

## Some Thoughts on Burma-Thai Relations

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Any attempt to understand Burma-Thai relations today must begin by recognizing the existence of misunderstandings on both sides, open criticism of each other, friction and conflict. Why is this so?

It is only a little more than a decade ago, that Thailand's General Chaovalit opened a new period in the relations between the two nations by becoming the first official visitor to Burma after the military brutally seized power and suppressed the people. Thailand was rewarded with timber and fishing concessions which its military/business groups had been seeking. Until Thailand's unexpected action, there was almost universal condemnation of the new Burma rulers and international calls for the restoration of democracy. The visit seemed to represent the beginning of a new stage in the long history in the relations between the two. However, since that meeting Burma-Thai relations have been fraught with misunderstandings, accusations, broken promises and interference by both states in the internal affairs of the other. No era of "good feeling" has yet emerged.

To begin to explain the current state of relations between the two, it is necessary to recall the long history and consider some of the continuities and attitudes which have built up over the years and exist to the present.

For centuries, the two nations have shared a common territory in Southeast Asia, whose prominent physical feature - the north-south valleys and rivers - were the high-ways of migrants from China and the Himalayas from time immemorial. New arrivals settled on both sides of today's common border and populated the area with peoples of the same languages, cultures and traditions. Even now, as migration from China to Burma continues, a relatively larger migration is occurring from Burma to Thailand, as Burmese ethnic minorities flee from oppression and violence at home for safety in Thailand. These new migrants follow a new route, moving across mountains and rivers which, in the past, were barriers to west-east movement. But the conditions inside Burma are so terrible, the latest migrants are creating new routes at great personal hardship because they see no other way to escape from the murderous wrath of the

Burmese military. This migration is one of the key problems in the current relations between Burma and Thailand.

The emergence of two strong states, Burma and Siam (its name before 1936), in adjoining areas, gave rise to disputes and wars as each nation sought to determine and protect the extent of its kingdom. By tradition, authority was personal and not territorial, therefore, the dividing line between two states, at any particular moment, was determined by the loyalty of local leaders to a particular monarch. Modern boundaries are territorial, either imposed by the victorious side in warfare or, more recently, by peaceful agreement recorded on maps and recognized by the other nations of the world. Today, as in the past, Burma and Thailand are locked together along a common frontier, which extends for more than 1,000 miles, which, in many areas, is poorly defined and occasionally contested. Until both sides can agree on an acceptable border, friction, disputes and occasional border wars will continue.

Memories of the past, both written and oral, contribute to shaping the attitudes of the governments and peoples in the two countries. While in both, Buddhism is the dominant religion that informs both the national culture and traditions, other religions and cultures coexist amongst the ethnic minorities. Despite this, there are bitter memories of wars, destruction of cities and enslavement of captured peoples which are perpetuated in literature and school textbooks. Burma's Prime Minister, U Nu, once said while on an official visit to Ayudhya, "...there were incidents which we should remember with pride and there were also happenings it is best for us to forget."<sup>1</sup>

In the nineteenth century, the course of history of the two nations divided sharply; Burma lost its independence to Great Britain and became a subject of colonial rule while Thailand retained its independence. For the Burmese, it meant the introduction of English as the official language, a new system of bureaucratic rule, Western law, administration, education and the rapid transformation of the economy from subsistence to exchange. Europeans dominated administration and diplomacy was conducted from India, to which Burma had been annexed. Many of the Burmese who were directly exposed through education and employment became assimilated, but most of the population, especially those living in the countryside, continued in their traditional ways and were hardly touched in their personal lives by the changes. Overall, the people never accepted foreign rule and responded by developing nationalist movements and anti-Western sentiments; they were determined to recover their independence and restore their traditions. On the eve of World War II, a small group of Western-educated students turned to Japan for military training and help in making a revolution.

During this same period, Thailand's kings avoided colonial rule by allowing Western influences and foreign advisors to enter the country and help create a modern veneer atop their traditional society. Western influences were most pronounced in government, law, education, diplomacy and the military. A modern elite emerged from amongst the aristocracy and became skilled in the use of the new knowledge and ways. By integrating international law and modern forms of diplomacy into their traditional system, Thai diplomats became the equal of their Western counterparts as they participated in world affairs. A few of the Thai students who were sent abroad in the 1930s for education, returned with new Western political ideas; they joined together to overturn the absolute rule of the Thai king and substituted a new political system based on limited monarchy and nominal popular rule.

