicly and there is no recognised procedure for appealing to a higher tribunal;

(iv) All civilian court judges are subject to arbitrary removal by SLORC/SPDC and have no practical or formal independence from SLORC/SPDC's authority;

(v) The military tribunals established by Martial law Order No. /89 were staffed by military officers who were completely subject to military authority. Those tribunals were empowered to conduct summary trials of civilians from 17 July 1989 until September 1992 when they were abolished.

The basis for judicial independence in a future democratic Burma

For genuine democracy to exist in Burma once there has been a successful transition of power from SLORC/SPDC to the democratic opposition, an understanding and respect for judicial independence will be the corner stone for a new democratic society governed by the rule of law. Democracy cannot prevail in Burma without institutional, legal and practical safeguards for ensuring proper procedures for the appointment and removal of judges and for the exercise of their functions without undue external influence so that judges remain impartial and independent of the executive and legislative branches of government.

For this reason, the draft proposed Democratic Constitution for a Federal Union of Burma adopted by the National Council of the Union of Burma in May 1996 provides in Chapter 8 for the independence of the judiciary. Article 304 states: "The Justices shall be independent and only answerable to the law".

Article 106 of the draft constitution also requires that remuneration for judges shall be fixed by the Federal Congress "to enable them to independently carry out their duties and responsibilities".

Security of judicial tenure is guaranteed by article 107 which provides:

(a) The terms of the Justices shall cease:
  (i) at their own request; or
  (ii) on being permanently incapacitated, and unable to perform their duties; or
  (iii) on committing gross misconduct.

(b) Subject to the above, the appointment of Justices shall be for a term expiring on attaining the age of 75 years.

Article 108 provides that an equal number of representatives of the National Assembly and Peoples Assembly comprising a joint committee will investigate and submit findings to the Federal Congress on the capability and integrity of Supreme Court Justices upon receipt of a complaint from the Federal attorney General.

Article 109 guarantees the indemnity of judges in the following terms: "Justices shall not be charged for performing their judicial duties and their responsibilities"

Respect for judicial independence

Judicial Independence must be founded not merely in formal constitutional terms but also by a deep and abiding respect for the very traditions of judicial independence. Those matters underlie the recognition by the international community of the importance of each of the elements embodying the notion of judicial independence such as the doctrine of separation of powers, security of tenure, judicial immunities and proper remuneration for judicial officers. Those concepts and notions have been variously expressed in the international legal instruments discussed at the beginning of this article as well as being contained in the traditions of the English common law system inherited by the Burmese in the former part of this century.

The protection of fundamental human rights and of democratic processes requires a judiciary that is not only independent from legislature and executive controls but also neutral, objective, competent and free of all external influences. Constitutional safeguards can go only so far in ensuring those qualities in a country's judiciary.

The doctrine of the separation of powers and the various ingredients necessary to maintain the independence of the judiciary must be respected at all levels of government and not merely proclaimed in constitutional provisions and legal pronouncements. It is essential that judicial independence be understood and institutionalised as an enduring concept and an inherent component of any democratic society which seeks to he governed by the rule of law.

Martial Law in Burma

This paper is from a report produced by Article 19 titled Burma: Beyond the law and written by K S Venkateswaran, an international human rights law expert and lecturer at the University of Ulster, at Jordanstown in Northern Ireland. This report analyses the martial law in Burma from an international law perspective. We thank Mr Venkateswaran and Article 9 for their permission to reproduce the following extract.

Introduction

The Burmese peoples have had a long tradition of adherence to legal formality. As well as the legislation inherited from the British, a complex web of post-independence statutes and, more recently, martial law decrees, orders and regulations govern almost every aspect of the country's civil and political life. Despite this attachment to legal formalism, successive military governments have often impeded access to vital information, especially in matters touching on the politically sensitive issue of human rights, so that the precise state of the law on such matters is often difficult to ascertain.

Even defendants in criminal cases, and their lawyers, hove often been denied access to many of the laws. As the UN Special Rapporteur noted in his 1993 report:

Various SLORC Orders have been inaccessible to those to whom they would have applied, they have been vague, randomly interpreted and arbitrarily applied. Government authorities themselves, in explaining the law to the Special Rapporteur, proffered contradictory interpretations. Lawyers and elected representatives told the Special Rapporteur that they did not have any idea which laws and orders were applied, how they were applied or to whom they applied.

