# Issues of self-determination in Burma

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## Introduction

This paper seeks to provide an introduction to the concept of self-determination, and to suggest the importance of this concept in Burma. A comprehensive analysis of either topic is beyond the scope of this paper, which is aimed at readers without great familiarity with either area. Suggestions for further reading may be found in the references.

The paper begins by discussing the concept of self-determination, and its varied meanings. A brief history of the development of the concept follows, in which the meaning of self-determination beyond decolonisation is touched upon. The situation of minorities within a state is then considered. The second section of the paper is a discussion of the particular case of Burma.

## 1 The international context

### What is self-determination?

Self-determination is a powerful and emotive concept, inspiring and threatening, frequently cited yet rarely defined. It is "a social and political fact in the contemporary world, which we are challenged to understand and master for what it is: an *idée-force* of powerful magnitude, a philosophical stance, a moral value, a social movement, a potent ideology, that may also be expressed, in one of its many guises, as a legal right in international law."[1]

As a principle, self-determination achieves almost universal support, perhaps because it is difficult to be sure what it actually means. This support, however, rarely translates into encouragement from the international community for the break-up of States.

Statehood and self-determination have an ambiguous relationship. Self-determination supports statehood by giving a rationale for the acceptance of existing State boundaries and leadership. Yet self-determination also shows that "statehood *per se* embodies no particular virtue."[2]

In the 'post-decolonisation' era, the scope of self-determination in international law is a matter of debate. Any extension of the meaning of the concept beyond decolonisation is perceived by many States as a threat to territorial integrity. To understand the implications of the self-determination debate we need to consider the range of options encompassed by the term 'self-determination'. One writer[3] has identified at least eight of the more prominent 'faces' of self-determination as follows:

(1) The established right to be free from colonial domination,
(2) The converse of that - a right to remain dependent, if it represents the will of the dependent people who occupy a defined territory,
(3) The right to dissolve a State, at least if done peacefully, and to form new states on the territory of the former one,
(4) The disputed right to secede,
(5) The right of divided States to reunite,
(6) The right of limited autonomy, short of secession, for groups defined territorially or by common ethnic, religious or linguistic bonds - as in autonomous areas within confederations,
(7) Rights of minority groups within a larger political entity, as recognised in Article 27 of the Covenant on Civil and Political Rights and in the General Assembly's 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, and
(8) The internal self-determination freedom to choose one's form of government, or even more sharply, the right to a democratic form of government.

How far any of these will be internationally recognised as legitimate in different circumstances is quite unclear and depends on such variables as the political interests of regional powers. These factors are of tremendous importance for a country like Burma, where both the State rulers and ethnic insurgent groups have had a history of complex relationships with both neighbouring China and India. Self-determination is one of the central issues in Burma's troubled past and present. The ethnic diversity, the differing treatment of ethnic groups, and cultural and economic dominance by the majority ethnic group are all potent factors in what has become an enormous and intractable tragedy.

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## Historically

Self-determination as a principle for 'national' ethnic-linguistic-cultural groups emerged as a natural corollary of developing nationalism in the eighteenth and nineteenth centuries.[4] It was initially focussed in Europe, and came to the fore at the end of the First World War, when the German, Austro-Hungarian, and Ottoman empires were broken up and eight new States created, including Finland, Hungary, Czechoslovakia, Poland and Yugoslavia. "These new countries were designed to be nation-states, which conformed to the geography of existing national or ethnic groups."[5]

However, one must bear in mind that the geopolitical and strategic interests of the Great Powers largely determined whether and how the 'self-determination' process developed. Self-determination in 1919 otherwise had little to do with the demands of the peoples concerned. In addition, overseas colonies and 'nations' within the territories of the victorious powers were not considered candidates for self-determination.[6] For those minorities whose claims to self-determination it was considered neither desirable nor necessary to meet, at the end of World War I the so-called minority treaties were adopted and subsequently overseen by the League of Nations.[7] These were designed to protect ethnic and religious minorities from oppression, and to allow them to practise their own cultures and religions. The Second World War was to prove, however, that political will was insufficient to make these minority treaties any sort of guarantee at all, as millions of people comprising minority groups were denied even the right to life.

The twentieth century has seen the disintegration of the British, French, Dutch and Portuguese empires through Africa and Asia in the face of nationalist movements, which have drawn heavily on the ideal of self-determination.[8] A notorious legacy of the colonisers was their tendency to ignore ethnic, linguistic, or other 'national' considerations.[9] Burma is a perfect example of such a situation, where a political time bomb was left by the colonial administration upon independence. The dominant theme of decolonisation seemed to be to leave such complexities to be dealt with by the independent states that emerged from the process. After some turbulence, African States have elected to deal with the issue by maintaining existing colonial boundaries and concentrating on 'nation-building' activities. In Burma the issue remains unresolved, after the deaths of countless thousands of people.

## Decolonisation and beyond

A common theme in commentaries on self-determination is the distinction between self-determination as a principle and as a right. Self-determination claims based on ethnicity or nationalist sentiment require recognition of the shift from "the territorially based *right* of self-determination developed by the United Nations in the context of decolonisation to the ethnic-linguistic-national *principle* of self-determination advocated…in 1919."[10] The shift from principle to legal rule had not occurred at the time of the drafting of the United Nations (UN) Charter or the early years of the UN, despite the political significance of the principle. The "moral and political imperatives of decolonisation,"[11] however, led to the transformation, one of the clearest illustrations of which is the UN General Assembly's 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples.

The 1960 Declaration proclaims the necessity of "bringing to a speedy and unconditional end colonialism in all its forms and manifestations." It also declares that independence should not be delayed on the pretext of inadequacy of political, economic, social or educational preparedness. While the thrust of the declaration is clear, a closer reading reveals "uncertainties arising from varying uses of the terms 'peoples', 'territories', and 'countries'. Although the title of the declaration refers only to 'colonial' countries and peoples, operative paragraph 2 refers expansively to the right of '[a]ll peoples' to self-determination..."[12]

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impact on rights of the general rhetoric of self-determination. The principle of self-determination is expressed often enough in international documents and dialogue. For example, both UN human rights covenants, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, contain a common article 1, which states:

> All peoples have the right of self-determination. By virtue of the right they freely determine their political status and freely pursue their economic, social and cultural development.

The reference to 'peoples' may at first blush suggest that ethnic groups are the beneficiaries of the article. In fact, 'peoples' has been understood as referring only to States and the entire populations within them. Even so, several States have attempted explicitly to limit any meaning of self-determination beyond decolonisation.[13] The narrow interpretation of the word 'peoples' effectively limits any use of the concept of self-determination, beyond decolonisation, for non-State actors. One writer explains this idea that minorities are not 'peoples'. Rather, 'peoples' are "all inhabitants of each existing state, and the guarantee [in Article 1 of the covenants] denotes little more than the right of the population of every sovereign state to determine their own form of government without interference from other states. This is made clear by Article 1(2) of the UN Charter, which declares the UN's purposes, inter alia, 'to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples...'..."[14]

One must not forget, however, that it is not unknown for the UN to recognise non-State actors as the legitimate representatives of peoples well before they achieve independent statehood, such as the ANC, SWAPO and the PLO.[15] Generally, however, States have maintained the idea that self-determination is supportive of territorial integrity. From the other side of the spectrum, Non Government Organisations also attack the apparent tension between the two concepts, with opposite conclusions:

> The often invoked contradiction between the principle of self-determination and the notion of territorial integrity is artificial. The latter, on one hand, can play a decisive role in the relationship among States to protect borders against external threats. On the other hand, the fundamental right of peoples' self-determination has to do with relationships between a State and a people; failure to respect this right implies raising those reservations...concerning territorial integrity.[16]

The Declaration on Friendly Relations[17] was adopted by consensus by the UN General Assembly in 1970 after years of negotiation, and may be considered to state existing international law.[18] It declares that "all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every state has the duty to respect this right in accordance with the provisions of the [UN] Charter" Again, this involves the troublesome word 'peoples'.

The objectives set out in the Declaration are not broad: "(a) to promote friendly relations and co-operation among States, and (b) to bring a speedy end to colonialism, hav-

Declaration firmly within the context of endorsing and strengthening the existing international order, specifically within a decolonisation framework. The only circumstances in the Declaration in which action is permitted against a State is if that State is not sufficiently representative of the *people* (which term, as opposed to 'peoples', underscores the idea of unity of the population within the state) within its territory. It is not apparent what this 'representation requirement' entails. It has been suggested that it does not imply explicit recognition within the government of all of the various ethnic, religious, linguistic and other communities. "Indeed, such a state might itself be considered to violate the requirements that it represent 'the whole people...without distinction as to race, creed or colour'".[19]

One idea is that the Declaration must be read in the context of its time, when the South African and Southern Rhodesian regimes were almost universally opposed within the international community. In this context, the 'representative requirement' would involve a State not formally excluding "a particular group from participation in the political process, based on that group's race, creed, or colour...At the very least, a state with a democratic, non-discriminatory voting system whose political life is dominated by an ethnic majority would not be unrepresentative within the terms of the Declaration on Friendly Relations."[20]

While it is apparent that there are limits on the exercise of a claim to self-determination, it is difficult to state with any precision exactly where those limits fall.[21] It has been argued that UN and State practice since 1960 provides evidence that "the international community recognises only a very limited right to 1) external self-determination, defined as the right to freedom from a former colonial power, and 2) internal self-determination, defined as independence of the whole state's population from foreign intervention or influence."[22] In view of the Rhodesia/Zimbabwe and South Africa experiences, perhaps internal self-determination requires an expanded definition to include the sometimes-recognised right of independence of a majority from political exclusion by a minority. This, however, does not move us a great deal closer to knowing where the limits of self-determination fall.

## Minorities within a state

The inter-war minorities' treaties failed dramatically to prevent the horrors prior to and during the Second World. "What emerged from that darkness - in which minorities suffered horrifically - was a new way of thinking about human rights which ironically denied them any special protection."[23] This was the idea that human rights belonged to individuals, and if they were protected then the rights of peoples would automatically be preserved.

Minorities possess defined rights protecting their existence[24] and the maintenance of their culture, language and religion,[25] but in terms of self-determination, they really have no 'rights', chiefly because they are not accepted as 'peoples'. One writer, arguing against secession or self-determination for each and every minority wishing to take it up, sets out the 'peoples' / 'minorities' dichotomy[26]:

> Minority rights are the rights held by minorities… But the right of self-

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> tirely discrete rights to minorities on the one hand (minority rights, as elaborated in Article 27) and to peoples (self-determination rights, as provided in Article 1). One cannot - though many today try, lawyers as well as politicians - assert that minorities are peoples and that therefore minorities are entitled to the right of self-determination. This is simply to ignore the fact that the Political Covenant provides for two discrete rights. It also, more insidiously, denies the right of self-determination to those to whom it was guaranteed - the peoples of a state in their entirety.

Minorities have few options in international law to present their case[27], and have no standing before the International Court of Justice. The effect of this lack of options, along with the difficulties faced by States in recognising minority rights, may well be to increase tension as well as fears among minority groups themselves. "These fears are in part a reaction to the non-recognition of minority rights as such since the Second World War, as the concept of minorities has been sacrificed to state-building despite the fact that ethnicity and / or religion continues to define many internal conflicts."[28]

One approach that has been put forward is to address the lack of standing for minorities by the development of international arbitration to adjudicate claims by ethnic minorities to statehood or to increased political recognition. "Teams of lawyers are less expensive than armies, and do not slaughter each other. Millions of lives have been lost through secessionist movements, and while it may be idealistic to hope that both sides will respect an international court decision, at least that reasoned adjudication would provide some guide as to whether and on what sides other states or the Security Council should intervene to stop the conflict."[29]

While the idea of self-determination was never actually reserved for 'colonised' peoples only, until recently they were its main beneficiaries. In recent years, however, a number of ethnic groups have successfully demarcated their claims in the language of self-determination. The obstacles in their path are formidable, as they are effectively fighting established Statehood and its inherent dominance. International law, as a creation of States who rely on and intend it to maintain stability, obviously will not facilitate such a process. If the effect of international law were to assist in the destruction of States it would be a revolutionary tool, almost the obverse of a legal rule. It is not surprising, then that, rather than the principle of self-determination, "it is the principle of national unity that has been almost universally followed by the international community - which, after all, is composed of states whose interest is to maintain themselves."[30]

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Of course on many occasions in the past decades minorities have, whether by force or otherwise, forged new international identities for themselves. However the international community is reluctant to support such a process, and tends to delay recognition for newly declared states comprised of former minorities until reality demands it.[31] The partial erosion of State sovereignty through the development of human rights and other areas of international law provides a jurisprudential basis for recognition when political realities make it expedient.

As there are degrees of self-determination, there are also degrees of representative government. It has been argued that there is an inverse relationship between the degree of representative government, on the one hand, and the extent of destabilisation that the

government is at the high end of the scale of democracy, the only self-determination claims that will be given international credence are those with minimal destabilizing effect. If a government is extremely unrepresentative, much more destabilizing self-determination claims may well be recognized."[32] Of course, geopolitical interests and alliances mean that political will may not exist to recognise the claim to self-determination of even the best qualified minority under the criteria described above.

Generally, the international community is extremely reluctant to recognise claims to self-determination by minorities within a State. International law has not greatly advanced the claims of such minorities since the establishment of the United Nations, and it would not seem prudent to expect otherwise from the 'nations united'. "The reason why international law has made so little contribution to the reduction of ethnic strife is because of its positivist composition: it constructs its rules as a synthesis of what states in fact do, rather than by reference to what they *should* do according to principles of fairness and justice."[33]

### Conclusion to Section 1

The ambiguities of the many shades of self-determination can often be useful for harnessing political support, both by States and ethnic groups seeking to increase their independence. The lack of precision can, however, be an obstacle to developing understanding of the issues. Self-determination can mean much more than the right to secede, which is often politically virtually impossible for minorities within a State, or spread across several States, such as the Kurds and several of Burma's ethnic peoples. It should not be forgotten that varying degrees of self-determination exist which have the potential to dramatically improve the lives of the people involved without necessarily threatening the 'territorial integrity' of the State or States concerned.

The main obstacle for minorities is the fact that they have no recognition as 'peoples', and so international rhetoric about the principle of self-determination may actually bolster claims to State sovereignty. The gulf between the principle and the right of self-determination is not always easy to bridge, although one commentator envisages that "[d]espite this limited contemporary definition of the *right* to self-determination - a definition created primarily by states - the *principle* of self-determination will continue to be a major political force both internationally and domestically. Indeed, developing concepts of human rights, minority rights, and indigenous rights may contribute directly to strengthening the principle of self-determination, even as state-developed law is seeking to minimize its post-colonial impact."[34]

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## 2 Burma

Burma has over 100 ethnic groups, comprising seven major groups with numerous subgroups and smaller distinct groups. Burma's ethnic history is one overwhelmingly of conflict, which has dominated most spheres of life, at least since independence in 1948. While conflicts and wars were waged for countless generations prior to British rule, the

colonial era oversaw the transformation from traditional expressions of enmity to modern civil war. Colonial rule brought about vast changes in demographics, political geography and the political landscape generally. The region now known as Burma was a very different place at the end of its 62 years of full British occupation.[35]

One highly significant change was the fact that the new Union of Burma on independence in 1948 included the Frontier Areas, populated by diverse ethnic minority peoples living in a number of mini-states. Prior to independence these had been administered separately from the rest of Burma. British rule established and entrenched differing treatment for different ethnic peoples, which did little to reduce historic tensions between the peoples of hills and plains. As in many colonial territories, Burma's boundaries were decided as much by the political machinations of various regional colonising powers than by reference to the historical development of the peoples. The effect on the peoples concerned has been to divide them across frontiers, impede their development and undermine their cohesion. In terms of self-determination, though, perhaps an even more significant aspect of colonial rule was the deliberate British policy of bestowing different levels of self-rule upon different ethnic peoples. This has often been described as a policy of 'divide and rule', although no doubt to some extent it was motivated by the more simple aim of securing maximum local co-operation with least trouble on an as-needs basis. To appreciate the spectrum of fine distinctions considered appropriate for the many peoples of Burma under colonial rule, it is worth quoting from Martin Smith at some length, as he describes some examples of the differentiation from 1909 to the 1930s:

> Under a series of reforms...a limited form of Home Rule was introduced... [T]hese reforms did little to address the very real problems of political representation posed by Burma's complex ethnic background. The convenient distinction in rule between the hills and plains that had evolved during the process of annexation came to be encoded in law. There were many odd anomalies. Burma remained divided into two distinct areas, namely Ministerial Burma, or the old Burma Proper, and the Frontier Areas, which became known as the Scheduled or Excluded Areas. For Ministerial Burma there was a parliament to which there were elections and a limited form of local democracy, though matters such as defence and external affairs remained the exclusive preserve of the governor. But the concept of communal representation, bitterly opposed by many [majority race] Burman politicians, was allowed in seats reserved for certain minorities, the Karen and immigrant Chinese, Indian and Anglo-Burma. Yet (and somewhat inconsistently) there was to be no separate representation for the Mon of Lower Burma; the question of seats for the Southern Chin (and Muslims), briefly considered in 1932, was ruled out… Meanwhile the vast hill tracts of the Frontier Areas remained directly under the governor… But again there were many inconsistencies. While most of the 'backward tracts' were left in a state of sleepy isolation, in the Shan states, which were considered more advanced, a Federal Council of Shan Chiefs was formed in 1922 [with certain representative powers]… Then, in a belated attempt to redress some of these inequalities, the Frontier Areas were themselves divided into two categories, Part I or Excluded Areas and Part II or Partially Excluded Areas. The Part II Areas were, in turn, di-

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and one without.[36]

This complex process had the unsurprising effect of fuelling ethnic nationalist sentiments, which complicated somewhat the 'Burmese national independence movement'. While considering the impact of the colonial era on ethnic nationalist aspirations, one also cannot ignore the effect of missionaries, who developed close relationships with several ethnic communities, provoking resentment and suspicion from many Burman nationalists. "Ethnic assertiveness and the expression of ethnic minority views became equated with the division of colonial rule."[37]

## The Panglong Agreement

At the close of World War II the independence movement had gained momentum, and Britain was clearly not intending to resist its pull. In view of the two separate administrations for Ministerial Burma and the Frontier Areas, questions arose as to the make-up of any future country, and whether the Frontier Areas should be included in it. The independence leaders were strong advocates of a united Burma, including all Frontier Areas, and in February 1947 a conference was held at Panglong in Shan State, attended by Shan, Kachin and Chin leaders as well as Burman leaders of the independence movement. The 'Panglong Agreement' was hammered out, which laid down that the peoples of the Frontier Areas could freely join in forming a federal union, be represented by one member to the Executive Council and take part in the writing of the new Constitution.[38]

While the ethnic representatives had agreed before the Panglong Conference on such demands as secession rights, equal rights with Burmans and political autonomy, their united front collapsed and separate sub-agreements were actually reached by the Burman independence delegation with each group.[39] One serious shortcoming of the Panglong Agreement was the lack of participation by representatives of most ethnic groups.