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The separate historical roads each nation followed continued into the next century. Until the Second World War, Burmese and Thais had little or no contact across their frontier and knew very little of the changes taking place in their neighbor's state. The war thrust the two nations together as the Japanese initially invaded Thailand and used it to launch the war into Burma. The Thais accepted the Japanese terms for ending the war and then became an ally of their former invaders. Thailand suffered only minimal damage from the fighting and was rewarded by Japan for its help in the early stages of the military campaign. Following the defeat and expulsion of the British from Burma, Japan transferred two Shan States from Burma to Thailand. At war's end, and with Japan's defeat, Thailand accepted the British terms for peace and the recovery of its independence by returning the Shan States to Burma and promising to pay an indemnity.

The war experience in Burma was radically different. Without consulting the Burmese people, Great Britain fought to hold Burma against the invaders. In doing so, the economy and many of the natural resources were destroyed. The defeated British forces escaped to India and left the people unprotected. Under Japanese rule, thousands of Burmese were sent to Thailand to work, building a railroad through the jungle in order to create a land-link between the two countries. The Japanese gave the Burmese nominal independence in 1943, and allowed them to form a government. Two years later, the British renewed the war in Burma, defeated the Japanese and drove the remnants of their armies from the country. The Japanese-installed Burma government collapsed and the British sought to restore its rule. As in the war's first phase, the Burma economy and society suffered from the fighting.

In the immediate postwar period, while Thailand made a relatively smooth and easy transition to peace and independence, Burma was caught up in the final stages of its renewed struggle for independence. The Burmese forced-laborers returned home with no compensation for their work and suffering. There was no immediate payment of the war indemnity from Thailand. Under new postwar leaders, the Burmese nationalists put all their efforts into recovering their independence and little or no economic recovery took place. On January 4, 1948 Burma became independent. The Thais closely watched the events in their neighbor state and saw the Burma Communist Party, a one-time partner in the Burma leadership coalition, as a potential threat, if the party gained control of the state. Following independence, a number of ethnic groups and the Burma Communist Party revolted against the nascent Burmese government. The Thais secretly supported the Burmese ethnic groups who were based close to the border, whom they saw as a potential buffer between themselves and possible invading Communist forces. The Burmese government watched events in the border area, aware of what was happening but too weak to do anything to stop it. Memories of this long history are the basis of the present fears and distrust harbored by leaders and peoples in both countries and influence their relations.

## I

As an independent nation, Burma drew upon the liberal democratic ideas acquired from the British and inscribed them in its constitution, the basis of which the leaders intended to follow in making foreign policy.<sup>2</sup> They renounced war as an instrument of policy, accepted the "generally recognized principles of international law as its rule of

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conduct in its relations with foreign states” and “affirmed [their] devotion to the ideal of peace and friendly cooperation amongst nations founded on international justice and morality.”<sup>3</sup> From the outset until the constitution was set aside by the Burma military in 1962, they followed the rule of law and their diplomacy was open and transparent.

Burma was faced almost immediately with pressures from the protagonists of the “Cold War” to join one or the other side. Eager to escape involvement, dismemberment and political domination by foreign powers, the leaders adopted two further principles, neutrality and nonalignment.

The first major issue the Burma government faced was the presence of Nationalist Chinese forces on its territory. Having been driven from their homeland by the victorious Communist army in China’s Civil War, they settled in the Shan State and refused to surrender their arms and acknowledge the authority of the Burma government. More important, the Chinese Nationalists began giving military aid to Burmese ethnic groups in their revolt against the state. The Burmese army’s first priority was to put down the internal revolts and, without enough troops and weapons to expel the Chinese at the same time, it could not restore Burma’s sovereignty over all of its territory. Burma’s leaders believed that the Thai government, like the U.S., was sympathetic to the Chinese and supported their efforts to continue their war from Burmese soil. They also let them take refuge in Thailand and remain active partners with the Nationalist Chinese in Burma. In 1953, Burma took the issue to the Security Council of the UN and asked for help in removing the Chinese.<sup>4</sup> Thailand joined the U.S., Nationalist China Government in Taiwan and others in watering down Burma’s complaint and helped formulate a voluntary evacuation plan outside the control of the UN. As a result, the Chinese soldiers never completely withdrew from Burma; instead, many settled in Thailand and became involved in organizing and directing a world trade in Burma grown opium. Burma became convinced that Thailand bore a heavy responsibility for its difficulties with both the Chinese and its own ethnic dissidents.