The following analysis will focus on those laws which have been known to be used regularly by the SIORC. Prominent among these are: the Emergency Measures Act, 1950: the State Protection taw, 1975; the Unlawful Associations Act. 1908; the Public Order (Preservation) Act, 1947; the Printers and Publishers Registration Law, 1962; and a plethora of martial law orders promulgated since 1988. For the sake of convenience, the laws will be grouped together thematically wherever possible. A later section will discuss the constitutional proposals that have emerged from the SLORC convened National Convention.

The right to life

Burmese law permits the imposition of the death penalty, but no executions have becn carried out since 1988. In January 1993, the SLORC issued an Order commuting all death sentences passed between 18 September 1988 and 31 December 1992 to life imprisonment. According to information received by the UN Special Rapporteur in 1995, another governmental order of November 1992 apparently commuted all death sentences to life imprisonment after that date.

However, a previous SLORC Order of July 1989, which conferred judicial power on army commanders allowed the then newly-established military tribunals, which were given jurisdiction to fly civilians as well as military personnel, to impose the death penalty in all cases involving defiance of SLORC Orders. That Order raised a number of serious concerns about the fairness of the judicial process which are discussed below. It was, however, repealed in September 1992.

In The past eight years, hundreds of deaths are appointed to have occurred either as a result of unlawful and extra judicial executions in the context of armed conflict or following torture or other forms of ill-treatment, including denial of medical assistance to prisoners, by security personnel in different parts of the country. Some of the victims were people who were detained under such laws as the 1950 Emergency Provisions Act, the 1908 Unlawful Associations Act, and the 1975 State Protection Act, or who had been compulsorily conscripted under the 1908 Village Act and the 1907 Towns Act, which raise serious concerns about arbitrary detention and forced labour respectively.

Particularly shocking were the reported deaths in mid-1988 of pro-democracy activists demonstrating against the military in Rangoon and other parts of the country. Non-governmental sources have estimated the number of fatalities to be in the region of 3,000, with eyewitness reports suggesting that, in one incident alone, some 327 people were shot dead by the military in one small

town, Sagaing, on 8 August 1988. The SLORC, however, has played down such incidents, maintaining that altogether countrywide no more than 15 demonstrators and another 516 "looters' had lost their lives. It has repeatedly refused to carry out an independent inquiry into these shootings or to account for the grossly disproportionate use of force by government troops which led to high numbers of civilian casualties.

Arbitrary arrest and detention

Several Burmese laws and SLORC orders are known to permit arbitrary arrest and detention. Some of these laws predate the *coup d'etat* of [8 September 1988, while others have been amended by the SLORC to make them harsher. The arbitrariness arises from both substantive and procedural aspects of the law.

Among the foremost in this category is the misleadingly-titled Emergency Provisions Act, 1952 (EPA). This law is not, as might be supposed, concerned with the regulation of a state of emergency; rather, it is a widely-worded law which can be, and has been, used to suppress dissent, even in the absence of a proclaimed state of emergency. Under the Act, anyone who, among other things, "violates or infringes upon the integrity, health, conduct and respect of State military organisations, government employees and towards the ... government", or "causes or intends to spread false news about the government" or "causes or intends to disrupt the morality or the behaviour of a group of people or the general public" is liable to imprisonment for up to seven years. The EPA also makes it an offence, punishable with death or life imprisonment, to "intend to or cause sabotage or hinder the successful functioning of the State military organisations and criminal investigative organizations."

The Act has been used extensively against a wide range of people, including members of opposition political parties, Buddhist, Christian and Muslim clerics, university and high school students, professionals and trades unionists. In July 1991; for instance, at least 7 students from the Monywa State High School in northern Burma were reportedly charged with "causing or intending to disrupt the morality or the behaviour of a group of people or the general public" after they attempted to organise a public demonstration to commemorate Martyr's Day, when Burma's independence hem, Aung San, was assassinated. As recently as 20 February 1995, several students were arrested after they reportedly sang the pro-democracy anthem, Kaba Ma Kye Bu ("The world won't forgive" - a pun on the national anthem). Two months later, nine of those arrested were sentenced to seven years' imprisonment under the EPA. The UN Special

Rapporteur, in his 1995 report cites the case of at least three people (two politicians and one writer), who had been convicted and given the maximum punishment under the EPA, he also refers to reported cases of death in custody of people held under the EPA.