Both British and Burman politicians were perhaps reluctant to hold up the independence process with complicated questions about self-determination, autonomy or other 'national' issues concerning Burma's ethnic groups. In view of the varied political weight the different ethnic groups had been able to wield under British rule, and their varied experiences with the concept of democratic governance, the issues were not necessarily susceptible to quick resolution. In textbook decolonising style, British policy towards the ethnic peoples reflected the British government's reluctance to try to untangle a mess that had been years in the making. They tended to accept the Burman independence movement's assurances that unification was desirable, yet failed to make their position clear to the ethnic peoples. Smith points out that numerous indications (and, in some cases, pledges) of future British support for the minority races had been given prior to independence, and that "[r]ight up to independence, the hill peoples, particularly the Karens, continued to believe that, whatever the state of British negotiations with the [Burman independence party] AFPFL, they still had the ultimate right of self-determination. This is still the most contentious issue between the ethnic nationalists and the central government and explains, in part, the repeated failure of later peace negotiations."[40]

It had been agreed by treaty[41] between the Burman independence movement leaders (as part of a Provisional Government) and Britain that a constituent assembly should be convened to decide on a future Constitution for Burma. In 1947 a Frontier Areas Committee of Enquiry was established pursuant to agreement between the British Government and the Executive Council of the Governor of Burma. It was comprised of "equal numbers of persons from Ministerial Burma, nominated by the Executive Council, and of persons from the Frontier Areas, nominated by the Governor after consultation with the leaders of those areas, with a neutral Chairman from outside Burma selected by agreement"[42], although there were complaints of Burman ethnic domination of the Committee.[43] The Committee was established to enquire "as to the best method of associating the Frontier peoples with the working out of the new constitution for Burma."[44]

The Committee made recommendations as to which ethnic peoples should be represented in the Constituent Assembly, which should be entitled to form states and which should be governed by either the future state or federal administrations. It is interesting to note, in the context of self-determination, some of the rather abruptly expressed views of the Committee regarding 'appropriate' representation in the Constituent Assembly, for example:

> We found it impracticable to procure witnesses from the Naga Hills and the Wa States, but we have no hesitation in recommending that representatives need not be sought from these areas for the Constituent Assembly on account of the primitive nature of their civilisation and the impossibility of their finding persons who will be able to assist in the drawing up of Burma's future constitution[45].

The overall thrust of the report was that the larger ethnic groups should be represented in the Constituent Assembly and that both the Frontier Areas and Ministerial Burma should combine as a new country.[46] This is essentially what happened, interrupted briefly by the assassination of independence leader Aung San and many of his cabinet by a political rival, during the drafting of the Constitution.

The determination that all of the British-administered areas should be formed into one State (in the international sense) meant that the status of 'peoples' in international law was effectively no longer available to the ethnic groups comprising the whole state. This fact, combined with the unequal positions of the ethnic minorities (described further below) and the legal and political capacity of the majority to overrun the minorities, rendered their aspirations for self-determination virtually unrealisable.

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## The 1947 Constitution

The 1947 Constitution has been described as an attempt to blend liberal democratic and socialist ideas.[47] It has also been described as a recipe for disaster[48], and in relation to providing the means for resolving self-determination questions for Burma's ethnic peoples, the 1947 Constitution was certainly a failure. Its most glaring problem was the inconsistency of rights allowed to different ethnic groups. Examples include that while Shan and Karenni States had the right to secede from the Union after ten years[49], Ka-

Division"[51] with less rights, and there was no provision made at all for Mons or Arakanese. The whole Karen question wasn't solved at all, but two options were allowed for in the Constitution.

Relevantly for self-determination, the Constitution provided for a split of legislative powers between the Union and the States, although the effect remained that economically the States were dependent on the Union, which possessed rights over virtually all natural resources. In a concession to regional concerns, s 93 required that before a federal authority issued any authorisation for the exploitation, development or utilization of resources, the authority "shall consult the Union Minister for the State concerned." Section 91 allowed provision to be made by law "on principles of regional autonomy for delegating to representative bodies of such regions as may be defined in the law, specified powers in administrative, cultural and economic matters."

The Constitution reflected the unequal relations of the preceding years, and the minorities' individual bargaining powers, which, it could be argued, "owed more to the haphazard nature and legal quirks of British rule than to any genuine national aspirations."[52]

## Post-independence ethnic conflict and military rule

Frustration with the lack of resolution in the Constitution of numerous long-standing problems was manifested in armed outbreaks following independence. As a result, Burma's military has been engaged in suppressing ethnic rebellion since the birth of the country.[53] The new central government faced immediate armed challenge from one faction of communist insurgents, and this was soon followed in 1949 by rebellion of the Karens in southeast Burma. Karen units in the Burma Army defected en masse. The fighting spread into Upper Burma, and other minority groups such as the Mon, the Karenni, the Pao and the Kachin rebelled. In Arakan in the northwest, insurgency by various communist groups, ethnic Rakhine and Mujahid separatists and militia gangs contributed to a collapse of law and order.[54] Armed rebellion continued almost unabated until the cease-fire process, begun in 1989, discussed below.

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After just over a decade of democracy, interrupted by a period of military 'care-taker' rule following a political crisis, the army seized power in 1962. It appears that prime motivations for the coup were indications by Shan State that it wished to exercise its constitutional right to secede, and moves by ethnic leaders and the Prime Minister, U Nu, to discuss possibilities for reforming the federal structure to redress some of the grievances of ethnic groups.

The army ruled by decree until 1974 through a Revolutionary Council of a few officers led by General Ne Win, who had been commander of the armed forces since 1949. Hopes of a negotiated settlement to what was essentially a civil war were largely extinguished after peace talks in 1963 were unsuccessful. These talks are the subject of controversy and divergent historical accounts. Ethnic organisations have claimed that the military sought only their surrender and refused to listen to their political demands.[55] Following the breakdown of the talks the army's two-fold policy of centralising administration and crushing insurgency was continued. The Ne Win regime responded to the

donment of any notion of 'unity in diversity' or 'federal' democracy. Security became the regime's main concern.[56] A harsh crackdown on dissent was initiated with a continuation of the military campaigns against certain ethnic and other groups.

The small level of autonomy previously enjoyed by the states was eliminated, initially by decree and then under the military's Constitution of 1974. The Constitution "established a unitary state with the fiction of seven states (really provinces) organised along ethnic lines and seven divisions (also provinces) for the Burman majority."[57] This veneer of federalism masked an extreme centralisation of power in what had become a single party 'socialist' state based on Eastern European models. The Constitution laid down a number of basic rights important for the realisation of some measure of self-determination. However these rights were subject to such vague interests as 'national security' and 'the interests of one or several other national races', rendering them meaningless. One example is Article 153, which provides as follows:

> (a)...
>
> (b) Every citizen shall have the right to freely use one's language and literature, follow one's customs, culture and traditions and profess the religion of his choice. The exercise of this right shall not, however, be to the detriment of national solidarity and the socialist social order which are the basic requirements of the entire Union. Any particular action in this respect which might adversely affect the interests of one or several other national races shall be taken only after consulting with and obtaining the consent of those affected.
>
> (c) Notwithstanding the rights enjoyed under Clauses (a) and (b), acts which undermine the unity and solidarity of the national races, national security or the socialist social order are prohibited. Persons who violate this prohibition shall be punished according to law.

Hand in hand with centralisation came Burmanisation, the attempt to equate all cultures in Burma with Burman culture, ignoring or repressing inconvenient differences... Post-independence governments in Rangoon have tended to seek unity through the idea of a common Burmese identity shared by all the inhabitants of modern Burma.

Hand in hand with centralisation came Burmanisation, the attempt to equate all cultures in Burma with Burman culture, ignoring or repressing inconvenient differences. In many ways this had greater potential to undermine self-determination than military campaigns. Post-independence governments and regimes in Rangoon have tended to seek unity through the idea of a common Burmese identity shared by all the inhabitants of modern Burma.[58] This has also been taken up by some Burman and foreign historians, who have sought to identify a unified Burman past, a view of history bitterly disputed by ethnic nationalists.[59] Under Ne Win, schools were nationalised, teaching in ethnic languages was kept to a minimum and ethnic language newspapers were restricted to insignificant topics. Distribution of religious literature was also restricted and complaints made, for example, by government officials to pastors that the militant language of the Old Testament was an incitement to rebellion.[60]

Throughout this time there were various groupings of armed opposition organisations, some of whom managed to find common ground in the formation of a broad-based alliance, the National Democratic Front, in 1976.

## 1988 and subsequently

During 1988 protests and demonstrations against the ruling military-controlled state party broke out and were bloodily suppressed. Of the many factors contributing to the uprising were Burma's economic collapse, general political frustration, anger towards the military administration and resentment at the poor state of education. The protests were largely a Burman phenomenon, chiefly occurring in the urban centres. However, in the aftermath of the massacre an alliance was forged between the approximately 10 000 student and other mostly Burman protestors who fled to the ethnic-controlled border regions, and the ethnic armies who had been fighting for decades against the central government and military regime.

In 1988 the ruling regime also re-organised itself and dispensed with its state party. The following year the junta took advantage of a mutiny in the Burma Communist Party to initiate a cease-fire with the ethnic Wa, which began the trend for ethnic armed organisations to enter cease-fires. Currently all but two of the major ethnic groups have entered cease-fires, although one cease-fire collapsed in 1996. These cease-fire agreements do not address any of the political issues the cause of the long conflict. They don't operate as autonomy regimes[61] but as respite. Perhaps more than anything else they are a "recognition by ethnic leaderships that their peoples were exhausted from years of warfare."[62] They do open the door for some international NGOs to work in ethnic areas, which had previously not been permitted, and allow the army to exploit resources in ethnic areas with some financial benefits awarded to ethnic organisations.

In 1990 growing international and domestic pressure for democratic reform led the military regime to hold multi-party elections, won overwhelmingly by the opposition National League for Democracy (NLD). Nineteen ethnic minority parties were also successful in having candidates elected. The junta justified its subsequent refusal to transfer power by claiming that this could only occur when a new Constitution had been drafted. The duty of the elected representatives, rather than to form government, was to draft the Constitution. The junta then established the National Convention, a forum for the drafting of principles for the new Constitution. However the elected representatives formed only a minority of delegates, the rest being military appointees. The proceedings of the Convention were strictly controlled, and it was mandatory for the Convention to approve several central principles, including that the military would be guaranteed a leading role in the future of the country.

The NLD boycotted the National Convention in 1995, and since then it has been rarely convened, abandoned by the junta, which has continued to draft its Constitution in private. A number of principles underlying the proposed Constitution have been published in state newspapers. It provides for a bicameral parliament, with a President (with military experience) as Head of State. The military will have a quota of seats in parliament. In relation to self-determination, "new 'self-administered zones' [will] be created for the Pao, Kokang, Palaung and Danu minorities in Shan State and the Naga in Sagaing Division, a larger self-administered division for the Wa, and special 'participation rights' for the smaller groups such as the Akha and Lahu, also in Shan State. By contrast, no such nationality representation [is] indicated for large minority groups outside the ethnic states, notably the more than one million Karen living in the

tern of anomalies that [have] troubled national government throughout the 20th century."[63]

Opposition organisations have also been considering the question of future constitutional arrangements, and one umbrella opposition group, the National Council of the Union of Burma, has prepared a first version of a draft federal Constitution, which provides for equal powers for all constituent states. The issue of which minorities will be granted states and the rights permitted the remaining minorities is but one thorny question in this area. Self-determination, secession and levels of autonomy promise to remain crucial issues in any future constitutional arrangements.

Burmanisation policies in this decade have continued, reflected, for example, in the regime's reliance on 'nationalist Buddhism' to undermine minorities and build 'national unity'. The ability to practice one's religion has a central place within self-determination. The fact that most Burmans are Buddhist provides the junta a useful means of undermining ethnic communities, through emphasis on Buddhism as a 'unifying force'. One commentator claims that the military junta has an implicit 'one nation, one race, one religion' ideology, "which is clear in all its dealings with ethnic and religious minorities". She cites, as examples, the fact that one of the duties and powers of the ministry created under the 1993 Development of Border Areas and National Races Law is "making arrangements for the promotion and propagation of the *sasana* [Buddhist religion] in the Development Areas", and that the regime has also created or revived Buddhist missionary universities, which "send out monks to proselytise, often with the assistance of military force, in ethnic minority areas."[64]

## 3 Conclusion

Burma's history is a highly complex story, and only a few introductory aspects have been discussed here. It is the premise of this paper that self-determination has played a central role in Burma's tortuous political and military development since at least British colonial times. The military's traditional unwillingness to recognise even the limited 'traditional' rights of minorities to religion, language and culture may itself have fuelled much of the separatist ire. The policy of the military administration to centralise[65] has reduced the autonomy of ethnic groups, and increased the effects of Burmanisation.

Self-determination has played a central role in Burma's tortuous political and military development since at least British colonial times. The military's traditional unwillingness to recognise even the limited 'traditional' rights of minorities to religion, language and culture may itself have fuelled much of the separatist ire.

On the scale discussed in the first section of this paper, Burma must rank as one of the world's least democratic or representative countries, exemplified by the junta's failure to honour the election results and the military's numerous gross violations of human rights, consistently condemned by the UN. The military's abuses are particularly directed towards members of many minorities. A number of ethnic minorities have maintained consistent claims to self-determination for decades, yet despite this, and the highly unrepresentative nature of the country, the prospect of international recognition of these claims to self-determination is currently quite inconceivable. The response to the situation of ethnic Albanians in Serbia last year, involving more or less united international action on a grand scale, provides an interesting contrasting model.

The military's proposed Constitution suggests that it recognises the need to grant some degree of self-determination to ethnic nationalities, although the lack of equality in ethnic relations that has haunted Burma is again reflected in the regime's proposal, which perpetuates historical patterns of inconsistency. Its provisions set up a hierarchy of self-determination, from which numerous ethnic groups appear to be excluded.

The answer to Burma's self-determination dilemma, if there is one, is obviously extremely complex and will require flexibility, compromise and goodwill. If one lesson can be learned from Burma's history, it is that any solution sought to be imposed by one group upon the others will fail.

## Postscript

Since this article was written, the 56th session of the UN Commission on Human Rights adopted a resolution on the establishment of a new UN body, the Permanent Forum on Indigenous Issues (E/CN.4/2000/L.68). This body is to be established as part of the Economic and Social Council, serving as an advisory body to the Council, and discussing indigenous issues within the mandate of the Council relating to economic and social development, culture, the environment, education health and human rights. The future impact of this body on the issue of self-determination will be interesting to monitor.

Notes

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1. Rodolfo Stavenhagen, *Self-Determination, Right or Demon?*, IV Law and Society Trust (Issue No. 67, November 1993) reproduced in part in Henry J. Steiner and Philip Alston, **International Human Rights in Context: Law, Politics, Morals**, 1996, Clarendon Press, Oxford, p 986
2. Martti Koskenniemi, *National Self-Determination Today: Problems of legal theory and practice*, reproduced in Steiner and Alston, (see fn 1) pp 980-981
3. Frederic Kirgis, jr., *The Degrees of Self-Determination in the United Nations era*, 88 Am. J. Int. L 304 (1994) at 306, reproduced in Steiner and Alston (see fn 1) pp 984-5.
4. Hurst Hannum, **Autonomy, Sovereignty and Self-determination: The accommodation of conflicting rights**, 1990, University of Pennsylvania Press, Philadelphia, p 27
5. Andrew Heywood, **Political Ideologies: An introduction**, 1992, MacMillan Press Ltd, London, pp 138-9
6. Hannum (see fn 4) p 28
7. These 'guarantees' for minority rights "were not inserted to redress earlier depredations by empires (despite such atrocities as the Armenian genocide in 1915-16), but rather to assuage and protect those "national" minorities whose claims to self-determination were not recognised by the victorious Great Powers": Hannum (see fn 4) pp 53-4
8. Heywood (see fn 5) pp 138-9
9. Hannum (see fn 4) pp 55-6
10. Hurst Hannum, *Rethinking Self-Determination*, 34 Va. J. Int. L. 1, at 3 (1993), reproduced in Steiner and Alston (see fn 1) at p 977
11. Hannum (see footnote 10, above) p 973

12. Hannum (see footnote 10, above) p 974
13. For example, the Indian government made the following reservation to the two covenants:
    *With reference to article 1...the Government of the Republic of India declares that the words 'the right of self-determination' appearing in [those articles] apply only to the peoples under foreign domination and that those words do not apply to sovereign independent states or to a section of a people or nation - which is the essence of national integrity*.
14. Geoffrey Robertson, **Crimes Against Humanity: The struggle for global justice**, 1999, Penguin Books Ltd, London, p 140
15. One commentator has pointed out that the Organisation of African Unity similarly decided to seat a POLISARIO delegation in 1985, which "represented a statement that the people of the Western Sahara held rights against those actively denying their aspirations towards autonomy - notably Morocco. Gregory Fox" *Self-determination in the Post-Cold War Era: A new internal focus?* , 16 Mich. J. Int. L 733 (1995) at 743, reproduced in Steiner and Alston at p 981, (see fn 1) quote from p 982
16. Written statement submitted to the 54th session of the UN Commission on Human Rights, 1998, by the International League for the Rights and Liberation of Peoples, E/CN.4/1998/NGO/30, para 13 (c)
17. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations.
18. Hannum (see fn 10) at p 973
19. Hannum (see fn 10) at p 976
20. Hannum (see fn 10) at p 976
21. Kirgis, in discussing his eight faces of self-determination, set out above, considers that while "clearly the right to be free from alien control is an established rule of international law, [o]ne cannot categorically say the same about the other manifestations". Kirgis (see fn 3) at p 985
22. Hannum (see fn 4) p 49
23. Robertson (see fn 14) p 133
24. Such as the 1948 Genocide Convention, which outlawed serious crime committed "with an intention to destroy in whole or in part a national, ethnic, racial or religious group". The International Court of Justice issued a decision on genocide in 1951, declaring it to be a crime under customary international law, "confirming that such groups had at least a right to exist, maintainable against states which sought to splinter or extinguish them by physical force." Robertson (see fn 14) p 133-4
25. For example, under Article 27 of the International Covenant on Civil and Political Rights. Article 73 of the UN Charter states that those Member States which administer territories inhabited by non-autonomous populations have the duty to provide the necessary conditions for their economic, social and political development. The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities (GA Res. 47/135) also sets out duties for states in relation to such matters as minority languages, culture, education and political and economic rights.
26. Rosalyn Higgins in Catherine Brolmann, R. Lefeber & M. Zieck (eds.), *Peoples and Minorities in International Law* 29 (1993), at 30, reproduced in Steiner and Alston (see fn 1) at pp 989-990
27. A good example is given by Robertson (see fn 14) at p 140: "When the Grand Captain of the Mikmaq tribe complained that the Canadian government was denying his members their Article 1 right to self-determination (they wanted to form an independent state), rather than reject his argument, the [Human Rights Committee] refused to hear it, on the ground that this right belongs not to individuals as a group, but to 'peoples.'"
28. Hannum (see fn 4) p 72
29. Robertson (see fn 14) p 144
30. Hannum (see fn 4) p 46
31. For example, the international reaction to the break-up of the Soviet Union, the delayed recognition of the former Yugoslavia republics, the UN's avoidance of taking a stand on the secession of East Pakistan (Bangladesh) from Pakistan and the condemnation by the

Security Council of the proclamation of a Republic of Northern Cyprus. For further discussion, see generally Christian Tomuschat, *Self-determination in a Post-Colonial World* in Tomuschat (ed.), *Modern Law of Self-Determination 1 (1993)*, at 2, reproduced in Steiner and Alston (see fn 1) at p 97; and Fox (see fn 15)