In 1954, Thailand became one of two Southeast Asian nations to join the American inspired anti-communist Southeast Asia Treaty Organization with headquarters in Bangkok. In that same year, Burma signed a treaty with the Peoples Republic of China in which both subscribed to the principles of “peaceful coexistence.” These two events further divided Thailand and Burma.

Also, during this initial period of Burma-Thai relations, there was far less openness on the side of the Thais than the Burmese. Despite the treaty of friendship between the two nations, the Thais did not respect the rule of law as they denied secretly aiding Burmese dissidents and harboring the remnants of Nationalist Chinese leaders and armed forces. The Burmese were aware of this lack of openness on the part of the Thais but were in no position to do anything about it. They continued to practice open diplomacy and publicly declared and explained their positions. In the case of the Korean War, Burma openly supported the initial decisions of the UN to aid South Korea and faced a political crisis in its own government over the decision. When the UN forces crossed the 38th Parallel to carry the war into North Korea, Burma did not support the action as its leaders believed it went beyond the original mandate to defend against invasion. Again, Burma was open both in explaining and following through on its decision. The same degree of openness and transparency could be seen in 1954, when Burma and China signed their treaty of peaceful coexistence. The Burma action was

consistent with its publicly stated policy of nonalignment and was not a rebuke to Thailand and other anti-communist states for attempting to build a defensive shield against a possible expansive China. A year later, and in line with the efforts of U Nu to establish better and more open relations, both countries took part in and cooperated at the Bandung Conference on Asia and Africa. Thailand contributed ideas at crucial moments in the discussions while Burma contributed leadership to the meeting. Consistent with its policy of nonalignment, Burma had no difficulty working with Thailand when the two nations were in agreement, even while fundamental differences over bilateral issues persisted and continued to divide them.<sup>5</sup>

U Nu took the first steps to reverse the course of Burma-Thai relations by sending and receiving several low-level missions, even as the nations stood divided from each other. In 1955, U Nu waived all war claims against Thailand and, at the end of the year, invited the Thai Premier to lead a section of the two-year celebration in Rangoon to honor the Buddha.<sup>6</sup> Even though the original problems which divided and led to distrust between the two continued, by 1957, representatives of the two nations met in Rangoon and exchanged instruments of ratification of their first Treaty of Friendship.

But real improvement in their relations did not follow. The border remained poorly guarded and men and arms could easily slip across. In 1959, the problem worsened as several of the ethnic minorities openly revolted against the Burmese government.

On March 2, 1962, the Burma military overthrew the government, set the constitution aside and ended the liberal democratic period. Throughout this period, Burma and Thailand pursued different courses in defending their territory and independence. Thailand was fearful of foreign invasion from China by way of neighboring states, Burma, Laos and Vietnam. In the case of the latter two, China and the Soviet Union were involved, which complicated the picture. Burma, at the same time, was fearful that Thailand's close military connection with the U.S. might involve Burma in a war against China. To avoid controversy with the Thais, Burma neither engaged in ideological competition with its neighbor nor complained publicly about its pro-Western stand. When the U.S. sent planes and military personnel to Thailand in 1962, to bolster it in the face of increasing military activity in Laos, the Burmese did not make a public protest, but privately its leaders felt that the move was an overreaction and the influx of weapons might find their way into the hands of its own dissidents living or taking refuge in Thailand. These and other foreign policy problems remained unresolved and were passed on to the new rulers in Burma.

## II

When the military in Burma seized power in 1962, the leader of the coup, General Ne Win, sought to reassure the world that his government did not intend to alter the foreign policy principles of the government he overthrew. His government, he said, was dedicated "to the ideal of peace, friendly relations and cooperation between all nations based on international justice and morality" and "the policy of positive neutrality." He also looked forward to the continuance of their cordial relations with all nations" and added "wholehearted support for and complete faith in the purposes and principles of the United Nations as embodied in its Charter."<sup>7</sup>

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One of the first things the new government did was to begin negotiations with Thailand to close the border and obtain the right to pursue Burma insurgents into its neighbor state. In 1963, the two nations agreed and signed a treaty, but it was rarely carried out.