Following the release of Aung San Sun Kyi, the EPA was also used against four entertainers, U Par Par Lay, U Lu Zaw, U Htwe and U Aung Sue, who had put on a performance in Sun Kyi's house on Independence Day 1996. Charged with "inciting the audience to unseemly behaviour" and "harming state security by word and action", under Sections 5(e) and 109, they were each sentenced to 7 years' imprisonment after a summary trial held within the prison premises at which neither any defence lawyer nor key witnesses were allowed to be present.

The EPA violates one of the fundamental tenets of civilised jurisprudence, namely that no one shall, in the exercise of their rights and freedoms, be subjected to greater limitations than 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. This principle is enshrined in Article 29(2) of the Universal Declaration of Human Rights (UDHR) and in Article 5(l) of the ICCPR

International standards also require that every person subjected to arrest is informed at the time of arrest, of the reasons for arrest, and, promptly thereafter, of any charges that may he laid against him/her." The arrested person is entitled to be brought promptly before a judge or other judicial authority and tried within a reasonable time or released A detainee is also entitled to be considered for conditional release pending trial, and to have the lawfulness or otherwise of their arrest or detention reviewd by a court of law without delay. Furthermore, the detainee has an enforceable right to compensation should the arrest or detention be shown to be unlawful. Many of these requirements have been reinforced by the UN Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment and other internationally, accepted human rights instruments.

The UN Human Rights Committee has been at pains to stress the importance of these guarantees. It has noted, for example, that the requirement to bring every arrested or detained person 'promptly' before a judicial authority means that delays, if any, in the production of detainees before the courts shall not exceed "a few days". The Committee has also emphasised that "pre-trial detention should be an exception and as short as possible." Yet, it is clear from the evidence that has emerged over the past few years that the SLORC has, in carrying out arrests and detentions un-

der the EPA, consistently acted in contravention of these provisions.

The Act also contravenes the provisions of Burmese domestic law. It is inconsistent with the guarantees of individual freedom enshrined in both the 1947 and 1974 Constitutions of Burma. The government has, of course, argued that those guarantees do not apply any longer in view of the SLORC's abrogation of existing constitutional arrangements - an argument that is highly questionable, given the rack of legitimacy of the martial law regime. In any case, there is certainly no excuse for the government to disregard the provisions of the Burmese Code of Criminal Procedure in its application of the EPA, as it has consistently been doing, given that, on the government's own admission, the guarantees contained in that Code remain applicable in all cases of detention carried out under a SLORC Order or emergency regulation."

Most of the criticisms levelled against the EPA above also apply to another draconian law tat has been used selectively by the martial law regime to early out indiscriminate and arbitrary arrests and detentions of political dissidents. The Law to Safeguard the State from the Danger of Distinctive Elements, also called the State Protection Law of 1975. This law, which was amended in August 1991, allows the government to declare a state of emergency in a part or the whole of the country "with a view to protect state sovereignty and security and public law and order from danger and to restrict any fundamental rights of the citizens in specified regions or all over the county." The state of emergency, to be declared by the State Council and subject to approval by the People's Assembly within 60 days, can be extended indefinitely by the latter body. If the necessary approval is not forthcoming, the declaration by the State Council ceases to have effect forthwith, although any action taken previously would continue to be valid.

The law also allows the government to impose wide-ranging restrictions on individuals: anyone who is suspected of having committed, or who is committing, or who is about to commit any act which endangers the sovereignty and security of the state or public peace and tranquility, can be ordered by the Council of Ministers to be imprisoned for up to five years without trial. The government is also empowered to issue restriction, orders under which a person may he confined to a specified area or have his/her freedom of movement otherwise constrained, or be prohibited from possessing or using specified articles. An original provision in the law, allowing those subjected to detention or restriction orders to appeal to the civilian judiciary, was removed in 1991.

The State Protection Law has been applied extensively to suppress peaceful political dissent. The Act was used to detain Aung San Sun Kyi under house arrest between July 1989 and July 1995 and a former Prime Minis-

ter, U Gnu, between December 1989 and April 1992.

The law is inconsistent with a member of principles enshrined in international human rights instruments. Not only does it define punishable acts in a vague and overbroad manner, it also violates most of the guarantees on personal liberty contained in Article 9 of the ICCPR. As the Human Rights Committee has emphasised, those guarantees apply as much to preventive detention, that is, detention for reasons of public security, as to detention following a criminal charge. Preventive detention, said the Committee, 'must not be arbitrary, and must be based on grounds and procedures established by law; information about the reasons must be given and court control of the detention must be available as well as compensation in the case of a breach." None of these requirements have been met either by the terms of the State Protection Law or in its application in practice to individual cases.