32. Kirgis (see fn 3) at p 984. Similarly: "exceptionally, minorities may be entitled to secede if their oppression is of a duration and magnitude that they are suffering gross violations with no prospect of relief or remedy." Higgins (see fn 26), at p 1011
33. Robertson (see fn 14) p 143
34. Hannum (see fn 4) p 49
35. For details, see Martin Smith **Burma: Insurgency and the politics of ethnicity**, 1999, second edition, The University Press, Dhaka, White Lotus, Bangkok, Zed Books Ltd, London, p 27. This section of the paper draws heavily on his excellent work.
36. Smith (see fn 35) pp 42-3
37. Smith (see fn 35) p 45
38. Josef Silverstein, *Historical Introduction: Burma 1945-1992* in Marc Weller (ed), **Democracy and Politics in Burma: A collection of documents**, 1993, Government Printing Office of the National Coalition Government of the Union of Burma, p 1.
39. Smith (see fn 35) p 79
40. Smith (see fn 35) p 72
41. Treaty between the Government of the United Kingdom and the Provisional Government of Burma, London, 17 October 1947
42. Frontier Areas Committee of Enquiry Report, reproduced in Weller (ed), (see fn 38) p 27
43. Smith (see fn 35) p 84
44. Frontier Areas Committee of Enquiry Report (see fn 42), p 27
45. Frontier Areas Committee of Enquiry Report (see fn 42), p 38
46. There is evidence to suggest that the Burman independence party, the AFPFL, was able to largely dictate proceedings of the Committee to their advantage and ensure that voices opposed to their own were not presented in a united fashion, see Smith (fn 35) p 84.
47. Silverstein (see fn 38), p 2
48. Smith (see fn 35) p 79
49. s 201
50. s 178
51. ss 198-198
52. Smith (see fn 35) p 83
53. Which may to some way towards explaining the siege mentality evident within the military leadership.
54. Smith (see fn 35) pp 27-8
55. Smith (see fn 35) p 206-212
56. Smith (see fn 35) p 199
57. David Steinberg, *A Void in Myanmar: Civil Society in Burma*, in **Strengthening Civil Society in Burma: Possibilities and dilemmas for international NGOs**, Burma Center Netherlands (BCN) and Transnational Institute (TNI) (eds.), 1999, Silkworm Books, Chiang Mai, pp 8-9
58. Smith (see fn 35) p 35
59. Smith (see fn 35) p 36
60. Smith (see fn 35) p 205
61. For example, use of ethnic languages in schools is strictly controlled, as are the curricula of ethnic schools. Burman troops enter ethnic territory frequently, and there are restrictions on possession of arms by ethnic groups.
62. Mark Purcell, *Axe-Handles or Willing Minions?: International NGOs in Burma*, in BCN/TNI (eds.) (see fn 57) pp 89-90
63. Smith (see fn 35) pp 428-9
64. Zunetta Liddell, *No Room to Move: Legal constraints on civil society in Burma*, in BCN/TNI (eds.), (see fn 57) pp 66-7.
65. A tendency interestingly also evident in many of the opposition organisations

# Ethnic issues in Burma

## PART ONE - THE FOURTH BURMAN EMPIRE

*by Aung Htoo*[1]

*This is the first of three articles about issues of different ethnic peoples in Burma (parts two and three will be published in future issues of this journal). This part provides some basic history of ethnic peoples and assesses the military regime's relations with the non-Burman ethnic groups.*

## 1 Introduction

The international community, with its interest in promoting democracy and human rights, is curious about Burma's future. If the ruling military junta falls, what will lie in store? The ethnic resistance organisations are still holding enormous caches of arms, regardless of any cease-fire agreements they have entered into with the military junta. Given this, many observers have expressed concerns that Burma may experience horrors like those of the former Yugoslavia. It is undoubtedly true that if the root causes of the problems in Burma are not properly addressed and resolved, the country will be thrown into further chaos; the rule of law will not be restored and human rights violations will increase terribly.

Burma is composed of various ethnic nationalities, including the majority Burman people. The situation of the non-Burman ethnic nationalities has been a political issue in Burma for hundreds of years. The struggle for democracy and human rights in Burma cannot be separated from the struggle for the self-determination by the non-Burman ethnic peoples. Long-term peace, freedom and justice for all people in Burma will never be realised unless the issue of non-Burman ethnic peoples is properly resolved and their rights are guaranteed in accordance with the constitution and other laws. To appreciate the importance of the ethnic issue and the need for its proper political resolution, it is necessary to examine it in depth.

In spite of the fact that the "ethnic issue" must be properly addressed, this doesn't

mean that the issue is too complicated to resolve and Burma will certainly be in chaos in near future. The current military junta in Burma (the State Peace and Development Council or SPDC) repeatedly claims that Burma will collapse without strong centralization, achieved through military prowess. This claim is ridiculous. There must be an aim for Burman and non-Burman ethnic nationalities to reach a common understanding on "how to construct a political union in which people who formerly were separated could be joined together in such a way as to benefit from unity and still continue to enjoy a considerable degree of cultural, ethnic and political diversity"[2]. Through a greater understanding of each other's situation and history, trust can be established, national unity will be possible and accordingly, a constitution that will guarantee equality for all ethnic nationalities including Burman will certainly emerge. This paper aims to assist increasing understanding of ethnic issues. The paper, using basic human rights concepts, will consider "ethnic issues" from the perspective of political legitimacy, national unity and constitutionality with some relevant historical references.

## 2 Background

Burma is a country inhabited by many ethnic peoples, including Mon, Shan, Rakhaing (Arakanese), Burman, Karen, Karenni, Chin, Kachin, Palaung, Pa-O, Kayang, Wa, Lahu and others.

The central plains of the Irrawaddy valley constitute the ethnic Burman heartland, while the mountainous frontiers, which make up as much as 75% of the land area, are home to the non-Burman ethnic nationalities[3]. In order to properly understand the positions and claims of the various ethnic groups in Burma, it is useful to briefly review the relevant history. The following sections provide a brief history of various ethnic groups.

### Burman

The dominant ethnic group in Burma is the Burman. It is estimated that at the time of the first Anglo-Burman War (1820's) the Burman people numbered between two and three million[4]. Currently, many believe that of the approximately 45 million people in Burma, nearly half are Burman.

Historians are uncertain when the first Burmans settled in the plains area of upper Burma. One commentator estimates that it probably was between the ninth and eleventh centuries, while another gives 839 AD as the appropriate date[5]. The Burman King established hegemony over the other people of the land and created the first empire[6] of King Anawratha by the middle of the 11th century; the second empire of King Bayinnaung in the sixteenth century and the third empire of King Alaungpaya in the eighteenth century[7]. In addition, the King Anawratha built a great city at Pagan during the first Burman empire, erected millions of pagodas that reflected the Indian influences on their art forms, and adapted the Pali-script to their language. Historians usually consider the Pagan period to be the "golden age" of Burman tradition, customs and ideas during the first Burman empire[8]. The military might of the Burman King Bayingnaung is also

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noted in the second Burman empire. During that period, Ka-the State (Assam and Manipur, now part of India), Zin Mae State (now part of Thailand) and Lin Zin state (now Laos) were also annexed.

## Arakan

Three ethnic nationality groups, the Arakanese, Mon and Karen, shared lower and parts of upper Burma with the Burmans.There are many similarities between Arakan and Burman in terms of culture and language, and it may be that both are descended from common ancestors.

Of the three, the Arakanese were the closest of kin with the Burman ethnic group. According to many historians, the Arakanese were part of the Burman migrations into the area; they became separated from the mainstream and settled in semi-isolation in the southwest in an area that came to be known as Arakan[9].

Many Arakan people believe their history can be traced back further than the history of Burman people, and that "Arakan history shows their own self-rule under Arakan kings was longer than the period the Burman kings ruled the Burman people"[10]. Merely emphasising historical factors, of course, will not resolve ethnic issues properly and peacefully. However, at the same time, recognition of the identities of different ethnic peoples is of paramount importance.

The Arakanese people enjoyed a long separate and independent existence that lasted from the end of the Pagan dynasty in the thirteenth century to 1784-85. During that year, the Burmans defeated the Arakanese kingdom and exiled the Arakanese king together with 20,000 of his subjects[11].

After the annexation of a part of Burma into the British Empire, relations between the Arakan and Burman people have been described as follows:

> By the beginning of the Anglo-Burmese war in 1824, two developments occurred among the Arakanese. The first was that many Arakanese had been forced to leave their land and live in 'Burma proper' among the Burman. These people were assimilated and integrated in the local Burman society. However, the other development was nationalist and anti-Burman sentiments, which were held by Arakan people who continued to live in the depopulated area of Arakan and across in India. These people perpetuated their separated identity and helped precipitate the first war between Britain and Burma[12].

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## Mon

Historically and ethnically, the Mon are distinct from the Burmans, Karen and other indigenous groups in Burma. "Their migration into the area is believed to have preceded that of most of the other peoples in the land". Since the beginning of recorded history of Burma, Mons established their own kingdom as an independent country

along the south coast. The Mon are usually recognized as highly cultured people. They were first to adopt Indian civilization and Theravada Buddhism and adapted Indian laws to their local needs. During the first Burman empire period, the Burman King Anawratha conquered the Mon kingdom, and the Mon king, scholars, architects, religious leaders, artists and another 30 000 people were taken to Pagan, the capital of the Burman King. The Burmans then assimilated Theravada Buddhism and other aspects of Mon culture.

The war between the Burmans and the Mons initiated a long history of conflict between the two groups which lasted until the Burman King Alaungpaya and his successors, in the eighteenth century, finally defeated the Mons and then consciously sought to assimilate the two groups[17].

Despite a forty-year war between the Mon and Burman, these two nationalities have been living together peacefully for hundreds of years.

The two communities were thoroughly mixed during a long period of intermarriage and intermingling, through adherence and acceptance of the same culture and social values. However, even in this situation, Mon identity persisted: the Mon history as a separate kingdom provides the basis for the contemporary aspirations of a few of the modern descendants for a separate and autonomous state[18].

Major Ethnic Groups of Burma

Map

Source: Martin Smith, *Burma, Insurgency and the Politics of Ethnicity*, Zed Books, 1991

## Karen

The Karen are among the oldest inhabitants of Burma. Historians believe that the Karen originated from what is now southern China during the sixth or seventh century[19]. The grouping 'Karen' includes a number of different tribes of which the Pwo, Bwe and the Sgaw are the most numerous. According to Professor Cady, the Pwo were the earliest Karen settlers and they eventually established their home in the present area of Thaton and Amherst, among the Mon. The Sgaw settled first in the watershed between the Sittaung and Salween Rivers and eventually were driven west and south by the more powerful Burmans[20].

Factors contributing to the alienation of the Karen from the Burmans include external influences. The American Baptist missionaries who came to Burma in the early nineteenth century influenced the Karen and "educated"

them in the western tradition.

The Karens of the delta and the plains warmly received the missionaries because their appearance and their religious mission seemed to fulfil the prophecy of an ancient Karen myth that predicted the return of a white brother bearing the lost book. The identification of the Karens with the Baptists and the British colonials widened further the gulf between the Karens and the Burmans[21].

**Shan**

It is generally believed that the Shan entered the hill fringe and the plains of upper Burma in the seventh century. As part of the Tai migrations southward into the Indo-China peninsula, the early Shan spread throughout the northern region of Burma and there settled among the various indigenous groups that preceded them into the area[22].

The Shan people had been gradually pushed south, at about the beginning of the Christian Era by the advance of the Tartars. About 650 AD the Shans formed a powerful state in Nanchao, the modern Yunnan, and could resist Chinese attempts at conquest until 1253. During the years 754 to 763 AD the Nanchao Shans extended their rule into the upper basin of the Irrawaddy River and came into contact with the Pyu who were then rulers of the Upper Burma plains. The Pyu were a race that later merged with others to form the Burmese. Trade and commerce and internal and external relations developed through these contacts, with Nanchao and with China. Even in those days some Shans ventured beyond Upper Burma into lower Burma to mingle and live together with the Mons[23].

It is believed that the Shan who settled in the plains area among the Burmans, tended to merge with the latter, "but those on the high plateau to the east continued to be governed by their own chiefs according to their own customs, subject to the suzerainty of Burma"[24]. For a short while after the fall of the (Burman) Pagan Dynasty in 1287, the Shans overran upper Burma and established a temporary hegemony over the other ethnic groups[25]. From that period to 1604, the Shans were direct political rivals of the Burmans for control of the entire area. After 1604, they ceased resisting and accepted indirect rule by the Burmans[26].

Despite Burman conquest, the Shans maintained their separate political identity. Internally, the Shans had their own social and political organization, which differed from the pattern of the Burmans or the other groups in the territory. Like the peoples of the plains and the delta, the Shans had their own language, written script, history and literature that were centuries old[27]. Whenever the Shans came to close proximity with the Burmans, they tended to merge with them by assimilating the customs, traditions and social values[28].

The Shans, who retained their separativeness, were organized in numerous subgroupings each under the absolute authority of a hereditary chief or Sawbwa. The Burman policy toward the Shan States was to govern them indirectly and to leave their traditional social and political organizations intact. The Shan chiefs showed their loyalty to the Burman kings by sending their sons to the royal court ostensibly to

for their own behaviour and loyalty[29].

With regard to the relation between the Shans and the Burmans, the Shan scholar Chao Tzang Yawnghwe has commented as follows:

> "We note that King Anawratha ascended the Burmese throne in Pagan in 1044 AD and during his 43 year reign, he was able to unify Burma under his rule for the first time in history. During this time he sent detachments of his army into the Shan State to ensure the security of his Kingdom. However, he had no intention of annexing the Shan State. He merely wished to defend the low-lying plains of Burma from raids by the Shans. For this purpose he established strong...fortified towns along the length of the foothills. Relations between Shans and Burmese became friendlier under Anawrahta's successors, but the Kingdom of Pagan fell to the Chinese attackers in 1287 AD and was destroyed. Then in 1312 AD a Shan Prince took the Kingly Title of "Thihathu" and ascended the Burmese throne in the City of Pinya.
>
> In the year 1555 A.D. King Bainnaung succeeded in unifying the whole of Burma for the second time in the history of Burma. He was able to "persuade" the Shan Chaofas to submit to his suzerainty. In accordance with the traditions of the earlier Burmese Kings, the administrative set up was that the Shan Chaofas who submitted to the suzerainty of the Burmese King...[would retain] full powers to rule over their own States. Because of this relationship was based on mutual respect, the Shans and the Burmese developed a cooperation that was very close. The military forces of Burma included contingents of Shan soldiers who proved their valour on the foreign battlefields. That is why Shans and Burmese had lived closely together, like brethren, till the fall of Upper Burma to the British in 1886"[36].

Many Shans united with the Burmans through non-political bonds such as religion. Shan Buddhism, like that of the Burmans, was accommodated and blended with a deeper and older religious practice of spirit or nat worship[31]. In the areas of transition where the two groups met and intermingled, other ties with the Burmans such as dress, language and agricultural practices were evident. Regardless of these contacts, the Shans, as a group, never lost their culture, political organizations and, most of all, their sense of identity as a group apart from the Burmans[32].

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## Kachin, Chin and Karenni

Among the other hill peoples inhabiting the upland fringes separating Burma from its largest neighbors, India, China and Siam, the three most important groups, in the light of contemporary development, were the Kachins, Chins and the Kayahs or Karenni. In terms of political organization, historical origin, customs and traditions, they too were distinct from the plains and delta dwellers. In general, while they acknowledged the nominal suzerainty of the Burmans – especially in the transitional zones between

the plains and the hills – they were indifferent to the life of the plains peoples. For the Burman Empire, these peoples and their hilly homeland served as a shield against potential invaders from the west, north and east. Most historians pay scant attention to them in recounting the long history of Burma because of their late arrival into the territory and their lack of contribution to the culture and other development of the area. Harvey, for instance, records little more than the fact that they served as warriors in the Burman armies[33].

The political relations between the Burmans and the Chin, Kachin and Karenni were neither formal nor regular in the same way as those between the Burmans and the Shans.

Only in the case of the Karenni was there any real challenge to Burman nominal authority. An instant quarrel between the chiefs of Western and Eastern Karenni erupted in 1863; the British Deputy Commissioner or Toungoo proceeded to the area to restore peace and while there found occasion to renew the "contract of friendship" between Great Britain and Western Karenni originally signed in 1857[34]. Beginning in 1873 reports of Burman efforts to extend their suzerainty over Western Karenni brought a protest from the British. The Burmans, weakened by two wars with the Westerners and incapable of asserting their authority over the Karenni, settled the matter by signing a treaty with Great Britain on June 21, 1875 which provided that "the State of Western Karenni shall remain separate and independent and that no sovereignty or governing authority of any description shall be claimed or exercised over that States[35].

Under the Karenni name are actually grouped several nationalities, such as Kayan, Kayah, Kayaw, Manu, Manaw, Ka-ngan and others. In resolving issues of freedom, fairness, social justice and development, which are basic to establish a genuine peace, it is necessary to take into account inter-relations within the Karenni, as well as relations between the Karenni and other groups, including Burman, Karen and Shan. In this regard, except for some minor disputes, and influence by one ethnic nationality over another, there were no major conflicts within these local ethnic communities.

Living in the hills apart from the main body of Karens, [the Karenni] developed a distinct set of local characteristics in their language, dress, customs and mores. Their close proximity to the Shans influenced their pattern of tribal organization and the names they adopted for their petty chieftains[36].

Relations between the Burman and the Chin or Kachin were historically friendly. There was no conflict of similar magnitude between the Burmans and the Chins or Kachins. Both these groups were content to accept nominal Burman authority so long as it did not interfere with their own internal affairs and did not attempt to force them to accept direct rule[37].

The Reports of the Frontier Areas Committee of Enquiry 1947 notes the fact that Kachin levies were used in the Burman army as early as 1551-81, during the reign of King Bayinnaung. It concludes its remarks about Kachin-Burman relations with the following:

> "The Burmese were not interested in the internal administration of the

> occasional presents or tributes from the Kachins and their occasional service in the Burmese armies. In some cases Kachin Duwas of importance received appointment orders from the Burmese king. Thus, the Kansi Duwa, a powerful chieftain, received his appointment order and his badge of office from King Mindon (1853-1878)"[38].

They are reported "to have had social intercourse with the Burmese at the time of the Kingdom of Pagan (1044-1287)[39], and to have provided soldiers for the armies of King Bayinnaung (1551-81) and Alaungpaya (1752-60)". The Chins who lived in areas where they had regular contact with the Burmans adopted the language, customs and religion of the latter. Those living in the remote hill areas retained their traditional social and political pattern, animistic faith and local dialects[40].

The Chins continued to practice their custom of slaving until the twentieth century when the British forced them to cease[41].

During the periods of the Kingdoms of the Burman, the Chins enjoyed local autonomy and no major racial conflicts between the Chins and other ethnic nationalities, including Burman, occurred. "The Burmans never exercised direct authority over the more primitive Chins and never sought to integrate and assimilate them into Burman society"[42].

## 3 Relations between ethnic peoples

With reference to the ethnic nationalities issues, Professor Josef Silverstein, a renowned expert on history of Burma, commented as follows:

> During the period of recorded history, the Burmans, through force and conquest, created three separate empires. The first two lasted for approximately two centuries each and the third enjoyed a lifetime of slightly more than one century. Between the periods of unification, the area of what is now modern Burma was the scene of constant warfare between the largest ethnic groups, the Burmans, Shans, Mons, and Arakanese. Despite their tradition of military prowess, the Burmans failed to establish internal peace and security, did not create the political machinery necessary for stable government, orderly administration and peaceful succession to the royal throne. In addition, there was no concept of nationhood that included all the ethnic minorities, nor any theory that supported the idea of assimilation and integration of these people[43].

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In the history of Burma, the Burman kings established three separate empires. Many times they occupied the other kingdoms. It is useful to carefully consider the motivating factors in the wars between the Burman kings and the kingdoms of other ethnic nationalities including hereditary chiefs, to decide whether these were really ethnic conflicts.