If the foreign policy principles were the same, their application was not. Without announcing any changes, the Burmese took actions which gave a clear indication that openness no longer was the hallmark of its foreign relations. As it moved domestically to establish a socialist economic and political regime, it closed the country to tourism, granting no more than a 24 hour layover in Rangoon for travelers to change planes. It was not until 1970 that it extended tourist visas for seven days. Foreign journalists were not encouraged to come and report and news services were not allowed to open bureaus. It asked the U.S. to suspend the Fulbright Program - an educational exchange program, and ordered the Asia Foundation - an American NGO, to leave Burma. The government threatened, and then in 1964, shut down Burma's once vibrant press on the basis that it did not exercise self-censorship in reporting the actions of the government. With no parliament to report to and explain its actions, the ruling dictatorship was free to take any desired actions without responsibility to the people, as had been the case in the previous government.

Within the first eighteen months in power, the new Burma rulers made clear that their approach to foreign nations would not be even-handed. As it moved away from the U.S. and other Western nations, it came closer to the East European Republics and the Republic of China. This was reflected by its redirection of trade, students for higher education and cultural exchanges, away from the former and towards the latter. Until 1979, it continued participation in all international organizations; but in that year it withdrew from the nonaligned movement which it criticized for having moved too close to the Soviet Union.

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The changes in Burma led to a significant decline in foreign trade and a shortage of consumer goods. In response, an illegal trade at the border with Thailand emerged and a black market evolved. The new imports were paid for by smuggling cattle, timber, precious stones, rice, art pieces and other local goods. The new trade was handled by the ethnic minorities living along the border and was run in an efficient and orderly manner. It generated income for these ethnic minorities and was used in part, to pay for new arms. The Burmese government neither was able nor willing to stop the trade as the demand for consumer goods could not be met with the requisite supply in the existing socialist system. Thailand benefited in two ways--from the income generated by the trade and the existence of a buffer between itself and the Burma armed forces provided by the Burma ethnic minorities.

Despite the fact that the trade was vast and profitable it never appeared in the trade statistics of the two countries and most nations of the world were unaware of how extensive it was.

The wars along the Burma-Thai border took a new turn in 1969, following the arrival of former Prime Minister U Nu in Thailand. U Nu and members of his government had been taken prisoner at the time of the coup. After four years, he was released and his freedom was restored. Ne Win invited him to advise on the future political structure of

Burma. But his recommendations were rejected, and as noted above, he left Burma and was granted sanctuary in Thailand. Shortly after his arrival, he declared war against the Burmese military government, raised an army from the dissident ethnic minorities and Burmans living in Thailand and launched a military campaign against the ruling military. The Burmese government formally protested but relied upon its armed forces to keep the new revolutionary opposition contained. Thailand remained silent, neither justifying nor denying its involvement. Following the failure of the revolt in 1971, U Nu gave up leadership and, two years later, left Thailand for refuge in India.

U Nu's departure and a political upheaval in Thailand in 1973 made it possible for the governments of the two countries to reassess their relations. The Thai military had come to realize that the Burma Communist Party no longer posed a real threat to their country and that the Burma government, although professing to be socialist, was not a supporter of either Soviet or Chinese foreign policy objectives. In this new situation, the new Thai government looked for ways to improve relations with Burma. But the war in Vietnam, followed by wars in Afghanistan and Cambodia were viewed differently in Bangkok and Rangoon and each nation pursued different ends. In 1981, when tensions between Vietnam and Thailand were high as a result of the former's invasion of Cambodia, Burma provided the venue for talks between the two and, even though they did not succeed, both nations thanked Burma for its efforts.

In 1981, Burma provided sanctuary for General Sant Chitpatima following his escape from Thailand after the failure of a coup he had lead. Many saw Burma's action as retaliation for Thailand's role in U Nu's efforts to lead a revolt from its territory and for the many Burmese insurgents it had sheltered in the past. Thailand did not protest Burma's action.

Throughout this period, opium production in Burma and its distribution, mainly through Thailand, continued to grow. The product was distributed primarily through Thailand by the Chinese dealers who came there by way of Burma in the early 1950s.

The war in Vietnam and the influx of American soldiers became a major market for opium and its derivative, heroin. At the same time, the narcotic found new and expanding markets worldwide. Despite pressure by the U.S. on Thailand to curb the trade, and provision of aid to Burma to spray and destroy the crops in the field, neither nation took extensive action to comply. Whilst, the King of Thailand took some interest in eradicating opium production in his country, supporting local efforts to end its cultivation and substitute other crops or restore traditional crafts as means of replacing revenues the farmers lost, in Burma, the state took very little action against opium cultivation and instead concentrated on fighting against its own ethnic minorities.