The State Protection Law also violates another important tenet of international human rights law. The arbitrary increase of the maximum permissible term of imprisonment - from three to five years- brought about by an August 1991 amendment to the law clearly contravened the well-recognised prohibition against retroactive enhancement of punishments. This amendment was, for instance, used to justify the continued detention of Aung San Sun Kyi beyond July 1992 when, under the terms of the law as it stood at the time of her initial detention, she was entitled to be released. It is a measure of the importance attached to the principle of non-retroactivity in international law that it has been made non-derogable even during times of emergency.

A third law which has been used by the SLORC to arbitrarily arrest and detain political opponents is the Unlawful Associations Act 1908. This law allows the government to imprison for up to five years anyone who has been a member of, or contributes to, or receives or solicits any contribution towards any association "(a) which encourages or aids persons to commit acts of violence or intimidation or of which the members habitually commit such acts; or (b) which has been declared unlawful by the President of the Union." Anyone managing or assisting in the management of an unlawful association, or who promotes or assists in promoting a meeting of such an association, can be subjected to similar punishment.

A number of organisations, including political parties, student unions, professional groups and religious associations, as well as armed opposition groups, have been declared unlawful wider this Act. A list published in November 1989 named, among others, the Kachin Independence Organisation (KIO). the New Mon State Party (NMSP), the Karenni Na-

tional Progressive Party (KNPP), and the Karen National Union (KNU). Despite a formal rapprochement between the government and the first two groups which resulted in those groups being brought into 'the legal fold" recently, their status as 'unlawful associations' appears to remain unchanged, with villagers and supporters in their operational areas being arrested or harassed frequently. The arbitrary manner in which the Act is being applied is further illustrated by the fact that some eight other ethnic groups, which had also fallen foul of the law, were apparently legalised by a May 1990 decree.

The Unlawful Associations Act falls short of international human rights standards. By conferring wide and untrammelled powers on the executive to declare any association unlawful, it subjects the tights and freedoms of Burma's peoples to greater restrictions than is strictly necessary to meet the requirements of morality, public order and the general welfare. The Act's incompatibility with international standards is underlined by the arbitrary, indiscriminate and heavy-handed manner in which it has been applied in practice, usually to suppress peaceful dissent.

Parliamentarians and officials of political parties have been a particular target of arbitrary arrest and detention under the above laws, which are sometimes used in conjunction with other laws to increase sentences. Scores of elected members of the *Pyithu Hluttaw* have been imprisoned after trials which fell far short of internationally accepted standards In some cases, the sentences passed have subsequently been increased U Tin Oo, the chairman ofthe NLD, for example, was initially sentenced to three years' imprisonment, but in 1991 he was again tried for the same offence by a military tribunal in Insein Prison which extended his sentence to 17 years. The Inter-Parliamentary Union has repeatedly expressed its concern over the treatment of Burmese parliamentarians and in October 1991 expressed a desire to send a fact-finding mission to the country - a request which the SLORC turned down on the specious ground that it was already co-operating with the UN Commission on Human Rights and therefore saw no reason for an on-site visit. Another law which has also been used to target parliamentarians is Section 122 (1) of the Penal Code, more, commonly known as the "anti-treason law", under which anyone found guilty of "high treason" can be punished with death. Although death sentences are routinely commuted by the SLORC, several people have received exceptionally harsh sentences under this law in recent years. In early May 1991, for instance, some 25 MP's belonging to the NLD were sentenced to between 10 and 25 years' imprisonment after being charged with attempting to form a parallel governmental. All the sentences were reportedly handed down by military tribunals which lacked due process of law.

Some 2,000 political detainees have reportedly been released by the Burmese authorities since April 1992, but hundreds more are believed to be still in custody, and the practice of arbitrary arrests for the peaceful expression of opinions and ideas continues unabated. As recently as May 1996, for instance, over 300 members or supporters of The NLD, including 273 MPs-elect, were arrested and held for questioning, ostensibly on the grounds that they had adopted a "confrontational stance" vis-à-vis the SLORC, although most observers believe that the action was taken as a pre-emptive attempt to prevent the NLD from holding a meeting planned to coincide with the sixth anniversary of its victory at the 1990 elections.