During the feudal lord era, the kings, if possible, usually wanted to expand their territory and powers with military prowess. ...[This was not only the desire of] Burman kings but it was also relevant to Shan and other kings all over the world at those historical periods. It was also noteworthy that the Burman people themselves were slaves of their kings. In the history of Burma, one ethnic nationality did not make slaves of the others. Generally speaking in Burma, people-to-people relations among various ethnic nationalities were friendly. We cannot say that there has been ethnic conflict between one ethnic nationality and another. Since the independence of Burma, given that the Burma army, comprising a majority of Burman soldiers, brutally oppressed the Shan people in Shan State, it may be true that many Shan people have hated Burmans...[Yet] the oppression of the Shan people was not the attitude of the ethnic Burmans, but the policy and program of the ruling military regime. It was not a question of ethnic conflict but a question of the political system. That is why we can solve ethnic issues in Burma politically and peacefully once the military or other dictatorial regimes no longer rule the country[44].

It can be seen that within hundreds of years all people of ethnic nationalities, excepting a few cases, have intermingled with each other and have been living together in various parts of the country with a kindred spirit. For instance, the lowland of upper and central Burma is the area of origin where the majority Burman people live. There, Burman, Shan, Kachin and Chin have been living peacefully. A similar situation occurred in lower Burma, particularly in the delta lowland area where Burman, Mon and Karen have been living. Another example is Shan State, where many ethnic nationalities have been living. Almost all states in Burma have become multi-ethnic states.

Following the three wars, the British occupied Burma. Beginning after the end of the third Anglo-Burmese war of 1885, the British authorities embarked upon a series of administrative and political changes that had a major impact upon Burmese society.

The 'local' Government (directed from England) did not treat the whole territory as a single administrative unit; instead it loosely followed the policy of its predecessor, the Burman kings, and administered Burma proper directly and Frontier Areas indirectly[45].

From 1897 and 1922 home rule was gradually introduced into Burma, and one Shan Chaofas was appointed as representative of the Shans, to the Governor's Advisory Council, to advise the Governor on matters pertaining to the Shan State. Then from 1922 to 1935, the Federated Shan States was established in the Shan State. The British commissioner was appointed as the Chairman of the Federated Shan States Council and the Chaofas were given the privilege of discussing and advising the Commissioner on administration of the Shan States, on finance and on important matters concerning general administration[46].

Kachin and Chins were permitted to live under their own leaders and in accordance with their laws, customs and traditions so long as they gave up such traditional practices of slaving and war making.

Kachin and Chins were permitted to live under their own leaders and in accordance with their laws, customs and traditions so long as they gave up such traditional practices of slaving and war making[47].

The British made a contract with the States of Western Karenni, under which the British treated the territory and its people as a separate feudatory state. This gave some independence to the Karenni people. Following an earlier British precedent in their

keep the area outside the colonial administrative structure and treat it in the same way as the feudatory princes were treated in India[48].

The British parliament enacted the Government of Burma Act in 1935 and it was effective from April 1, 1937. Under this law, Shan State and other mountainous regions, or "Frontier Areas", were excluded from the administration of Burma proper.

The 1935 Constitution provided further changes which strengthened the division between the Frontier Areas and Burma proper – or as it was then called, Ministerial Burma[49].

Accordingly, Shan State and other mountainous regions were left behind the improvement of administration from proper Burma[50].

Many Burmese historians simply concluded that differences arose between the Burman and non-Burman ethnic nationalities because Britain administered Burma with a "divide and rule policy". This view is exemplified in the following quotes:

In the Report of the Simon Commission, it was recommended to continue separating mountainous regions such as Shan, Kachin and Chins from Burma proper [because] the Burmans were not interested in the affairs of these non-Burman ethnic people. Actually, it was a complete fabrication to create misunderstanding and discrimination among the ethnic people themselves[51].

Since the annexation of Burma by the British, “Divide and Rule Administrative System” was practised. As a result, the ethnic nationalities did not trust each other and, due to suspicion and skepticism, it came up with narrow nationalism[52].

In respect of this, some political critics have a different analysis.

It is true that the British practised separate administrative systems in various parts of Burma. However, it was not concern[ed] with politics but economics. Colonialists [generally], including the British, directly ruled lowlands and other places that were economically feasible and viable for exploitation and export of natural resources and products. Colonialists indirectly ruled mountainous inland areas that were not economically feasible. For instance, in Vietnam the coastal areas were ruled by the French directly and, in Indonesia, Java was also ruled by the Dutch directly. In those colonized countries, many of the hard terrain areas were ruled indirectly or left unadministered. We cannot say that it was a “Divide and Rule Administrative System”, [designed] to create misunderstanding and distrust among the ethnic peoples politically. It was actually practised for economic interests[53].

In the Report of the Simon Commission, it was recommended to continue separating mountainous regions such as Shan, Kachin and Chins from Burma proper [because] the Burmans were not interested in the affairs of these non-Burman ethnic people.

The Karen National Union (KNU) is one of the major ethnic resistance organizations in Burma. The Karen people usually use the term, “Payaw” in Karen language, meaning “Burman”. Whenever the KNU soldiers have seen troops of the ruling military junta coming, they have shouted “Payaw Hae Lee” which means “Burmans have come” and then they fought against them. This does not mean that they understand all Burmans to be enemies. They can differentiate between enemy Burmans and friendly Burmans.

Following the 1988 popular democratic uprisings in Burma, hundreds of thousands of people and students, the majority of them Burmans who mainly lived in the lowland areas, escaped to the non-Burman ethnic areas and took refuge there. All the non-Burman villages hosted the Burman people and provided food, shelter and, sometimes, clothes to them. There were no reports at that time that anyone was refused assistance on account of being Burman. Similar peaceful and friendly relations among the various ethnic nationalities have been taking place up to the present time.

When ruling regimes or authorities promote the language, culture and history of only one ethnic nationality while oppressing those of others, it becomes an issue to be resolved and causes concern and dissatisfaction from other ethnic nationalities. Another serious issue, in terms of natural resources, finances, education, positioning of administrative offices and others, is if distribution is not fair among the ethnic nationalities. Such situations threaten ethnic harmony; as a result national unity can collapse and the whole society can be thrown into chaos. This has been the case in Burma under military rule. This is not because of racial hatred among various ethnic nationalities but because of the elite who rule the country with military might. If a proper administrative system can be created politically and constitutionally, these issues can certainly be resolved.

Issues of relations between ethnic groups have existed in almost all societies of the world since early periods of human history. How to properly resolve any differences is the question not only for the current society of Burma, but for many other countries, including, in Southeast Asia, Indonesia, the Philippines and Malaysia. In Vietnam, Cambodia and Thailand there have also been similar issues, although without the severity of Burma.

To resolve ethnic issues properly, the first necessity is to recognize ethnic identity within a society.

Ethnicity is a broad concept, covering a multiplicity of elements: race, culture, religion, heritage, history, language, and so on. But at bottom, these are all identity issues. What they fuel is termed identity-related conflict - in short, conflict over any concept around which a community of people focuses its fundamental identity and sense of itself as a group, and over which it chooses, feels compelled, to resort to violent means to protect that identity under threat[54].

The ethnic histories mentioned above show that, in general, the rulers of Burma, including kings, political parties and authoritarian regimes, have never made a concerted effort to establish a plural society in which all the ethnic nationalities enjoy freedom, peace, equality and development, leading to genuine national unity.

Recognition of identity does not cover only the existence of various ethnic nationalities within a society but it also relates to the distribution of resources in between those groups. Often such identity-related factors combine with conflicts over the distribution of resources (such as territory, economic power, employment prospects, and so on)[55].

Without fair distribution of resources among ethnic nationalities, as collective units within society, we cannot say that ethnic identity is properly recognized. Clearly, the issues of non-Burman ethnic nationalities are worthy of being addressed properly by paying attention to ethnic identity. The ethnic histories mentioned above show that, in general, the rulers of Burma, including kings, political parties and authoritarian regimes, have never made a concerted effort to establish a plural society in which all the ethnic nationalities enjoy freedom, peace, equality and development, leading to genuine na-

strated strong evidence of the existence of national unity of ethnic nationalities in Burma to achieve independence from the British. However, the efforts at Panglong are forgotten by the current military regime. Instead the military, with reference to the three Burman Empires in history, is attempting to establish a "Fourth Burman Empire", merely with military might agitating the emotional national spirit of the Burman people.

The Burman King, Bayinnaung, created the second Burman empire in 1562 and extended it by occupying Chiangmai State (now northern part of Thailand) and Dwarawaddy State (now Ayudaya, the ancient capital of Thailand) again. The current military regime has constructed statues of Bayinnaung in border towns such as Tachileik and Kauthaung between Thailand and Burma (the former is near the northern part of Thailand and the latter is near the southern part of Thailand). These statues face Thailand and portray the king taking his sword from his shield. The SPDC is excavating the ground in Hansawaddy (now Pegu in Delta area of Burma), the ancient capital of Bayinnaung, to promote the military achievements of Bayinnaung.

One Burman military officer wrote a series of articles entitled "Bayinnaung: Honour of the Country" in March, April and May 1994 issues of Myet-Khin-Thit (New Grass Land) Magazine, which is the policy magazine of the military regime. The ruling generals usually provide lectures in the military intelligence training courses and military universities, analyzing the 1962 military coup as an attempt by the army to save the Union from collapse, and this was also a part of the plan to create a Fourth Burman Empire. Si-thu-nyein-aye is the Pen Name of U Win Aung who is SPDC's Foreign Affairs Minister. He wrote a series of articles entitled "Sa-tok-hta-shwe-phi-tho (Towards Fourth Golden State)" in the Myet-khin-thit Magazine No (94) published in February 1998 and onwards. In these articles, the Foreign Minister wrote that the military government is establishing the Fourth Burman Empire. Following the second military coup, the military junta extended the number of its army from 186,000 in 1988 to over 400,000 currently. The chauvinistic ethno-nationalism practised by the SPDC not only deprives other ethnic minorities in Burma of their rights, but also represents a threat to neighboring countries.

In order to resolve ethnic issues properly in the case of Burma, it is necessary to address the relevant historical inequities.

## 4 Equality

Under the separate administrative systems exercised by the British in Burma, the non-Burman ethnic nationalities suffered from *inequality*. This has been a serious issue up to the present. Clearly, action must be taken to address this situation. Some people call for absolute equality between all ethnic groups, for example: any national parliament must have the same number of members for each ethnic groups, or any finances shared by a central government must be provided in equal amounts to each ethnic area. Such a claim is not proper because different ethnic areas are not the same. The differences between ethnic areas can be seen in terms of population, natural resources, geographi-

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cal situation, qualification of the individual people, or background history. It is not fair, for example, to give a group of 10,000 people the same amount of political representation and resources as have to be shared between another group of 100,000 people.

The paragraph above considered the issue of equality in governance and distribution of resources, demonstrating that areas with different populations may require different amounts of resources. However, this "proportional equality" is not the only relevant issue in considering Burma's future governance. Equity and fairness are also very important concepts. The history of Burma shows repetitive exploitation of the non-Burman ethnic areas and ethnic people. These historical practices must be corrected by affirmative action where appropriate, favouring under-developed areas that have suffered from historical exploitation and repression. A practice of affirmative action, aimed at achieving a national equity *and* equality, could be exercised in matters such as sharing natural resources, distribution of political offices, access to political information, procedures and practices, conditions of employment etc.

Any assessment must be made with proper consideration of all groups of ethnic nationalities in Burma with due regard to the population size and other factors at the same time. There must be an aim for, or a concept of, shared access to development, utilization of natural and other resources, and administration with equity and fairness. Since recorded history, such an aim has never been translated into reality, and even the concept has not been properly formulated as a whole. Without acceptance of the concept by a majority of the people in Burma, including ruling parties and regimes, a proper constitution promoting and protecting equal rights of the ethnic nationalities will never emerge. A dream of genuine national unity will never come true.

## 5 Individual rights and collective rights

Human rights mainly concern the relationship between the state and individuals. However, human rights do not explicitly address the collective rights of ethnic people who would like to maintain their particularities such as culture, custom, language, literature, ancestral domains etc. It has become doubtful that particularity of the ethnic people can be maintained while human rights are being promoted.

Ethnic people have practiced different cultural systems in Burma for hundreds of years. All ethnic peoples have their own languages and the majority of them have their own literature. Unfortunately, under the rule of the military junta, learning and teaching of ethnic literatures has not been allowed in government schools. Only Burmese (Myanmar), the major language of the majority Burman people, is permitted. From 1992 to 1997, under the military's program claiming to preserve cultural inheritance in support of "national unity", the junta re-established "Kambawza Thardi", the ancient palace of Burman King Bayinnaung. The military spent 170 million Kyat (Burmese Currency) in doing so[56]. Under the same program, the military junta allotted 1.3 million Kyat for the extension of Shan State library[57]. At the same time no project was allowed for the Shan people to preserve the ancient palaces of Shan hereditary Chiefs such as Chaofas or Sawbwas. Instead, Keintong Haw, palace of Keintong Chaofas in eastern

Shan State, was destroyed and replaced with a hotel.

The Karen people love their national flag very much as a symbol of the dignity of their nationality. Unfortunately, in a surrender ceremony for a group of Karen rebel soldiers, the SPDC vice-chairman, Lieutenant General Maung Aye, lay down the Karen national flag and stepped on it. These brutal actions of the SPDC leaders strike at the hearts of the non-Burman ethnic people. These are only some of the dealings of the military junta with ethnic nationalities.

People usually love their culture and want to practice it freely. If their practises are not against public health and basic rights of other people, the practices should be allowed in respect of the fundamental collective rights of ethnic people, rather than just individual rights. Without paying due respect to the different cultures of the ethnic people in a certain country, without sharing political power and the country's resources fairly, and without establishing a pluralistic society, genuine peace and stability will never be a reality in Burma. While the current practice of attempting to establish a unitary state under strong centralization continues, countless problems will continue. Additionally, trust among various ethnic nationalities has been waning, and national solidarity will never be achieved.

## 6 Future governance of Burma

With reference to the factors mentioned above, in order to achieve peace, freedom, justice and development in Burma through the process of genuine national solidarity, the major issue for serious consideration is what kind of state will be established currently in the future.

Since the time of the recorded history in Burma, the concept on the State is very much one of centralization. During the three Burman empires, the feudal lords ruled the country with centralization. In the name of the Kingdom (now the State), the king exercised all legislative, judicial and executive power. Following the independence of Burma from the rule of British in 1948, socialism gained momentum in the world and the leaders of Burma at that time were mostly influenced by socialism, in which the state plays a great role in establishing society. At that time, the concept of the majority of intellectual leaders were that the government, on behalf of the State, will exercise strong power, in the "interests and welfare" of the State.

Following the first 1962 military coup, in the name of socialism and the "interests" of the "State", the military junta practised centralization; brought in the 1974 unitary constitution and removed almost all the rights of non-Burman ethnic nationalities provided for in the 1947 constitution.

However, between 1948 and 1962, democracy and human rights, to a large extent, improved in the country and people in urban areas, as individuals, could enjoy relatively more liberty. At that time, the State could play a relatively protective role for the rights of many individual. Following the first 1962 military coup, in the name of socialism and the "interests" of the "State", the military junta practised centralization; brought in the 1974 unitary constitution and removed almost all the rights of non-Burman ethnic nationalities provided for in the 1947 constitution. Then, following the second military coup in 1988, the military promoted the role of "State" much more strongly than any other regimes in the history of Burma. Even in the periods of the three Burman em-

pires, the kings allowed non-Burman ethnic nationalities regional autonomy. However, unfortunately, with strong determination to establish a "Fourth Burman Empire", the SPDC is currently attempting to establish a state with the strongest centralization in the history of Burma. Clear evidence of this can be observed in its planned new constitution for future Burma.

The military junta has been convening a National Convention, or Constituent Assembly, and has already laid down guidelines and basic principles for a new constitution. Significant portions of the military's new constitution have now been published in the "New Light of Myanmar", Burma's pro-military State newspaper. The Burma Lawyers' Council has examined these and analysed them in its paper "The Military and Its Constitution." Some major points made in this paper are as follows:

> The constitution establishes an authoritarian centralist government with very few checks and balances. The military is to be entrenched in every institution of State, including the Union Presidency, the Union Government, the Union Assembly (comprising the People's Assembly and the National Assembly) and the Regional or State Assemblies.
>
> The military is effectively established as an ultra-constitutional organization. It is to be above the constitution and above the law. The "Chief of Staff of the Defence Forces" is the most powerful person under the constitution. His appointment and removal are not referred to in the constitution. It is anticipated that he will be beyond the control of a civilian government. The Chief of Staff of the Defence Force and the military will be regulated by the military's own regulations, which will override the constitution. The Chief of Staff of the Defence Forces is entitled to nominate twenty five percent of all members of the People's Assembly, the National Assembly and the State and Regional Assemblies. The Chief of Staff of the Defence Forces is also entitled to nominate the Minister for Defence (i.e. the Chief's own boss), the Minister for the Interior and the Minister for Border affairs. Members of the Union Assembly appointed by the Chief of Staff of the Defence Forces are entitled to nominate a Vice-President of the Union. The "elected" members of the Union Assembly nominate two further vice Presidents. Members of the Union Assembly then form an Electoral College to elect a President of the Union from among the three Vice-Presidents. It is anticipated that the members of the Union Assembly appointed by the military will form a block vote and unite with the political parties aligned with the military to ensure that the Vice-President nominated by the military is elected as the President.
>
> The proposed system is essentially a presidential system, with extensive powers vested in the President who is subject to very few limitations. Apart from the ministers nominated by the military, the President nominates the ministers in the Union Government. A minister may come from inside or outside of the Union Assembly, and may or may not be a military officer.
>
> The Union Assembly is the national legislature and will comprise of a Peoples Assembly and a National Assembly. The National Assembly,

membership of each Assembly is to be "elected". The constitution is vague as to the true nature and functions of each Assembly. It is unclear whether the Assemblies may exercise any "legislative" powers at all.

The constitution is silent on the entire law making process. It is unclear who can initiate laws and whether laws must be passed through the one house or both houses of the Union Assembly. It is unclear whether the President and the Ministers of the Union Government are subject to laws passed by the Union Assembly. It is unclear whether the President can veto or ignore laws passed of the Union Assembly. These discrepancies are deliberant and are designed to give the military some flexibility in controlling the government.

The Union of Burma is to be divided into seven states and seven regions (similar to the division established by the military's 1974 constitution). The President will appoint a Chief Minister for each state and region. A partially elected Legislative Assembly will also be established in each state and region. It is unclear whether the governments of the states and regions will have any administrative and legislative functions. No functions are guaranteed by the constitution. Any administrative or legislative functions must be delegated (and can be removed) by the President of the Union. The military has deliberately avoided the formation of any type of federal system of government in accordance with the demands of Burma's ethnic nationalities. However the military is attempting to create theappearance of a federal system by establishing powerless state governments and legislatures.

While seventy-five percent of each legislature established in the Union of Burma is to be "elected", there are no constitutional guarantees of democratic procedures. There are no guarantees that the representatives will be elected by the people in a free and fair vote. There are no guarantees of free speech or political activity. There is no freedom for the media. There are no human rights protections. In fact there are no general protections for the people or at all in the constitution. There are no guarantees of equal rights or any special protections for Burma's ethnic nationalities.