Cruel and inhuman detention conditions

The harshness of the above laws is compounded by the cruel and inhuman manner in which those detained under them are treated by the authorities. Apart from being subjected to torture, including rape, and other forms of physical violence - a subject which, is discussed separately - detainees air often made to sleep on cold cement floors, deprived of water, forced to eat substandard - sometimes spoiled - food, confined to small, unhygienic cells, and denied medical attention. Hundreds of prisoners are also reportedly subject to forced labour, in inhumane conditions. As the UN Special Rapporteur noted it, his 1996 report, forced labour from prisons was recently used to build railway lines front Mong Nai to Nan, Zamg, Mong Nai to Mawtonai and Ho Nam Sai Khao to Shwe Nyong. In the course of such construction, at least three prisoners are reported to have died.

Such practices clearly violate the standards laid down in, for example, Article 10(1) of the ICCPR and the UN Standard Minimum Rules for the Treatment of Prisoners.

Commenting on the importance of the former, the Human Rights Committee has stressed that people deprived of their liberty should not "be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under The same conditions as for that of free persons' This, said the Committee, is 'a fundamental and universally applicable rule" whose application cannot be dependent on the material resources of a State. The SLORC's treatment of detainees also falls foul of the United Nations' Code of Conduct for Law Enforcement Officials, which imposes a number of obligations on police, military and other personnel, including the duty to respect and protect human dignity and to maintain

and uphold the human rights of all persons.

Torture and other cruel, inhuman or degrading treatment

A substantial body of well-documented evidence has emerged over the years of torture, including rape, and other forms of severe physical violence being inflicted by the Burmese police, military, intelligence and other security personnel on persons held in detention and during interrogation of suspected dissidents. Many of the worst abuses have reportedly been committed by the Burmese aimed forces in the fields and villages of the ethnic minority war-zones. Also accused of committing torture air military intelligence units 6, 7, 11 and 12. Places of detention where torture is reported to have occurred include Insein, Thayawaddy, Thayet and Mandalay prisons as well as the secret Directorate of Defence- Services intelligence interrogation centre at Ye Gyi Aing camp outside Rangoon. The UN Special Rapporteur lists a number of individual cases of severe torture, including rape, in his periodic reports, and similar credible accounts have also been publicised by organisations such as Amnesty International.

Among the methods reportedly used to inflict torture are: severe beatings with metal rods, chains, combat boots or rifle butts; burning with cigarettes; having iron or bamboo rods rolled up and down the shins until the skin is lacerated; application of electric shocks to body extremities; sleep, food and water deprivation; near-suffocation or drownings; and forced digging of "ones own grave".

By permitting torture to occur on such a large scale, the Burmese government is in serious contravention of a number of international human rights instruments. These include: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Declaration on Protection from Torture, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the Code of Conduct for Law Enforcement Officials. Significantly, on its accession to the Convention on the Rights of the Child, one of the two reservations which the Burmese government entered related to Article 37, which required states parties to ensure that no child may be subject to torture or other cruel, inhuman, or degrading treatment or punishment. That reservation has since been withdrawn.

The importance attached in international law to the prohibition of torture cat, be seen from the fact that it has been made non-derogable even during times

of public emergency. This prohibition makes no exceptions. As the Human Rights Committee has explained, the obligation cast on governments to enforce this prohibition extends to all torture. "whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity." and "no justification or extenuating circumstances may be invoked to excuse a violation of [this prohibition] for any reasons, including those based on an order from a superior officer or public authority." The Committee has further emphasised that, to discourage the practice of torture, "it is important ... that the law must prohibit the use or admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment - an injunction which has not, by any means, been respected by the Burmese government.

Fair trial concerns

The administration of justice has been one of the prime casualties of the military regime. Not only have the people charged under the various laws and military decrees been consistently denied fair trials and the due process of law, but the judicial system itself has been emasculated over the years. The process, which started as early as 1962 under the Ne Win regime, reached its apotheosis in 1988 when the SLORC abolished the lass vestiges of a civilian judiciary and replaced it with a network of military tribunals. These tribunals lacked even the barest minimum attributes of independence from the executive, and followed procedures that arc internationally regarded as a travesty of justice.

Until 17 July 1989, most defendants were charged and tried under the ordinary criminal laws, though such laws were often used for purposes which were far removed from those for which they were originally intended. Between July l989 and September 1992, however, all executive and judicial powers under martial law were invested in three Command Commanders, one for each major military region of the country, who in turn were empowered to set up military tribunals to try offences.

The Command Commanders had wide discretion to refer cases for trial either to the ordinary courts or to the military tribunals, although cases concerning defiance of orders issued by the SLORC, by the government or by the Command Commanders wore automatically to be tried by the tribunals. The tribunals could hand down punishments ranging from three years' imprisonment with hard labour to death, "no matter what the existing law provides." Cases could be disposed of summarily, at the discretion of the tribunals, whose decisions were final. In Aug.1989 SLORC outlined flit criteria for cases to be tried by either forum: ordinary crimes,

it said, would be handled by the civilian courts, while "those who instigate or incite people to harm, discredit and let others die, acts of cruelty, to defy power and create lawlessness and anarchy shall be tried by the military tribunals.. Working People's Daily, 26 August 1989. By October of that year, however, the criteria seem to hove changed, with the SLORC making another announcement that the military tribunals would try cases "affecting law and order" and those 'involving beheadings and killings during the disturbances. Sentences of life imprisonment or death required approval by the Command Commanders. With the SLORC expressly denouncing the existing Constitution in July 1990, the military tribunal were reed of all constitutional constraints, assuming that they had ever abided by any.

Neither the composition nor the procedures of the tribunals were calculated to inspire confidence among defendants. Each tribunal consisted of a lieutenant-colonel and two junior officers Prom either the army, navy or air force. The proceedings were not open to the public, and defendants were only rarely allowed to engage counsel to argue their case. Most of the trials were carried out in summary fashion, with scant regard being shown to the evidence adduced. Defendants were not presumed innocent until proven guilty, and very often sentences were announced without the relevant witnesses being examined. There was no effective right of appeal to an independent higher forum: Such appeals as were permitted to be made to the military authorities were usually in the nature of mercy petitions. instances of defendants being acquitted by military tribunals are virtually unknown.

It is estimated that several hundred people were tried and convicted by these tribunals before they were disbanded in September 1992; by the SLORC's own admission some 24 people were sentenced to death in the first three months alone of their functioning. An overwhelming majority of those brought before the tribunals were students, members of the NLD or other political parties, Buddhist monks and other pro-democracy activists arrested since the 988 seizure of power by SLORC. Such details as have emerged concerning the way the trials were conducted confirm the frequently expressed fears of human rights monitors about the tribunals' lack of independence and impartiality.

Typically, trials before the tribunals were brief to the point of being perfunctory: the defendant, on king brought before the tribunal, would have the charges against him/her announced by one of the judges or by the public prosecutor, who would also read out any statement that the defendant may have made during interrogation. (Often such statements, including confessions, had allegedly ken extracted under physical or psy-

chological pressure, including torture.) The defendant would then be asked formally to plead guilty or not guilty. This would be followed swiftly by the tribunal announcing its verdict, almost invariably one of guilt.

Defendants were given little chance to speak during the trial, let alone present a proper defence. Even where they managed to make a statement, the judges paid no heed to it. In one case, a Rangoon University student, Soe Htat Khine, who was sentenced to live years' imprisonment following a summary trial for "engaging in illegal criminal activity," was punished with another five-year sentence for contempt of court when he asked the chairman of the tribunal why he had been convicted despite pleading not guilty.

The sentencing methods of the military tribunals were no less arbitrary. Not only could the tribunals completely disregard statutory stipulations concerning sentences, they could, and often did, hand down punishments that were disproportionately harsh in relation to the alleged offences. There were also numerous cases of children being sentenced to long prison terms for relatively minor offences. The unfairness of trials and sentencing procedures under the tribunals raised issues of heightened concern in cases where defendants were sentenced to death. The tribunals were also know,, to hold trials and pass sentences in absentia, usually in cases involving high-profile critics of the regime who had succeeded in fleeing the country and who the government was keen to prevent from returning.

The constitution and functioning of the military tribunals violated several basic human rights standards under international law, including the right of every person to a fair and public hearing by an independent and impartial tribunal; the right to be presumed innocent until proven guilty to have adequate time to prepare a defence; to representation by counsel of one's Choice; to have an opportunity to examine witnesses and present witnesses on one's on behalf, to have judgement rendered publicly; not to be subjected to penalties heavier than those prescribed by law at the time the act leading to the conviction was committed; and to an effective appeal to a higher tribunal. While trials by a military tribunal are not per se unlawful, the Human Rights Committee has stressed that "the trying of civilians by such courts should he very exceptional and take place under conditions which generally afford the full guarantees stipulated in article 14 of the ICCPR - something the SLORC-appointed tribunals manifestly failed to do. The validity of the trials conducted by these tribunals is also suspect if regard is had to the Basic Principles on the Independence of the Judiciary, endorsed unanimously by the UN General Assembly in 985, which state inter alia that:

"Everyone shall have the right to he tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals."