# 7 Conclusion

In Burma, there is no conflict between either Burman and non-Burman *people* or between non-Burman ethnic nationalities themselves. Throughout the history of Burma, the source of ethnic "trouble" has been the extension of military power and a centralization process by the *rulers*. As a result, the rights of non-Burman ethnic nationalities were mainly neglected and peace, justice, equity and fairness were lost. Under the SPDC, which practices stronger centralization than during any other period of history in Burma, not only the non-Burman and but also Burman ethnic nationalities are suf-

fering terrible atrocities. The SPDC deprives non-Burman ethnic people of the right of local autonomy, which had even been permitted by earlier Burman kings during the three Burman empires.

Forceful conquest and annexation can be achieved by military prowess. Superficially, it may appear that the military is capable of establishing stability in Burma, but in essence, it has only been creating brutal oppression, fear, injustice, and loss of freedom for all people inside Burma. In such a terrible situation, we cannot say that national unity has been achieved.

However, at the same time, national unity can really be achieved once the Burman and non-Burman ethnic nationalities get a chance to sit together; exchange information about past sufferings, establish common understanding for the future and produce a new constitution which will guarantee liberty, freedom and development of individuals as well as ethnic groups.

## Notes

*In writing this article, the contribution of Professor Joseph Silverstein is recorded as he permitted the Burma Lawyers' Council to use his paper entitled "The Struggle for National Unity in the Union of Burma" as copyrighted.*

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# An Overview of the recognition of Native Title in the Commonwealth of Australia

*D L Ritter* [1]

Editor's note

*Rights to land in Burma are bound up with issues of ethnic conflict, militarisation and lack of democratic institutions. A future democratic Burma will need to seek ways to resolve competing claims to land, taking into account such issues as traditional ownership by particular ethnic nationalities, return of displaced persons, varying religious ties to land, development imperatives and agricultural demands. The chosen method of resolution will need to address, as much as possible, the needs for certainty, efficiency and a fair hearing for those concerned.*

*The democratic opposition and its international supporters are seeking to explore and collect ideas for the construction of effective and fair ways of dealing with the many complex legal and social issues in Burma. As part of this exploration of ideas for the future, Burma Lawyers' Council encourages articles explaining relevant issues in other countries. The following article is kindly provided by the principle legal officer of an indigenous land council in Australia. The Australian experience offers an interesting perspective on possible judicial, legislative and administrative responses to the issue of indigenous ownership of land.*

## 1 Introduction

Prior to 1992, Australia's law did not recognise traditional indigenous or Aboriginal rights to land. There were a few statutory exceptions but it was only in the watershed *Mabo v Queensland* (2) decision, handed down by Australia's highest court in 1992, that Aboriginal native title was finally recognised by Australia's legal system. The *Mabo* case was a judicial revelation that added a new dimension to the law and practice of land holding in Australia by recognising that a whole new layer of land tenure exists within the Australian property law system.

In this article, the legal history of Australia as it pertains to the indigenous inhabitants of the country prior to *Mabo* is briefly discussed. The *Mabo* decision itself is then outlined along with the statutory response that followed and some of the case law which has subsequently proliferated. The complicated native title processes that now govern all land use in Australia are described in some detail and are placed in their political and administrative context. An assessment is made of some of the difficulties inherent in the native title system in Australia and some of the more problematic issues facing Australia's native title processes are addressed. Finally some comments are made about Australia's native title experience in an international context.

Naturally, Australia's native title process has spawned a vast literature. However, this article is intended for the general interest reader who may not be familiar with Australian law or history. Accordingly, within this overview references are kept to a minimum. Some further more detailed and technical reading is recommended in the attached bibliography.

By way of brief background to assist readers' understanding: Australia has a national government (the Commonwealth) with separate governments for each of the six States (New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia) and two Territories (Australian Capital Territory and Northern Territory). Powers are divided between the levels of government but a valid Commonwealth law overrides any inconsistent law of a State or Territory. The highest court in Australia is the High Court of Australia, which hears appeals from the Supreme Courts of the States and Territories. The indigenous people of Australia are commonly referred to as a whole as 'Aboriginal' but comprise numerous different groups (estimated at 600 tribes at the time of British arrival in 1788). Aboriginals comprise about one and a half percent of Australia's population of 19 million people.

## An Undeclared Invasion

British colonization of Australia began in 1788 with landings on the eastern coast near what is now the city of Sydney. Upon declaration of sovereignty, under common (or domestic) law, the British Crown obtained ultimate (or supreme) title to all land in Australia. Following the commencement of colonization, interests in land were granted by the colonial government to particular colonists in increments. This is notwithstanding the fact that, at the time, Australia was possessed and occupied by numerous Aboriginal groups, each of which held land according to their own unique laws and customs. These indigenous groups (and their own laws) were simply ignored by the British Crown. Colonial law in Australia was not congniscent of Aboriginal people's traditional interests in land.

British colonization of Australia began in 1788... Following the commencement of colonization, interests in land were granted by the colonial government...notwithstanding the fact that...Australia was possessed and occupied by numerous Aboriginal groups

The interests granted by the Colonial Government were across a spectrum, from the grant of freehold title (which confers the greatest interest in land that can be held by a private citizen under the common law), through various kinds of lease-hold, down to mere licenses and easements. One form of land tenure, peculiar to the historical development of Australia, is the pastoral lease. This form of tenure was developed in response to Australia's particular economic, social and geographic circumstances. Pastoral

properly described as a licence at law (because they lack the character of conferring exclusive position on their holder), these pastoral leases nevertheless gave significant control and power over the land in question to the lessees.

Where the doings of Aboriginal people were in conflict with the interest of the colonists, brutal force was used. The colonisation of the southern island of Australia, Tasmania, has long been called Australia's "Black War". However, the conflict was much more widespread than Tasmania. A sustained (if disjointed, *ad hoc* and uncoordinated) campaign was waged against Aboriginal people throughout Australia. Massacres persisted into the twentieth century.

### Australian Law has Historically been Racially Discriminatory

While not directly related to native title, it is salient to consider other features of the Australian legal system that have related to Aboriginal people. In broad terms, Australia has a profoundly racist history of law-making and Aboriginal people had minimal legal rights until the 1960's, when Aboriginal people finally obtained the right to vote. Laws restricting the freedom of movement of Aboriginal people in a manner redolent of Apartheid or the segregation era in the southern states of America were historically commonplace in much of Australia. The application of the criminal law of Australia has consistently, in practice, discriminated against Aboriginal people with Aboriginal people being vastly over-represented in custody. Aboriginal people are also much more likely to die in custody than non-Aboriginal people, prompting a national royal commission of inquiry into the subject in the 1980's. A later royal commission considered the historical practices of Australian government departments removing Aboriginal children from their parents by force. It cannot be denied that Australia has a racist past, with Aboriginal people being both expressly and implicitly excluded and discriminated against by the application of the Australian legal system.

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Fortunately, and not before time, Australia is gradually (and not without serious hiccups) improving its record on racial equality before the law. A Commonwealth Racial Discrimination Act was passed in 1975. Various items of state racial discrimination legislation have followed, as has legislation prohibiting racial vilification. The *Mabo* decision and the Commonwealth *Native Title Act* are also an expression of Australia's modern commitment to racial equity. The *Mabo* decision was a statement that the common law of Australia "should neither be nor be seen to be frozen in an age of racial discrimination"[2].

## 2 The *Mabo* Case

The question of whether native title existed in Australia was not the subject of any litigation until *Milirrpum v Nabalco*, decided by the Supreme Court of the Northern Territory of Australia in 1971. In that case, his Honour Justice Richard Blackburn incorrectly applied Canadian and other international common law precedents to find that the doctrine of native title did not exist in Australia. It was not until 1982, in which year

the *Mabo* litigation was commenced, that the existence of native title was again argued before the courts. In the *Mabo* case it was argued by the applicants that the Meriam people of the Murray Islands in the Torres Strait in the north of Australia held native title to their traditional lands. It took a decade for the case to survive various challenges as well as racially discriminatory legislative efforts by the state of Queensland to prevent the case proceeding, before the matter was argued and then finally the subject of a decision by the High Court of Australia.

In the *Mabo* decision, handed down in June 1992, six out of seven judges of the High Court of Australia held that, where applicable on the facts, the common law of Australia recognises the doctrine of native title. The Court found on the facts that such native title existed and was held by the Meriam people of the Murray Islands. The Court stated that, in broad terms, for native title to exist, a number of elements must be satisfied:

- There must be an indigenous group who held native title for the country in question at the time of sovereignty;
- that group must have had to have a continuing traditional connection to their country that extends unbroken to the present day; and
- while the Court recognised that traditional Aboriginal society could not be expected to remain frozen in time, for a group to hold native title its connection to the land must remain rooted in tradition.

The Court recognised that in some circumstances native title could be "washed away" by "the tide of history"[3], or simply abandoned. The court in *Mabo* determined that the content of native title is dependent on the law and custom of the indigenous group concerned. Similarly, the identity of those who held the native title would be a matter of factual enquiry. The Court also recognised that native title could be obliterated by an act of government demonstrating a clear and plain intention to extinguish native title. The Court further found that, where native title was extinguished, the Aboriginal group who had lost their native title would have a right to compensation, where the extinguishment occurred after the passage of the Commonwealth's *Racial Discrimination Act* in 1975. Extinguishment prior to that time did not give rise to any right to compensation.

Immediately following the *Mabo* site decision there was, metaphorically, a short silence in which the Australian government, media and interest groups digested the decision. This was followed by a deafening cacophony of reaction over the meanings of *Mabo* and how government – and Australian society - should respond.

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## The Meanings of the Mabo Decision

Not surprisingly, given its late recognition, 'native title' was not a concept that easily located into existing Australian land administration. A party who has native title to an area of land or waters has rights and interests over and in that land and waters and may, accordingly, make use of that land. The exact rights and interests recognised by law in

terests, as determined. The native title will draw its content from the unique laws and customs of each claimant group. However, native title cannot displace any valid right or interest that existed prior to the determination of native title.

The potential effect of the *Mabo* decision was that where it had not been extinguished, native title could exist over the entire continent of Australia. However, this native title was inchoate and would remain incorporeal until recognised by a determination. It would exist prior to the determination, but it would not be clear what the native title was or who held it. In the absence of any specifically designed mechanism, the only way open to Aboriginal people to seek to have their native title determined would be by litigation. Further, if indigenous people wished to prevent a particular development occurring on their traditional lands then the primary remedy open to them would be to request a court order prohibiting the development under general law principles. Further, through the application of the Commonwealth *Racial Discrimination Act*, any item of state legislation that did not treat Aboriginal interests in land equally with non-Aboriginal interests in land could be invalid. The Commonwealth Government sought to address these and other issues in enacting the (Commonwealth) *Native Title Act* 1993.

## 3 The (Commonwealth) Native Title Act 1993

The Commonwealth's *Native Title Act* ("NTA") established a specific regime for the recognition and protection of native title; for the interaction of native title with other existing and future interests in land; and for applications for compensation arising out the extinguishment of native title.

In broad terms, under the NTA, a claimant application for a determination of native title is made to Federal Court of Australia (a Commonwelath court with specific jursidiction over various Commonwealth matters). Once such an application is made, it is obligatory for the Court to refer the claim to mediation, which is conducted by a special body known as the National Native Title Tribunal. The mediation is between the native title claimants and, potentially, every other party that has an interest in the land and waters covered by the native title claim. All levels of government in Australia (national, regional and local) are permitted to join such mediations as interested parties. Other interests that are commonly parties include mining and resource companies, pastoral leaseholders, developers and fishing interests. The purpose of such mediation is to achieve a determination of whether native title exists and if so, who holds and how it interrelates with other interests within the claim area. This is obviously an extremely difficult exercise that is time consuming, resource intensive and draining on all participants. This is reflected by the fact there have been only six such determinations of native title in Australia since the NTA came into operation at the beginning of 1994.

Where mediation reaches an impasse, the claim must be concluded before the Federal Court by litigation. Four claims have been determined by litigation since *Mabo*. The applicants were successful in three of the four claims (see page 43, below). Three of the four decisions have been appealed, two of which have been decided but may be the

subject of further appeal. The scale of native title litigation is massive, with multiple parties, hundreds of days of evidence, hearings in the field, teams of experts and numerous witnesses. Even when a case is determined by litigation, the parties may still be left having to negotiate on the terms of how they are expected to relate to one another. Accordingly, although native title mediation may be difficult, it is still always likely to be faster, cheaper and more efficient than litigation.

The NTA is designed to have maximum flexibility between the litigation and mediation streams. There is the capacity under the statute for particular questions of fact and law to be referred for determination in the Federal Court and, conversely, for particular questions to be referred from the Court to the Tribunal for further mediation.

Apart from the procedures for determining native title claims, the NTA sets up separate processes for dealing with the interface between native title and future interests in land. Whenever a native title claim is lodged with the Court, the registrar of the Tribunal applies a registration test that considers both the merits and the form of the native title claim in question. The claim must satisfy all such criteria or it will not be registered. Once registered, the native title claimants obtain valuable procedural rights in respect of non-indigenous parties who wish to perform 'future acts' on the land that is subject to the native title claim. In plain English, under the NTA a 'future act' is simply something with legal effect that a third party wants to do on land that is subject to native title.

Chief among these procedural rights that are obtained by native title claimant groups as a consequence of the registration of their claim, is the right to negotiate. The NTA gives registered native title claimants the right to negotiate over any significant proposed mining or exploration activity or any compulsory acquisition of native title rights and interest by government over the land that is subject to the native title claim in question. The native title party, the future act proponent and the government party are required to negotiate in good faith with respect to the proposed future act in question. If the negotiations do not result in an agreement about the doing of the act then there is provision for the matter to be referred to the National Native Title Tribunal which, in an arbitral capacity, will decide whether the act can go ahead and, if so, under what conditions. The future act processes of the NTA are essentially designed to maintain a status quo in respect of land that may be subject to native title, pending a determination of the native title claim in question. Apart from the right to negotiate, numerous lesser procedural rights exist under the NTA in respect of other future act interests in land.

## Extinquishment of Native Title

The *Mabo* case did not make clear what kinds of land tenure would extinguish native title. In this respect, the chief debate that followed *Mabo* was whether or not pastoral leases extinguish native title. The significance in this question lies in both the vast percentage of arable land in Australia that is covered by pastoral lease and the political strength of the pastoral industry. The matter was not decided decisively until the decision of high court in *Wik v. Queensland*[4], which was handed down in December 1996. In the *Wik* decision, the High Court held by a 4-3 majority that pastoral leases did not manifest a plain and clear intention to extinguish native title. The High Court

clear that exclusive possession leasehold extinguishes native title, as, for instance, do roads.

## The NTA and other Legislative Rights in Land for Aboriginal People

It is important to note that the NTA does not cover the field in terms of legislation that has a bearing upon indigenous people's relations with land in Australia. Most states and territories have Aboriginal heritage legislation, which affords particular rights for Aboriginal people with respect to preserving their cultural heritage. A number of states and territories also have land rights legislation which creates the opportunity for Aboriginal people to have land granted to them. Land rights legislation, although significant, is of a different order to native title legislation. Importantly, the law of native title is not a matter of any grant or gift of land being made to indigenous people. Rather, it is a matter of recognising indigenous native title rights, which already exist, albeit incorporeally. Indigenous people, along with other landholders may also access rights under a variety of environmental, planning and social impact legislation.

## The NTA and the Political Climate

Native title has not ceased to be controversial in Australia. The original NTA was passed in 1993 by the (centre left) Australian Labour Party which was then in national government. The legislation was not supported by the (centre right) Liberal-National Party coalition. When the Liberal-National Party coalition was swept to power in the federal election of 1996, it quickly moved to introduce a bill to amend the NTA. This bill was the subject of much political debate and a number of redrafts before becoming law as the *Native Title Amendment Act* 1998. In general terms, while the 1998 amendments were, in some instances, merely procedural, they also swung the balance of the NTA firmly away from Aboriginal people (although the legislation remains broadly beneficial in character). Thus, there has not been a political consensus to native title law making in Australia. Rather, native title has been a political target with both sides of politics accusing the other of failings of principles and pragmatism.

A number of [Australian] states and territories...have land rights legislation which creates the opportunity for Aboriginal people to have land granted to them. Land rights legislation, although significant, is of a different order to native title... [T]he law of native title is not a matter of any grant or gift of land being made to indigenous people. Rather, it is a matter of recognising indigenous native title rights, which already exist.

## The Role of Native Title Representative Bodies

The NTA also established provision for the recognition of specialist legal services to represent native title claimants. These organisations, known as 'native title representative bodies' are funded by the Commonwealth Government and have specific statutory responsibilities to represent their Aboriginal constituents. Each body has a geographic jurisdiction and is required under the NTA to meet certain minimum conditions of representation and service to its constituents. It is usual for native title representative bodies to have not only lawyers on staff, but also anthropologists, field officers, project officers, administration staff and, in some instances, historians, cartographers, economic advisers and others.

## Evidence of Native Title and the Role of Experts

The Courts have recognised that the best evidence of native title comes from Aboriginal people themselves. Nevertheless, it is in the interest of native title claimants to bring expert witnesses in support of their case. Anthropologists will give evidence of the existence of Aboriginal groups and their laws and how those laws relate to country. Historians will demonstrate the continuity of connection to land. Linguists will assist with the interpretation of Indigenous evidence and other matters. Such experts have been extensively involved in the native title cases that have been decided to date.

## Post-*Mabo* Litigated Determinations of Native Title

There have been four litigated determinations of native title since the *Mabo* case. In chronological order these are as follows:

### *Ward & Ors v Western Australian & Ors*[5]

In this case, the Miriuwung Gajerrong peoples established native title over large tracts of the north of Western Australia and the east of the Northern Territory. In the appeal decision, the full court of the Federal Court agreed with the trial judge that native title existed on the facts, but watered down the judgement significantly in terms of extinguishment and the extent of native title.

### *Yarmirr v Northern Territory* [6]

In this matter it was determined for the first time that native title could exist over ocean waters. However, the judge found that such native title as may exist over the ocean is non-exclusive and so cannot impact on non-indigenous rights over the sea.

### *Hayes v Northern Territory*[7]

The Federal Court found that native title existed in and around the city of Alice Springs in the Northern Territory. The case has not been appealed.

### *Yorta Yorta Aboriginal Community v Victoria & Ors*[8]

In contrast to the other three cases, in this matter, the Federal Court found that the native title of the Yorta-Yorta people had been washed away by the tide of history as long ago as the late 19th Century. The Court found to be persuasive, the writings of an amateur historian and pastoralist, Mr. Edward Curr who had described in his writings changes in the traditional way of life of the Aboriginal groups in question. The Court found this as evidence that native title had been washed away. The appeal in this case has not yet been decided.

# 4 Difficulties Inherent in the Native Title Process

Native title remains an intensely complicated process. Notwithstanding six years of operation, the NTA still excites extreme emotions. Some members of the Australian community still appear opposed to the very recognition of native title, and there remains widespread lack of understanding of both the concept and the attendant legal processes. This political volatility continues to have a significant impact on the length of time it takes to resolve native title matters.

Of particular concern has been the proliferation of overlapping native title claims. The NTA does not prevent native title claims from overlapping one another and, with significant procedural rights to be obtained through the registration of the native title claim, some parts of Australia have experienced an abundance of overlaps. Resources remain another significant issue in the native title process. It is commonly accepted that native title representative bodies are insufficiently funded to attend to even their minimum core functions under the NTA and this has a flow-on effect for the entire native title process. Party political division and Commonwealth-State political rivalries are another complicating factor. Regrettably, such politics can at times impair the commitment of governments to seeking pragmatic solutions to native title issues. The ongoing uncertainty of the law of native title is also problematic.