Even the possible invocation of emergency powers, permitted under international law to meet situations threatening the life of a nation, would be of no avail to the SLORC, because it has nut complied with the basic preconditions for invoking such powers. In any case, any derogation from normal law has to be confined to strict and narrow limits and cannot extend to a wholesale abrogation of rights in the way the creation of the military tribunals did. As the UN Special Rapporteur on States of Emergency has pointed out, no state may use its power of derogation from a right to "modify that right to the point of making it non-existent." So extensive was the derogation effected by the Burmese military tribunals that they have also been seen to have, infringed international humanitarian law, one of whose principles prohibits "the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court affording all judicial guarantees which are recognised as indispensable by civilised peoples" even during wartime.

It is not only the law and practice concerning military tribunals that fall short of international human rights standards. The SLORC's treatment of the ordinary' civilian legal system has been no less flawed After abolishing the 1974 Constitution - and with it the then existing judicial system - immediately on coming to power on 26 September 1988 The SLORC promulgated a Judicial law which sought to create a new hierarchy of civilian courts. Although the new law contained formal guarantees of independence for these courts, they were in practice subjected to tight control by the SLORC at all times. Judges enjoyed no tenure of office, and were under clear instructions to take their lead from their military masters in the discharge of their functions. This has ensured that, despite the abolition of military courts, political prisoners still do not get a flair trial. As the International Commission of Jurists noted in its 1991 report, most cases are tried in a summary manner and verdicts are determined in advance of the trials: "In cases where they had received orders to convict, judges warned lawyers that an overzealous conduct of the case might prove detrimental to the interest and liberty of the lawyer."

As part of the process of subordination of the judiciary to the executive, the SLORC introduced another piece of legislation, the Period Fixing Law, which, citing "the recent state of affairs", ordered the closure of all courts in the country from 1 June, 1988 until 31 March 1989. This had the effect, inter alia, of suspending or postponing the trials of hundreds of

people detained in connection with the 1988 pro-democracy demonstrations. It was intended, in the opinion of one analyst. "to keep the lawyers and others who had participated in the 1988 demonstrations off-balance and, gradually, to place the entire legal system under SLORC control through intimidation, rather than through dismissal of judges and others." The Period Fixing Law was thus blatant violation of several international standards concerning fair trial and the administration of justice.

The civilian courts near-total deference to the executive under the SLORC can be illustrated by the fact that judges who refused to fall in line faced swift dismissal: some 62 of them were reportedly deprived of office it, 1989 after failing to comply with SLORC instructions to sentence political dissidents to prison terms longer than those permissible in law. So blatant has been the interference in the administration of justice that, in one case, the presiding judge is reported to have admitted to the family of a defendant that he had no power to determine the outcome of the case as he was obliged to take his instructions from officials of military intelligence. Information compiled by human rights monitors on individual cases tried by the civilian courts indicates persistent and large-scale infringement of the international norms on fair trial. In his 1996 report to the Commission on Human Rights, the UN Special Rapporteur concluded that the Burmese legal system did not respect the 'due process of law'. He noted, among other things, that "there is no proportionality between offences committed and punishments applied, particularly it political cases…"

The intimidation of the judiciary has also, over the years, had art adverse impact on both the morale and professional standards of the Bar. There has ban a precipitous fall in advocacy skills, following repeated assaults on the independence of lawyers, many of whom have been subjected to political persecution by successive military regimes, including the SLORC. So great has been the pressure that lawyers are reportedly very reluctant, for instance, to file habeas corpus petitions on behalf of clients, who have been illegally detained, for fear of their own safety. This constitutes a serious infringement of the internationally-recognised norms for the protection of lawyers from undue harassment, hindrance or improper interference in the discharge of their duties. Officially-inspired attacks on the Bar included an unprecedented speech in May 1996 by the Chief Justice of the Supreme Court, U Aung Toe, in which he characterised the country's lawyers as "corrupt, thieving and greedy."