## The Australian Experience in International Context

The law of native title in Australia is most often compared with Canada, America and New Zealand. Yet, in each of these other three colonial societies the framework which native title is dealt with is markedly different. In America, Canada and New Zealand the process of colonisation included treaty making between the colonising power and the indigenous peoples. No such treaty making occurred in Australia. The effect is that a very different framework of native title rights exists in Australia compared to other colonial societies. However, where common law about native has emerged in Canada, America and New Zealand that law is useful in the interpretation of native title in Australia.

Less specifically, the Australian experience may be compared and contrasted with how modern nation states are dealing with their Indigenous peoples throughout the world from Japan to Norway; and from Russia to Malaysia. Australia's native title system may prove a useful precedent to such diverse international situations as Basque separatism in Spain, compensation and repatriation for land taken from black people in South Africa in the course of Apartheid and the treatment of the Romany people in the European Community. The Australian experience will no-doubt be of particular interest to other members of the Southeast Asian international community. Finally, the Australian experience is also being both studied and critically examined by the United Nations in the context both of the Convention for the Elimination of all forms of Racial Discrimination and the draft Declaration on the Rights of Indigenous Peoples.

# 5 Conclusion

Respect for traditional indigenous rights to land is a new phenomenon in Australia. The Australian legal system and Australian society are taking time to adjust. Dealing with the watershed of native title has required new and extremely complicated legislative machinery that is unique in the world.

Thus far, the Australian native title system has delivered recognition of native title to groups scattered throughout Australia, in northern Queensland, northern Western Australia and the Northern Territory. Whether a determination of native title can be achieved by Aboriginal groups in the more heavily colonised southern areas of Australia remains to be seen. However, regardless of outcomes in specific cases, the recognition of native title in Australia unquestionably marks a crucial step in Australia's retreat from an unjust and racist history.

Notes

1. BA (Hons) LLB (Hons), Principal Legal Officer of the Yamatji Land & Sea Council native title representative body.
   Author's note: I would be very pleased to engage in correspondence with any interested international readers of this article. Please contact me by email on <dritter@tower.net.au>. Thanks to Emma Smith for her assistance with editing.
2. *Mabo & Ors (2) v Queensland* (1992) 107 ALR 1 at 28.
3. *Ibid* at 43.
4. *Wik People & Ors v Queensland & Ors* (1996) 141 ALR 129.
5. (1998) 159 ALR 483. Appeal decision is not yet published in hard copy but is available electronically at [2000] FCA 191.
6. (1998) 82 FCR 533. Appeal decision is not yet published in hard copy but is available electronically at [1999] FCA 1668.
7. [1999] FCA 1248.
8. [1998] 1606 FCA.

## Select Annotated Bibliography

The literature of native title in Australia is indeed vast and is subject to the hazard of becoming outdated very quickly as the law of native title changes. The following is merely a selection of the more comprehensive works and sources of information.

- **Loose-leaf Service**
  *Butterworths' Native Title Service* [cited as NTS] is the sole loose-leaf native title service dealing with native title and can provide the most up to date hard-copy information.

- **Website Addresses**
  <http://www.nntt.gov.au> is the National Native Title Tribunal's homepage.

  <http://www.austlii.edu.au> is the most comprehensive electronic source of Australian case law and statutes

- **Texts**
  Bartlett, R., *Native Title in Australia*, Butterworths, Adelaide, 2000 is the most up to date and comprehensive text book.

  Horrigan, B. and Young, S., *Commercial Implications of Native Title*, Federation Press, Sydney, 1997 is a little dated but still a helpful anthology.

- **Journals**
  *Indigenous Law Bulletin*, *Australian Indigenous Law Reporter*, *Australian Mining and Petroleum Law Journal* and *Native Title News* have all covered native title and related issues extensively

# Military Regime to Establish Base on Mars ...or a Human Rights Commission

*John Southalan*[1]

## 1 Introduction

Recently, the military regime indicated it might establish a human rights commission in Burma. This proposal surprised many groups seeking democracy in Burma, and observers of Burmese politics. Indeed, some consider the regime would have as much success establishing a base on Mars!

The issue of a possible human rights commission in Burma first arose in 1998[2] but gained prominence because of a visit to Burma by Mr Chris Sidoti, the Human Rights Commissioner of the Australian Human Rights and Equal Opportunity Commission. During his visit, in August 1999, Mr Sidoti met with representatives of the military regime (including ministers and other government officials), the United Nations ('**UN**'), international non-government organizations ('**NGO**'s), and the National League for Democracy[3]. His visit attracted considerable comment among Burmese groups and observers: some supporting his visit[4], while others criticised his contact with the military regime[5] and the proposal of a human rights commission in Burma[6].

Some of the responses to Mr Sidoti's visit are part of the ongoing debate over whether any governments or other organisations should have contact with the regime. This article will not address the respective sides in the 'Burma: dialogue or isolation' debate; instead the article considers the practicalities of establishing an effective human rights commission under Burma's current governance.

The human rights commission being contemplated is a type of body existing in many countries and internationally known as a National Human Rights Institution ('**NHRI**'). The article provides a general background of NHRIs, notes the existing NHRIs in the Asia-Pacific, and addresses some main features of an NHRI. Then, with this back-

ground, an analysis is made of the relevant factors in Burma. It is hoped this will provide a basic explanation about NHRIs, which may assist in the ongoing discussion on how such a body could feature in Burma's future. The remainder of this paper is divided into four sections:

2 overview of NHRIs;
3 main NHRI features;
4 relevant factors in Burma; and
5 conclusions.

# 2 Overview of NHRIs

This section outlines the historical development of NHRI bodies and then discusses the NHRIs in the Asia-Pacific region.

## 2.1 History and role of NHRIs

The basic role of an NHRI is, as a semi-government body, to assist in protecting and promoting international human rights standards in a country[7]. There is no universal definition of an NHRI, and their role and powers vary slightly from country to country. However, it is possible to outline basic features of most NHRIs, which include that the body:

- is established by law - either under the country's constitution, a parliamentary statute, or a government or executive order;
- works to assist the education or promotion of human rights;
- provides advice / recommendations to government on human rights matters;
- investigates and resolves complaints of violations committed by public (and sometimes private) individuals and bodies; and
- is independent.

These features are considered in more detail in section 3, below.

The basic role of an NHRI [National Human Rights Institution] is, as a semi-government body, to assist in protecting and promoting international human rights standards in a country

It has been repeatedly emphasized that an NHRI is not a substitute for representative parliament or for an independent judiciary. As the UN notes: "The judiciary is the basic structure for protection of human rights at the national level. A national human rights institution, no matter how wide the powers or efficient its operation, can never adequately substitute for a properly functioning judiciary"[8].

NHRIs were first considered in the UN system by the Economic and Social Council ('**ECOSOC**), which is a subsidiary body of the UN General Assembly. In 1946, ECOSOC suggested countries should establish "information groups or local human rights committees"[9], which are seen as the beginnings of current NHRIs. This concept was further refined by the 1960 ECOSOC, which explained these bodies could have a participation and monitoring role on human

rights[10]. In the late 1970's an international seminar proposed guidelines on NHRIs' general functions, which that were later adopted by the UN Commission on Human Rights ('**CHR**') and UN General Assembly. In 1991, an international conference in Paris outlined what have since become the minimum standards for NHRIs, now known as the '**Paris Principles**'. These principles were accepted by the CHR in 1992 and the UN General Assembly in 1993[11]. In 1993, the World Conference on Human Rights adopted the Vienna Declaration and Program of Action ('**VDPA**') through the consensus of all governments present, including the military regime. The VDPA encouraged governments to establish NHRIs following the Paris Principles[12] and the General Assembly recently reaffirmed the importance of governments establishing NHRIs in accordance with the Paris Principles[13].

Through these various international developments on NHRIs, in the Paris Principles and the VDPA, we can see the "international community has come to agreement as to the optimal structure and functioning of these bodies"[14]. The meetings of the UN CHR and General Assembly that accepted the Paris Principles by consensus involved nearly all the world's governments, including Burma's military regime. The regime joined the Vienna World conference that adopted the VDPA by consensus and was also involved in the subsequent UN General Assembly meeting that endorsed the VDPA and called on States to act on the VDPA's provisions[15]. Through its involvement in these meetings, Burma's military regime is well aware of what an NHRI involves and has already accepted the universal standards for NHRIs.

## 2.2 NHRI development in the Asia-Pacific

To better understand the role of any future Burmese NHRI, it may assist to review other NHRIs in the Asia-Pacific[16]. By considering other NHRIs' histories, main roles and powers, it is possible to form a clearer picture of what a Burmese NHRI should be.

[T]he international community has come to agreement as to the optimal structure and functioning of [NHRIs]. ...Through its involvement in [United Nations] meetings, Burma's military regime is well aware of what an NHRI involves and has already accepted the universal standards for NHRIs.

The first NHRI established in the Asia-Pacific region, and the second in the world[17], commenced in New Zealand in 1978, when what is now the New Zealand NHRI was established under a parliamentary statute. In terms of investigations, the New Zealand NHRI has power to compel the provision of evidence and information. The NHRI also recognizes a need for, and is moving toward, more emphasis on systemic issues rather than just dealing with individual complaints. The New Zealand NHRI differs from most NHRIs in possessing some quasi-judicial power and being able to make binding determinations in some circumstances.

The Australian NHRI, established under parliamentary statute in 1981, was the fourth in the world. Its responsibilities include: legislative and policy development, public awareness and education, dealing with human rights complaints and also discrimination complaints, and national enquiries into systemic problems. The Australian NHRI has power to compel parties to produce information needed for its investigations. The Australian NHRI, more so than other NHRIs

in the region, undertakes national enquiries into systemic problems. These inquiries have considered the human rights abuses caused by Australian laws, and the policies and action of government and government agencies.

The Philippines NHRI was established in 1987. This made it the fifth NHRI in the world, however it was the first to be created under and receive specific protection from, its country's constitution (rather than simply be set up under parliamentary legislation or government order which, because they can be amended more easily, offer far less protection). The Philippines NHRI can investigate potential human rights violations either as a result of receiving a complaint or on its own initiative. The NHRI can issue subpoenae forcing parties to provide documents or give evidence for an investigation. The Philippines NHRI has the power to inspect prisons and detention centres and undertakes this work as well as research, education and public information programs, and monitoring government compliance with international human rights standards. One role the Philippines NHRI undertakes, which most of the other NHRIs in the region do not, is prosecutions in the country's courts for certain human rights violations.

The Indonesian NHRI was established, by an order of the Indonesian President[18] in June 1993, seven days before the World Conference on Human Rights[19]. Many people viewed this simply as a political credit-building stunt for the World Conference[20] and expected nothing from the Indonesian NHRI. However, the Indonesian NHRI, despite its weak basis (with the risk of simply another Presidential order terminating it), has been complimented by many human rights organizations for its work in improving human rights in Indonesia. Its duties or tasks include: human rights education and awareness, advising government on ratification of international treaties, monitoring and investigating the implementation of human rights, and fostering regional and international cooperation on human rights. The Indonesian NHRI's mandate is perceived as very broad[21]. This has advantages in not limiting the Indonesian body's work like some other NHRIs in the region. However, the very wide mandate also creates difficulties by not defining the work on which the Indonesian NHRI should concentrate. Like other NHRIs, the Indonesian body can investigate alleged human rights abuses either as a result of a complaint or on its own initiative. There are currently moves to have the legal basis of the NHRI 'upgraded' from a Presidential Order to parliamentary statute[22].

The Indian NHRI was established in 1994, under a parliamentary statute. Apart from investigations, the Indian NHRI's other functions include: jail visiting and reporting, reviewing constitutional and legislative safeguards, implementing international treaties, research, education, publications, court interventions on human rights matters, and assisting NGOs. The NHRI has some powers similar to a court, allowing it to prosecute parties if they fail to provide information as required under the NHRI's powers. The Indian NHRI, like others, needn't wait for a complaint but can investigate matters on its own initiative. The Indian NHRI, perhaps out of necessity given the high number of reported violations it receives, has a strong commitment to focus its investigations and work on long-term, systemic solutions.

Asia Pacific Forum of NHRIs ('**APF**'). The APF is an organisation made up of the, currently seven, NHRIs in the Asia-Pacific region (India, Sri Lanka, Indonesia, Philippines, Fiji, Australia, and New Zealand). The APF assists in establishing and developing NHRIs and provides opportunity for greater cooperation between the NHRIs (through actions such as information exchanges, training and development for NHRI members and staff, and specialist regional seminars on common themes and needs). The APF's activities are mainly undertaken by its secretariat, which is currently based with the Australian NHRI and receives funding from the New Zealand and Australian governments and the UN. The APF permits NGOs and governments to join its annual meetings.

The Sri Lankan NHRI was established in 1997 under parliamentary statute. Its mandate includes: investigating government compliance with human rights, investigating human rights complaints, advising government on legislation regarding human rights, and promoting human rights education and awareness. The Sri Lankan NHRI has various powers including to: intervene before any court on a matter of fundamental rights; investigate arrests, detentions and disappearances under specified Sri Lankan laws; regularly inspect conditions and welfare of people detained or arrested; summons and receive evidence in the course of any investigations. The statute also established compulsory reporting procedures for arrests under specified laws, requiring the arresting authorities to notify the Sri Lankan NHRI within 48 hours of any such arrest.

In 1999 the Fijian NHRI was established. The Fijian NHRI, like the Philippines NHRI, was also established under the country's national constitution. Commencing in March 1999, the Fijian NHRI has three specified functions: public education of human rights, recommendations to government on compliance with human rights standards, and "promoting and protecting the human rights of all persons in...Fiji"[23].

A NHRI commenced in Malaysia in April 2000[24]. At this stage, it is not possible to provide any reflection on its activities other than to note its creation has been cautiously welcomed[25]. There are other countries in the Asia-Pacific in the process of establishing NHRIs. The governments in Nepal, Bangladesh[26], South Korea[27] and Thailand[28] have all invested considerable time and effort in preparing for the establishment of NHRIs in their countries. Civil society in some of these countries has been dissatisfied with the establishing process or legislation. This was also the case in some of the countries mentioned earlier, and it demonstrates the importance of public involvement in NHRI establishment. Many voices in the civil society in the Asian region consider there is no shortage of semi-official bodies created by governments simply to make political gain, with no real commitment to improving human rights.

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The APF has consistently explained an NHRI that does not meet the Paris Principles will not be able to join the APF[29]. At the international level, though not specifically in relation to the Asia-Pacific region, there is an International Coordinating Committee of National Institutions. This body, like the APF, also emphasises compliance with the Paris Principles, and has recently begun implementing an accreditation process to monitor each NHRI's compliance with the

ment of NHRIs "in conformity with the Paris Principles, in order to strengthen the protection of human rights and consolidate the rule of law"[30].

Essentially, the Paris Principles are aimed at making an NHRI effective. The next section of this article outlines key features for an effective NHRI.

# 3 Main NHRI features

Through studying the Paris Principles and other NHRIs in the region, it is possible to identify some key elements for the effective functioning of an NHRI. Four of these will be addressed here: independence, jurisdiction / powers, promotion of human rights, and advice / assistance to governments. Then, in section 3.5, there is a short analysis of NHRI relations with government, reflecting on these key features already identified and also some of the experiences of NHRIs in the Asia-Pacific.

## 3.1 Independence

Independence is perhaps the most important aspect addressed in the Paris Principles. 'Independence' requires the NHRI to be able to operate free from the influence of government, political parties, and other groups or individuals who may affect the NHRI's operation. The Paris Principles identify four areas in which the NHRI must have independence.

The first requirement for independence is legal and operational autonomy. The NHRI must have the power to operate on its own and to be able to force others to cooperate if they will not freely do so.

The second aspect of independence is financial autonomy. The NHRI must have control over its own finances and not be part of the budget of a government department or ministry. Ideally, an NHRI submits its own budget directly to the national parliament for approval.

Composition of national institutions should be a reflection of its society, and accordingly its members should reflect diversity in sex, ethnic origin, language and political affiliation as appropriate

Appointments and dismissals are the third area of NHRI independence specified in the Paris Principles. An independent system is required for appointment (and, where necessary, dismissal) of NHRI members and senior staff. The system must protect the NHRI from partisan political appointments and also from the threat of dismissal where the government does not like the NHRI's activities. Again, as with the budget, the ideal situation is where these matters are decided by national parliament, which is usually the most representative body in a country.

The fourth area of independence is in composition. The origins and backgrounds of NHRI members and senior staff can act as a further encouragement and aid to the NHRI's autonomy: "Composition of national institutions should

be a reflection of its society, and accordingly its members should reflect diversity in sex, ethnic origin, language and political affiliation as appropriate"[31]. In the Asia-Pacific, one method adopted by some NHRIs like the Indian, New Zealand and Australian, "is to appoint commissioners representing specific vulnerable groups such as minorities [and] women"[32].

One matter not addressed in the Paris Principles, and relevant to the issue of independence, is public participation in the process of establishing NHRIs. This is an issue because a new NHRI is most unlikely to meet Paris Principles requirements of independence in appointments and composition if there is no public / civil society / NGO involvement in its establishment. This has been a particular problem in South Korea and Malaysia where the governments have restricted or ignored NGO input into establishing an NHRI, resulting in considerable public opposition to the government's proposals for the NHRI. South Korean NGOs, in particular, have consistently criticised their government's lack of involvement of civil society[33]. The problems created by many governments failing to properly include public involvement in establishing an NHRI have reached a regional level and are being addressed by the APF[34].

### 3.2 Jurisdiction / powers

The law establishing the NHRI must clearly define the NHRI's jurisdiction and provide it with adequate powers to perform its responsibilities. An important issue affecting an NHRI's potential to improve human rights, is what the NHRI is permitted to consider as 'human rights'. A wide or narrow definition of this phrase will have a large influence on the NHRI's work[35]. Some NHRIs, such as the Sri Lankan body, were established with a narrow 'mandate' in this respect, being directed to enquire into violations of rights under the country's constitution (the rights under the constitution are less than standard international human rights). The Indian NHRI's establishing law, on other hand, made reference to "rights…embodied in the International Covenants [namely; Economic, Social and Cultural Rights and Civil and Political Rights]" which is a better approach[36].

Perhaps the central issue to NHRIs, when considering jurisdiction / powers, is the ability to undertake investigations:

> "One of the most important functions…[for] a…[NHRI] is the investigation of alleged human rights violations. The existence of a national mechanism with the power to investigate abuses and provide relief to victims can act as a powerful disincentive to violative behaviour. It is also a clear indication of a Government's commitment to human rights and of its genuine willingness to take international and domestic obligations seriously"[37]

The UN considers an effective investigation system requires the NHRI to have: adequate legal capacity, organizational competence, a defined and appropriate set of priorities, and the political will to pursue its work[38]. Typical NHRI powers to enable effective investigations include:

- free access to all documents relevant to the investigation;

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evidence);
- freedom to conduct on-site investigations and inspections where necessary;
- power to force parties to attend NHRI hearings;
- power to hear every individual who the NHRI considers has knowledge concerning the alleged violation or may assist the NHRI's investigation;
- power to publish findings; and
- capacity to commence investigations of its own initiative without first requiring a complaint to be lodged.

One of the factors assisting an NHRI's investigative role, as well as other work it does in promoting human rights, is the accessibility of the NHRI. An NHRI must be accessible to the public in its location, organization and procedures. This may require action in publicising the NHRI or establishing offices in various parts of the country.

Just as the ability to conduct investigations is a central tool in NHRI powers, the limitation of investigation powers can be a significant restriction on an NHRI. Just one example of such a restriction can be taken from India: there have been calls for many years for the Indian NHRI to be granted the power to investigate military abuses[39], an activity from which it is currently prohibited by law.

### 3.3 Promotion of human rights

Enjoyment of all human rights is not achieved through protection alone. As has been noted: "not all situations of human rights abuse can be traced directly back to legislative inadequacies or unfair administrative practices. Human rights violations also occur in the private sphere: in the workplace, in the local community, and in the family"[40]. Improving human rights often requires promotion and education. NHRIs, like other societal institutions (including schools, NGOs and universities), have an important role in promoting human rights[41]. An NHRI's promotion of human rights can be done in many ways, including:
- collecting, producing and disseminating information materials;
- organising promotion activities and encouraging community initiatives;
- working with media;
- ensuring the NHRI and its work are visible;
- professional training (eg. training of police, military, public officials, media, lawyers, teachers, NGO and community organizations); and
- seminars or education programs.

Some NHRIs in the Asia-Pacific, in response to a large number of similar violations in their country, hold a general (often lengthy and public) inquiry into the overall causes of these violations.

One factor that can assist in promoting human rights is the wide-scale, or systemic, inquiries that some NHRIs undertake. Some NHRIs in the Asia-Pacific, in response to a large number of similar violations in their country, hold a general (often lengthy and public) inquiry into the overall causes of these violations. Reports in situations like this will often identify laws and government policies or actions that contributed to the many violations. The NHRI and other bodies can then use the report to advocate for change and promotion of human rights. Matters that have been considered in wider enquiries by NHRIs in this region

ess[43], and indigenous population control[44]. Another example of human rights promotion (although it also has a 'protective' aspect as well) is work undertaken by the New Zealand NHRI on women's rights in the region[45].

The situation of economic, social and cultural rights should also be noted here. Though all human rights are seen as interdependent and indivisible, considerably less attention has historically been given to economic, social and cultural rights (as opposed to civil and political rights). Often there are fewer avenues for improving these rights[46] and it is sometimes more difficult to identify specific breaches of economic, social and cultural rights. Many people consider promotion, education and awareness as the best way to improve economic, social and cultural rights. NHRIs can play a key role and the importance of public enquiries revealing wide-scale or systemic abuse has been particularly noted in the ability of NHRIs to improve economic, social and cultural rights[47].

### 3.4 Advice / assistance to government

Most NHRIs are able to provide advice or recommendations on human rights matters to the three 'arms' of government: executive, parliament, and even the courts (some NHRIs can intervene in legal proceedings to assist the judges in human rights matters). The scope for such 'advice' depends on the NHRI's powers in the law that created the NHRI. Some NHRIs can only advise after first being requested by a government official, whereas others are able to provide recommendations even where there was no initial request.

NHRIs frequently provide advice to parliament and government departments on proposed legislation (eg. reviewing or drafting) or on government policy or action. Governments and parliaments often require consistent lobbying to advance human rights. An NHRI can be a key player in persuading a government to act to improve particular human rights.

NHRIs usually advise governments on how to implement international human rights standards. This is particularly relevant where a government may have undertaken international obligations (eg. ratified a treaty) and those obligations are not being realised in the country. Also, in relation to the international context, NHRIs often have input into their country's reporting required under international human rights treaties[48].

[A]n NHRI's role is to protect and promote human rights, [so] when government actions threaten human rights, the NHRI must oppose these actions. The Asia-Pacific has many examples of NHRIs pressuring government to improve human rights.

### 3.5 NHRI relations with government

It is important to understand the relationship between an NHRI and its country's government. Too often, this relationship has been misunderstood, or ignored, by both governments and NGOs.

Firstly, it follows that because an NHRI's role is to protect and promote human rights, when government actions threaten human rights, the NHRI must oppose these actions. The Asia-Pacific has many examples of NHRIs pressuring gov-

ernment to improve human rights. In Sri Lanka, the NHRI publicised, nationally and internationally, the discovery and proposed investigation of mass graves in Jaffna when the Sri Lankan government remained quiet, and the NHRI successfully opposed government moves to reduce the NHRI's regional offices[49]. The Australian NHRI investigated and criticised historical government genocidal action aimed at eliminating indigenous people[50] and recently recommended the government not adopt proposed legislation that was racially discriminatory[51]. In Indonesia, the country's NHRI recently established an investigatory team to study the reported violations in East Timor: the report implicated many officials, including six generals, as involved in the violations[52]. Some NHRIs, such as the Indian body, also include recommendations for government in their annual report. The annual reports of Indian NHRI in the mid 1990's contained considerable information on violence in police custody and detailed recommendations for government action to improve the situation[53]. The Fijian NHRI, though less than a year old, has already acted to protect human rights, in recommending the government not proceed with amendments to the country's constitution[54].

Governments, unfortunately, sometimes ignore the advice of their country's NHRI. A Commissioner from the Australian NHRI provided a thoughtful analysis of the relation between NHRI and government:

> "National human rights institutions that comply with the Paris Principles are important resources to help States to...respect and protect human rights. States are free to ignore the advice of national institutions but they do so at their own cost and to their detriment - and, more importantly, at the cost of violating the human rights of their own people"[55].

It must be recognised that an NHRI is not able to act in the manner of many NGOs. An NHRI cannot withdraw from contact with the government. It cannot focus its activities on just one area (eg. criticizing government excesses) and ignore other parts of its mandate (eg. human rights promotion) that may require extensive cooperation with the government and its agencies. It has very little opportunity for international lobbying or assistance with its work. Importantly, it must operate within the country's laws even where they are against human rights (it can, and must, take action to change the laws, but it cannot break those laws).

An NHRI cannot withdraw from contact with the government. It cannot focus its activities on just one area (eg. criticizing government excesses) and ignore other parts of its mandate (eg. human rights promotion) that may require extensive cooperation with the government and its agencies.

Unrealistic expectations of an NHRI, by civil society, NGOs or others, can create problems for the NHRI. As noted at the outset of this article, an NHRI is not a substitute parliament or judiciary: an NHRI should not be expected to meet the role to be fulfilled by those institutions. Some parties misunderstand the important factor that an NHRI is separate from the government. An NHRI must be established by law and so there will need to be government involvement in its establishment. An NHRI, in its activities, will often have to work with government officials and organisations. However, it is over-simplifying the matter to identify the NHRI as essentially just another government body. The independence must be recognised and respected by all players: the government, the public, NGOs and, importantly, by the NHRI itself. Perhaps one reason for

out government tasks[56].

Another dimension of the NHRI - government relationship that must be noted is that it is dynamic. Changes in the government's composition (either through elections or other changes within the government) or to the NHRI's activities may affect the government-NHRI relationship. Where the executive government controls (either directly or indirectly through the executive's control of parliament) matters such as the NHRI's finances and staffing, there is even more scope for disagreement. The Australian government substantially reduced the NHRI's budget in one year, when no similar cut was made to defence and some other areas of State spending[57]. Another example is the Indonesian NHRI, which in its early years was cautious in its public statements on human rights matters, especially those involving the military, but now projects a more forthright approach after the recent political changes in the country[58].

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## 4 Relevant factors in Burma

There is considerable scepticism as to how an NHRI could operate in Burma. As Mr Sidoti observed, "[T]here would be particular difficulties in establishing a fully independent institution in a political system such as that in Burma"[59]. These doubts are easy to understand: the system under which the military regime has governed Burma would not accommodate an independent NHRI.

It must always be recalled that an NHRI does not fulfil the role of parliament or of the courts. Although Burma currently has neither a democratically elected parliament[60] nor an independent judiciary[61], any future NHRI cannot provide these.

Burma's current laws also conflict with what an NHRI would do in the country. Public discussion of human rights matters, which is one of the central activities of any NHRI, is restricted. After the coup in 1988, the military regime prepared a "list of topics that were 'off-limits' for discussion: these included: democracy; human rights; politics; the events of 1988; senior government officials…; criticism of the [military regime] or military personnel"[62]. The regime has many 'national security' and censorship laws through which it restricts freedom of expression[63]. It is clear there is much law reform required before an NHRI could effectively operate in Burma. If an NHRI endeavoured to commence work now, it is likely the first document the NHRI produced would breach various laws. And, if it didn't breach any of the current laws, serious doubts about the NHRI's work would be raised. One commentator has warned of the danger of establishing an NHRI now with the expectation the body will strengthen over time because the institution may simply be yet another body pervaded by military influence when democracy and rule-of-law finally come to Burma[64].

However, there is little point in attempting to correct the above problems, and little chance to do so, until the regime either changes its policies and actions, or is no longer in power. The regime repeatedly denies there are human rights problems in the coun-

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"There would be particular difficulties in establishing a fully independent institution in a political system such as that in Burma"

Chris Sidoti
Australian Human Rights Commissioner

try. The regime refuses to allow UN officials into the country to assess the situation[65] and attacks or avoids human rights issues raised by anyone about Burma. From past experience, the regime's approach at intergovernmental meetings is to:

- explain to UN meetings that Burma is a "country experiencing peace and tranquillity"[66];
- state that the Special Rapporteur's report is comprised of "baseless allegations made by a few dissidents" and "read[s] like a propaganda document for the…handful of… dissidents"[67]; and
- endeavour to convince the UN that the regime "upheld the principles embodied in the Charter of the United Nations and the Universal Declaration of Human Rights and abided by them scrupulously"[68].

In light of the military regime's response to human rights problems raised internationally, it is difficult to see it adopting a different attitude to an NHRI in Burma. It should go without saying that the human rights problems in Burma are not "baseless allegations made by a few dissidents". The reports of violations have been consistently acknowledged and raised by:

- UN organs (including the General Assembly and CHR);
- UN officials (including the Secretary General, through his envoy; the High Commissioner for Human Rights and Special Rapporteurs);
- governments and inter-governmental groups (including the European Union and Burma's 'partners' in the Association of South East Asian Nations or '**ASEAN**');
- intergovernmental bodies such as the International Labour Organisation[69]; and
- credible NGOs.

Any proper NHRI established in Burma will have to investigate many of these violations and is likely to make the same calls for the regime's accountability as are now made by virtually every other human rights body in the world.

The APF assists in establishing and strengthening NHRIs in the region. However, one commentator has queried whether the APF's methods used in "emerging democracies", like Indonesia, will bring similar results when applied to a repressive, and seemingly ongoing, regime that exists in Burma[70].

[T]here is much law reform required before an NHRI could effectively operate in Burma. If an NHRI endeavoured to commence work now, it is likely the first document the NHRI produced would breach various laws. And, if it didn't breach any of the current laws, serious doubts about the NHRI's work would be raised.

There are some points to be recognised if the regime is considering establishing an NHRI. The military regime, and groups calling for change in Burma, may wish to consider the following five matters.

### 4.1 Other countries' experiences

Lessons can be drawn from other countries that have established an NHRI. In one country, the government's moves to create an NHRI were viewed with suspicion by some NGOs and human rights activists. They considered the NHRI would be simply a government stunt. The result was that some people who could have greatly assisted the NHRI's development and work chose not to be involved. The NHRI, now operating for some years, could have benefited from their greater involvement from the beginning in improving human rights. This demonstrates the risk in remaining aloof from the establishment of an NHRI

because it mightn't be perfect.

The situation in Indonesia is also of some relevance. Some considered the Indonesian NHRI had factors restricting its work before the recent political changes. However, the fact the NHRI was well established before the changes enabled its experience to be used in those changes and in work immediately after those changes. The current Indonesian Attorney-General was previously a Commissioner of the Indonesian NHRI.

## 4.2 Role of Paris Principles

Some commentators have perhaps been too willing to declare that any future NHRI in Burma will not work, without fully considering the options. A common approach seems to be to identify an NHRI with the government of the country. One academic writes critically of the notion of establishing an NHRI, suggesting many other human rights improvements must be completed before considering an NHRI[71]. A different approach to a potential Burmese NHRI is taken by some commentators, in encouraging the work toward an NHRI, while recognizing the difficulties[72].

As explained above, the military regime has accepted the Paris Principles, from its many years involvement in international meetings dealing with these international standards for NHRIs. The APF has consistently stated it will not admit an institution unless it complies with the Paris Principles[73], and Mr Sidoti's work is part of the APF's ongoing contact with many governments and organisations in relation to establishing an NHRI. The international body of NHRIs also requires compliance with the Paris Principles, and is working toward checking to make sure NHRIs meet these standards. It seems unlikely either of these groups (the APF and the international body of NHRIs) will be involved in establishing an institution that does not meet the Paris Principles. As noted above, the UN General Assembly also encourages NHRI development in accordance with the Paris Principles.

NGOs and other parties advocating for change in Burma should use the Paris Principles in discussing a possible future NHRI. Rather than simply declaring an NHRI is impossible, reference should be made to the Paris Principles to identify what an NHRI would entail. For example, the Paris Principles require independence in an NHRI's composition. Half the people in Burma are women, and over 30% of the country's population is from non-Burman ethnic groups[74], therefore diversity in composition means women and members from ethnic groups must be involved at all levels of any future NHRI. Another method of using the Paris Principles would be to refer to the requirements of independence in appointment, and recommend specific Burmese human rights experts (eg. Burmese academics currently outside Burma due to political repression) for any future NHRI's commissioners.

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### 4.3 Constitutional / legal foundation

Burma is in an uncommon situation for most countries, of re-writing the constitution. This presents an opportunity to give constitutional support and protection to any future NHRI. Only two NHRIs in the Asian region are established under their country's constitution[75]. Thailand also has a short reference to an NHRI in its constitution, and relevant legislation was passed in 1999, but the NHRI's details will be established under that legislation, not under the constitution. In Malaysia, there are a number of commissions with constitutional bases.

The draft constitution for Burma currently emerging through the military regime's process has no provision for an NHRI. The draft constitution prepared by the National Council of the Union of Burma (a grouping of Burmese democratic, ethnic and opposition groups) includes provision for a Human Rights Commission[76], but is arguably too short. It may be too hasty to include in the constitution being currently prepared full provisions for an NHRI. However, some basic measures, such as when an NHRI should be established, and some guarantees for its key features and independence, would be a good start. This article does not intend to address the detail of NHRI provisions needed in any new constitution for Burma, which is discussed elsewhere[77]. This article simply notes the issue and opportunity of giving a constitutional basis for any future Burmese NHRI.

### 4.4 Non-government involvement

As noted earlier, it is important that there is public involvement in NHRIs, both in their creation and operation. The public involvement can be through individuals, community groups, universities, NGOs, and many other groups of people outside government. It is significant that a declaration adopted by the most recent international meeting of NHRIs emphasised, in its first paragraph: "the importance of…[NHRI] collaboration with non-governmental organisations and defenders of human rights, as well as with the whole of civil society"[78]. NGO involvement in NHRIs has also been encouraged by the UN General Assembly[79].

The regime's actions have weakened civil society in Burma over many years. However, working toward any future NHRI should not continue that situation. There should be ample opportunity made for meaningful public input into the establishment (and eventual operation) of any future NHRI.

[T]he Paris Principles require independence in an NHRI's composition… [D]iversity in composition means women and members from ethnic groups must be involved at all levels of any future NHRI

### 4.5 The next steps

The military regime's history of not fulfilling promises[80] suggests a cautious approach in any dialogue with the regime. Any contact made should indicate, diplomatically but clearly, what an NHRI would entail, and the changes in the political/legal climate inside Burma that would have to occur to accommodate an NHRI:

> "A road map should be made of the [proposed NHRI]'s creation and practical work in conformity with the Paris Principles. It should be clear at the start what this road map entails, and allow for the possibility of disengagement if the signs on the road map are not fulfilled..."[81]

Before the process of any discussion of an NHRI proceeds much further, it would be reasonable for all interested parties (including the regime) to outline the basic role, composition and duties of the body being contemplated. This will assist in identifying areas for further discussion.

# 5 Conclusions

This paper has described some of the main features of an NHRI, providing a basic picture of what such a body entails. Essentially, an NHRI is a body set up through government action and largely funded by government. However, it lives independently and often criticises government action.

Would the military regime be able to create such an institution? Many would argue, strongly, that the regime would not be able to do so. There are many human rights violations in Burma. The majority of these require action from the regime to remedy. Pressure must remain consistently on the military regime to correct all the problems it has created (including its illegitimate retention of governmental power) or at least let others attempt to do so. However, discussion of a potential NHRI must not be confused with governmental problems.

If the military regime wishes to proceed toward establishing an NHRI, then it should be done properly, with the resultant body complying with international standards that the regime has already accepted. There is a unique opportunity at the moment to give constitutional protection to any future NHRI by including appropriate provisions in the constitution. If the regime proceeds in attempting to create an NHRI but ignores this opportunity, its motives must be questioned.

Pressure must remain consistently on the military regime to correct all the problems it has created (including its illegitimate retention of governmental power) or at least let others attempt to do so. However, discussion of a potential NHRI must not be confused with governmental problems.

The Asia-Pacific was the early front-runner with NHRIs, establishing the second, fourth and fifth in the world, and also having the first NHRI to receive constitutional status and protection. There is a high level of cooperation between NHRIs in the Asia-Pacific, as compared to some other regions. The regime should ensure, on behalf of its ASEAN and other regional partners, that this commendable progress isn't degraded by establishing an ineffectual, political body.

Obviously, there will be problems. There are other NHRIs that were perceived as being established under a government so disregarding of human rights that nothing was expected of them. However, the fears seem to have been unfounded and this suggests that even where a government may operate a restrictive regime, an NHRI can assist in making some human rights improvements. There is a wealth of experience in the re-

these parties, and NGOs and the Burmese people, to assist in establishing an effective NHRI for Burma.

As for Burma's civilians and opposition / democracy groups, if the regime proceeds toward an NHRI without any accompanying changes to the situation in Burma, their response would be justifiably sceptical. Every opportunity should be taken to prevent the regime from following such a path. However, if the move toward an NHRI is made with necessary accompaniments (eg. improvements in judicial independence, convening of parliament, and legislative reform) and particularly if it is based in the new constitution, it would certainly be worth civil society's involvement, even if that is distasteful in requiring co-operation with the regime.

If the NHRI is set up now with no other changes, then its office may as well be located about 15 kilometres north of Rangoon, on the Rangoon-Prome Road, Insein District. This is Insein prison, which is home to many other people who endeavoured to improve human rights in Burma.

Notes

1. Legal Researcher, Burma Lawyers' Council; LLB, Barrister and Solicitor of the Supreme Court of Western Australia and Practitioner of the Federal Courts of Australia
2. Australia's Foreign Affairs Minister stated, during a press conference on 26 July 1998, "Myanmar/Burma should take a leaf out of the book of Soeharto's Indonesia...to establish an independent national human rights commission. ...I made the point to [the military regime's Foreign Minister] Ohn Gyaw that I thought such an organisation in Burma would be a very useful step forward and I'm glad to be able to say he did not respond in a negative way...", see Australian Department of Foreign Affairs and Trade < www.dfat.gov.au/media/transcripts/980726_ad_manila.html >;
   The military regime's Foreign Minister said, "We will set up (a commission) when the time is ripe… It would be an independent body like any other counter [sic: country] has", article 'Surin Confident on Rights Progress', **The Nation** newspaper (29 July 1999), as reported by BurmaNet news < www.burmanet.org >; and
   "[P]rior to Mr Sidoti's visit, two middle-ranking Burmese officials visited Australia in mid-July for an introduction to the Australian approach to national human rights institutions", article 'A start to help Burmese on road to human rights', **International Herald Tribune** newspaper (23 August 1999), as reported by BurmaNet news < www.burmanet.org >
3. the main political 'opposition' party in Burma, which obtained over 80% of the seats in the last elections

4. "Those in favour of the attempt to establish a human rights commission point out that a similar commission set up in Indonesia in 1993, when the Suharto regime was still solidly entrenched, had made a real difference to that country's attitudes towards human-rights abuses. They argue that a commission, once it exists, gains legitimacy and effectiveness with the passage of time", article 'Sidoti's Burma visit too risky', **Canberra Times** newspaper (6 August 1999) Australia (as reported by BurmaNet news < www.burmanet.org >); and
   Australia's Foreign Minister, in Thailand in November 1999, observed of Mr Sidoti's visit: "It wasn't misdirected. It was the right thing to do. It's an ongoing process that we are discussing with the Burmese. We want to see an improvement in human rights in Burma. We are not prepared to stand back and do nothing about it" **Rangoon Post** (18 November 1999), as reported by BurmaNet news < www.burmanet.org >.
5. "…[Australian Human Rights Commissioner Chris] Sidoti did not say how he or they [the Burmese regime] interpreted the word independent… Sidoti must know that in Burma today, there is no authority other than the dictatorship… In this environment, which is well-known to the world through…[UN and NGO] reports…it is hard to understand what Sidoti learned from his short visit to cause him to write [positively] in his report… Does Sidoti really believe that there is a political foundation in Burma upon which an independent human rights commission can be erected?", J Silverstein article 'Don't expect junta to respect human rights', **The Nation** newspaper (19 August 1999), Thailand
6. "London based Burma campaign director, Yvette Mahon, said the main risk [in establishing an NHRI] was the possibility of the Burmese regime 'setting up the Commission to stop the critics as another propaganda tool… I would be extremely surprised if any commission would be independent and have a free rein' ", article 'Cautious response to Sidoti's human rights proposals', **Australian Associated Press** media report (5 August 1999), as reported by BurmaNet news < www.burmanet.org >
7. UN Centre for Human Rights **National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights** (1995) Geneva, para 19.
   See also the most recent UN General Assembly resolution on NHRIs, which "encourages [NHRIs] to continue to play an active role in preventing and combating all violations of human rights as enumerated in…relevant international instruments" (A/RES/54/176, para 7).
8. UN Handbook on NHRIs (see n7 above), para 219
9. ECOSOC resolution 2/9 (21 June 1946)
10. ECOSOC resolution 772B (XXX) (25 July 1960)
11. General Assembly resolution A/RES/48/134 (20 December 1993), the full text of the Paris Principles is annexed to the resolution
12. "The World Conference on Human Rights encourages the establishment and strengthening of national institutions, having regard to the [Paris Principles]" VDPA, Part I, para 36
13. "The General Assembly…reaffirms the importance of the development of ***effective, independent and pluralistic*** national institutions…in keeping with the [Paris] principles" (resolution A/RES/54/176, para 2, emphasis added).
    Recent support for establishing NHRIs can also be drawn from paragraph two of the **Rabat Declaration** (outcome of the Fifth International Workshop for National Institutions, Rabat, Morocco) 15-18 April 2000.
14. UN Handbook on NHRIs (see n7 above), introduction, page v
15. General Assembly resolution A/RES/48/121 (20 December 1993)
16. The information about the NHRIs in the Asia-Pacific, unless otherwise noted, is taken from materials produced by the secretariat of the Asia Pacific Forum of NHRIs; including L Smith, "Practices of National Institutions for receiving, investigating and resolving complaints" (1998), background paper at 3rd meeting of the Asia Pacific Forum of NHRIs, September 1998; and web-site of the Asia Pacific Forum of NHRIs <www.apf.hreoc.gov.au>.

17. Danish Centre for Human Rights **Human Rights and Development Yearbook - 1998** (Copenhagen), chapter 'National human rights institutions - standard setting and achievements', section D implementation of Paris Principles
18. Decree of the President of the Republic of Indonesia No 50/1993 (7 June 1993)
19. 14-25 June 1993, Vienna, Austria
20. Although it should be noted the Indonesian NHRI's first annual report records its origins as being "established by the President...following a recommendation made at the...1991 Conference on Human Rights in Jakarta, jointly initiated by the Indonesian Department of Foreign Affairs...and the United Nations", see Komnas Ham Annual Report 1994, chapter I, < www.komnas.go.id/english/report/1994/ar_txtc01.html >.
21. L Smith's background paper (see n16 above), para 53
22. see 'The Draft Indonesian Law on Human Rights and the National Human Rights Commission' (1999) by Institute for Community Study and Advocacy (ELSAM) in Indonesia
23. Human Rights Commission Act 1999 (Fiji), section 6(1)(a)
24. Y Lertcharoenchok "FROM THE EDGE: Malaysia human rights panel fits Asean trend" newspaper article, **The Nation** newspaper (Thailand), 8 April 2000
25. "In Malaysia, the announcement of the human rights commission was met with both euphoria and scepticism among human rights activists and opposition politicians", Y Lertcharoenchok article (n24 above).
26. see AH Manjurul Kabir, 'Longing for a Recommendatory Institution' (1999), Bangladesh
27. see 'What's the Problem in Controversy of National Human Rights Commission in Korea' (1999) issued by NGOs Coalition for independent NHRC (Korea)
28. "In Thailand, the birth of the National Human Rights Commission is technically stalled due to the non-formation of the Senate, which is to select the 11 panel members", Y Lertcharoenchok article (n24 above).
    See also 'Recommendation from NGOs and Civil Society in Thailand on the Promotion and Protection of the Human Rights Act' (December 1998) Coordinating Committee of Human Rights Organisations of Thailand
29. The APF specifies: "institutions can apply for membership of the Forum subject to meeting or committing themselves to meet the fundamental criteria...[of] independence guaranteed by statute or constitution; autonomy from government; pluralism, including in membership; a broad mandate based on universal human rights standards; adequate powers of investigation; [and] sufficient resources".
30. Rabat Declaration (see n13 above), para 2
31. Danish yearbook (see n17 above), section 3(b) 'pluralistic reflection of society'
32. Danish yearbook (see n17 above), section 3(b) 'pluralistic reflection of society'
33. raising this at the APF's 3rd meeting in September 1998, and the UN CHR in April 1999
34. the APF's 4th meeting in the Philippines in September 1999, stated "The Forum also requested the [APF] Secretariat to prepare, in consultation with non-government organisations and the Office of the High Commissioner for Human Rights, guidelines for the process of establishing national institutions in accordance with the Paris Principles for consideration at the Fifth Annual Meeting of the Forum", Statement of Conclusions, para 12
35. "[I]f the meaning of 'human rights violation' is too broad, a commission's mandate will encompass too many issues to address any of them effectively. [But]…if the meaning of 'human rights violation' is too narrow, a commission will be barred from acting on the issues of greatest concern", South Asia Human Rights Documentation Centre, **National Human Rights Institutions in the Asia Pacific Region** (March 1998) India, page 10
36. although the Indian NHRI is then handicapped by the phrase stating "rights…embodied in the International Covenants ***and*** enforceable by the courts in India" (emphasis added), because many rights contained in the International Covenants are not enforceable in Indian Courts, see **NHRIs in the Asia-Pacific** (see n35 above), pages 10-12
37. UN Handbook on NHRIs (see n7 above), around para 216
38. UN Handbook on NHRIs (see n7 above), para 217

39. see eg., Centre for the Independence of Judges and Lawyers **Attacks on Justice: the Harassment and Persecution of Judges and Lawyers** (1999) Switzerland, pages 149-150
40. UN Handbook on NHRIs (see n7 above), para 203
41. The UN General Assembly recently "reaffirm[ed] the role of national institutions...as appropriate agencies...for the dissemination of human rights materials and other public activities, including those of the UN" (resolution A/RES/54/176, 17 December 1999, para 7)
42. Australian NHRI, 1996
43. Australian NHRI, 1997
44. Australian NHRI inquiry, see n50 below
45. "The National Human Rights Commission of New Zealand recently distributed a questionnaire to all established national institutions requesting information concerning their mandates, functions, methods of work, activism and programmes relating to the promotion and protection of women's rights", report of the UN Secretary General to 2000 CHR on National Institutions and Regional Arrangements, UN document E/CN.4/2000/103, para 14-16
46. this article does not address whether this situation is necessarily so, or whether the situation is due to self-fulfilling misunderstandings
47. see APF's theme paper 'National Human Rights Institutions and Economic and Social Rights' (produced for the 4th APF meeting, Philippines, September 1999), section 'The Role of National Human Rights Institutions', para 6
48. most of the international human rights covenants require States that have ratified the covenant to submit regular reports to a central committee, explaining how the State is implementing the provisions in the covenant
49. author's communication with a Commissioner of Sri Lankan Human Rights Commission
50. The Australian NHRI explained the findings of its National Inquiry into the Separation of Indigenous Children from their Families: "The Inquiry's examination of historical documents found that the clear intent of removal policies was to absorb, merge or assimilate children so that Aboriginal [indigenous] people, as a distinct racial group, would disappear", see < www.hreoc.gov.au/social_justice/stolen_children/j8_1_2.html#ques7 >
51. statement by Australian Human Rights Commissioner to the 1999 UN CHR, 'Effective functioning of human rights mechanisms: National Institutions for the promotion and protection of human rights', para's 13 to 15
52. article 'Justice for the Victims in East Timor', **suratkabar (indonesian daily news online)** (1 February 2000) < http://suratkabar.com/arsip/2//1/10222.shtml >; and
    S Tillou article 'The right kind of justice for E Timor', **Straits Times interactive**
53. see the Indian NHRI's 'Highlights of the Annual Report of 1996-97', < http://nhrc.nic.in/vsnhrc/Report9697.htm >
54. article 'Gay marriage row becomes power struggle', **The Weekend Australian** newspaper (26 February 2000), page 15
55. statement to 1999 UN CHR (see n51 above), para 16
56. NHRIs, including the Australian NHRI, strive to remain independent of executive government, however various descriptions of Mr Sidoti's visit, by Australia's Foreign Minister do not assist a general perception of independence:
    "I suggested to the then Burma's foreign minister, U Ohn Gyaw, that Rangoon consider setting up an independent [NHRI]... I pursued ***my*** proposal with the present foreign minister... It was in this context that...Sidoti visited Burma";
    "Work toward the establishment of national human rights organizations ***by governments***...can make a positive impact over the longer term"; and
    "[H]uman rights are a matter of international concern, and as their protection is the responsibility of the national government, ***we*** have to deal with that government";
    all quotes from newspaper article 'A start to help Burmese on road to human rights', see n2 above, (emphasis added)
57. The Australian NHRI's budget has been cut repeatedly in recent years, generally in small

amounts but with a massive cut announced in May 1997. The cumulative effect of the cuts is a reduction of around 40%, forcing the NHRI to retrench about 35% of its staff at the end of 1997. The NHRI's President, in the 1997-98 annual report referred to "significant funding cuts to the Commission, which necessitated the loss of 60 staff members over the last year", page 9.

58. One example of this change can be seen in comparing the Indonesian NHRI's early work with more recent material.
The Indonesian NHRI (Komnas Ham) explained, in its first annual report, that its involvement in international human rights meetings "emphasized the genuine willingness ***of the government of Indonesia*** to reduce potential human rights violations", see 1994 Annual Report (n20 above) chapter VII (emphasis added).
In mid-1998, Komnas Ham released a statement on enforced disappearances, critical of the military and making various recommendations for changes in military practices; see "Statement of National Commission on Human Rights regarding enforced disappearance of persons" <www.komnas.go.id/english/cases/cs_text01.html >.
However, even its 1998 statement (above), with its cautious wording like "There are strong indications within the society that the possibility is not foreclosed that elements of security forces were involved in the enforced disappearance of persons", is mild compared to Komnas Ham's recent work about East Timor (see text relating to n52).
59. undated document entitled 'VISIT TO MYANMAR (BURMA) BY THE AUSTRALIAN HUMAN RIGHTS COMMISSIONER', by Chris Sidoti, page 1
60. The UN Special Rapporteur on Myanmar (Burma) reported to the 1999 UN CHR, noting attempts in Burma to convene parliament in accordance with the results of the 1990 general election, and the authorities harassment and arrest of members of parliament and others involved (see UN document E/CN.4/1999/35).
61. A report by the international NGO, Article 19 (K Venkateswaran **Burma: beyond the law**, 1996) notes the regime's forced closure of all courts in the country for nine months in 1988 to 1989; numerous dismissals of judges for failing to comply with the regime's demands to imprison political dissidents to prison terms longer than those permissible in law; and the repression of lawyers resulting in the loss of effective legal representation for the people (pages 38-40).
62. National Coalition Government of the Union of Burma **Human Rights Yearbook 1998-99: Burma** (July 1999) Thailand, page 195
63. For example, a law passed in the 1960's (Printers and Publishers Registration Law (1962) prevents the printing or publishing of materials which would be detrimental to the Burmese socialist system or the ideology of the state, or which might be harmful to national security and unity, or which are "unsuitable because of the time or circumstances of writing" even if factually correct. The regime, rather than recognizing this as an outdated and excessive law, saw it could be used to further control citizens and in 1989 increased penalties for breaching the law to up to seven years' jail (see Burma yearbook, n62 above, page 197).
Also, more recently, laws created by the regime in 1996 forbid acts which "belittle the tasks being implemented by the National Conventions" (see Article 19's report, n61 above, page 40-41) and forbids "any person in Burma [from] discuss[ing] alternative constitutional principles", Burma Lawyers' Council **Burma: the military and its constitution** (1999) Thailand, page 12.
64. "Would establishing an [NHRI] in the hope that it would 'grow teeth' be a good foundation for the operation of an institution in the long term [?] ... The legacy of an NHRI in Burma before democratic governance takes root could be difficult to dismantle and replace with an effective institution", V Coakley 'Discussion Paper - the Australian government initiatives to create a National Human Rights Commission in Burma', October 1999, page 18
65. The current UN Special Rapporteur on Myanmar (Burma), since his appointment in 1996, has not been permitted to enter Burma despite repeated requests by him, the CHR and the UN General Assembly (see Special Rapporteur's report to 2000 CHR 'Situation of human rights in Myanmar', UN document E/CN.4/2000/38, paras 3 to 4).

66. note verbale by military regime to UN CHR, dated 15 March 1999 (UN document E/CN.4/1999/129), page 13
67. UN's summary record of delegation from regime's response to the Special Rapporteur's report to the 1999 CHR, UN document E/CN.4/199/SR.13, para's 59 and 62
68. reportedly from summary of 45th session of the UN General Assembly, UN document A/C.3/45/SR.53,3
69. "The [International Labour Organisation, or] ILO has taken the harshest measure it can against a member state. Following the ILO report in 1998 which found the use of forced labour in Burma to be 'widespread and systematic', the 1999...annual policy meeting of the ILO universally condemned Burma and excluded it...from the ILO...[because] the military regime had failed to respond satisfactorily to calls for improvements in the areas of forced labour and freedoms of association in the year following the ILO...findings and recommendations", paper by V Coakley, see n64 above, page 11
70. "[The APF's] technical projects could be of major benefit and use for countries that are emerging or re-emerging democracies. What about those that do not fall into these categories? Does the Forum have a policy or strategies to deal with countries that are...still under authoritarian rule, that have expressed interest in establishing a...[NHRI]?", paper by V Coakley, see n64 above, page 7
71. "[A] human rights commission, to function at all, cannot be erected and work until there is an environment in which it can take root and function. Such an environment does not exist in Burma today, and so long as the military continues to run the country, it never will…exist. …The people of Burma deserve more than they have got for the past three and a half decades. Help them Sidoti, to recover power. They have a rights to govern themselves and lead their nation into the new century", J Silverstein (see n5 above)
72. "Two essential preconditions that should be met before the establishment of a human rights commission or freedom of speech and freedom of the press. Without these freedoms, the commission cannot hope to possess the power to enforce respect for human rights. Unless freedom of expression is guaranteed, the human rights commission will not be able to accurately assess the situation, and could ever be used to cover up human rights abuses", Thar Nyunt Oo article 'Right Person, Right Place' in **The Irrawaddy** (1999) Vol 7 No 7; and
"…[T]he development of a genuinely independent body, if indeed that is possible, would take a considerable length of time. It would…have to be established according to internationally accepted standards. To be blunt, if the Burmese were to construct a bricks and mortar institution next week, it would not be credible", A Downer (Australia's Foreign Minister) newspaper article 'A start to help Burmese on road to human rights' see n2 above
73. see text relating to n27 above
74. Statistics taken from Open Society Institute **Burma: Country in Crisis** (1998) United States of America, however many commentators consider these figures under-represent non-Burman ethnic groups because of the difficult situation of many ethnic people (refugees etc) causing them to be 'lost' in census figures. Some commentators estimate the non-Burman ethnic groups are more than 50% of the population.
75. the Philippines, where provision for the NHRI was included in the constitutional re-writing following the end of the Marcos dictatorship; and Fiji
76. articles 31 and 129 of the draft constitution, see National Council of the Union of Burma **Commentary on the (Future) Constitution of the Federal Union of Burma** (1998) Thailand, page 18;
see also J Sarkin "Burma's future constitution: Comparing and Contrasting Democracy and Human Rights Provisions in the Two Draft Burmese Constitutions from an International Perspective" in Burma Lawyers' Council **Legal Issues on Burma Journal** (1999), Vol 4, page 56 at 66
77. see Sarkin J, (n76 above) at page 66
78. Rabat Declaration (see n13 above), para 1
79. "The General Assembly...recognizes the important and constructive role that non-government organizations may play, in cooperation with [NHRIs], for the better promotion

and protection of human rights" (resolution A/RES/54/176, para 14)

80. "[T]he regime is good at making promises and showing good intentions at critical junctures. The regime promised in 1998 when they took power to transfer power to the elected body following the 1990 election [it did not do so]. They established organisations such as the Maternal and Child Welfare Association (headed by SPDC Secretary-1 Khin Nyunt's wife)...when they faced criticism over the lack of civil society and free institutions", paper by V Coakley, see n64 above, page 19.
After the 1990 elections, which the military refused to observe, the regime stated "...the representatives elected by the people are responsible for drafting a constitution for the future democratic state..." and did not permit parliament to sit. Two years later, the regime first began the 'constitution-drafting' process, in which it selected nearly all of the participants involved (only 99 of the 703 members in the constitution-drafting body were elected by Burma's citizens). The regime has also set guidelines for the constitution, directing that the constitution must include "participation of the military in the leading role of national politics"; see **Burma: the military and its constitution** (n63 above), quotes from pages 7 and 10, respectively.
Even on a matter as simple as a visit by a UN official, the military regime contradicts itself without explanation. The UN Special Rapporteur has been consistently denied access by the regime. The regime discussed this with the UN Secretary General in 1999, and the Secretary General's informed the UN General Assembly "[T]he [regime's] Foreign Minister stated for the first time that the Government would give 'serious consideration' to a visit by a Special Rapporteur...[and]...I hope the Foreign Minister's indication that 'serious consideration' would be given to a visit...will translate into the setting of a date very soon, in time, I hope, for the submission of a report to the [2000] Commission on Human Rights" (UN document A/54/499, para's 7 and 13). However the Special Rapporteur could only report to the 2000 CHR, held nearly half-a-year later, that "[The military regime's spokesperson] stated that his Government did not rule out a visit... Similar indications had, year after year, been given in the General Assembly and the Commission by the [military regime]. To date no positive steps have been taken to allow such a visit" (UN document E/CN.4/2000/38, para 4).
81. paper by V Coakley, see n64 above, page 19