When the public demonstrations in Burma began in the Summer of 1988, in support of a peaceful revolution, the Thai government did not speak out. Only in September, after the Burma military seized power in Rangoon and violently suppressed the unarmed people, did Thailand act against the Burma rulers by allowing political refugees to take shelter on its land.

Burma-Thai relations took a different road following the military's seizure of power in Rangoon. Under military rule, the Burmese nominally held to the principles on foreign relations of their predecessors, but applied them in a different way, in a different set-

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ting. Instead of following the rule of law and conducting its diplomacy in an open manner, it both responded to and initiated policies behind closed doors; with no free press, political opposition or parliament to discuss, criticize and publicize its actions, it proceeded without reference to any or all of these institutions. Meetings, discussions and agreements were taken in secret and the world only became aware following the outcome of an action, or comments by an international partner. Thailand's officials gave little help to foreign and domestic journalists who were trying to cover events inside of Burma by illegally crossing the Burma-Thai border and talking to Burman and ethnic leaders living there. They also gave limited information about some of the things the Thai Border Police and Armed Forces did, which at times helped and at other times, hindered the Burmese refugees in the area. Even now, it is impossible to find out what happened in particular events and whether or not they were carried out within the framework of the nations' obligations to the UN Charter and the Burma-Thai Treaty of Friendship.

The period also shows how few advances were made in transcending the historic fears and attitudes of the leaders and people of both countries toward one another, at a time when they faced common problems. The period also offers examples of efforts by both to draw together, but failing as immediate events, needs or objectives took precedence over the desire to find ways to bury the past and rebuild relations.

### III

The third phase in Burma-Thai relations opened with the rush of Burmese students and others into Thailand, in search of asylum and protection from the unbridled wrath of the Burmese army. The junta was seeking to capture and arrest those fleeing, for participating in the preceding summer demonstrations. The reaction to the brutality of the events in Rangoon from most of the nations of the world was to condemn the new soldier-rulers for the army's excesses and, to emphasize their outrage by ceasing all aid programs. Burma's representative at the UN sought to deflect world criticism by assuring the member states that it would continue its traditional policy. In addition, he drew upon Art. 2.7 of the UN Charter and the "Five People's Principles"-adopted by Burma and China in their 1954 treaty - when he said that Burma intended to "maintain relations with other countries on the basis of mutual respect and non-interference."<sup>8</sup> This soon became the standard answer to criticism by Burmese diplomats around the world. The Burma UN representative also sought to deflect and soften criticism of his government by adding that the Burma rulers would soon hold national elections and return power to the people.

The first real change that the Burma military rulers made in foreign policy was in the area of economic relations with the rest of the world. On November 30, 1988, they announced that Burma would allow foreign investment, aid and technical assistance, which it anticipated would lead to economic development and modernization.<sup>9</sup> And, as noted at the beginning of this article, Thailand's General Chaovalit was the first important foreign visitor after the policy announcement and the first beneficiary of Burma's new policy. Many in the two countries hoped more concessions and trade would follow.

In response to Burma's action, Thailand agreed to return Burmese students who volun-



teered to go home. Both countries promised that the students would be protected by the Burma Red Cross, both in flight and upon their arrival home. However, after more than 300 students departed it was discovered that they had no international protection. The so-called Red Cross personnel, in fact, were Burmese soldiers wearing Red Cross armbands. Thus, Burma began the “new era” of misleading the Thai authorities and violating its international agreement with the Red Cross.

Thailand’s businessmen were eager to exploit the forests of Burma because their government had halted the harvesting of Thai teak due to near extinction through over-cutting. But they did not honor the terms of the timber agreement with Burma. In their eagerness to extract the prized teak as quickly as possible, they brought in modern equipment and clear-cut the forests, thus destroying other trees and vegetation surrounding the desired variety. When the Burmese government became aware, it abrogated the contracts with the 40 Thai companies and would allow only 3 to continue on the condition that they changed their methods of timber extraction.

Early in this diplomatic period, Thailand took a great interest in the economic opportunities it saw in Burma; at the same time, it averted its eyes from the human rights violations being committed just across its border. In 1989, Prime Minister Chatichai pursued a policy of “changing a battlefield into a market place” envisioning Thailand benefiting from trade and investment in Burma, Vietnam and other recent ‘battlefields’. But, his tenure as Prime Minister was short and his successors dropped the slogan while continuing to look for trade with its neighbor states.

The episodes noted above were not isolated examples. In them, both countries failed to honor their international agreements and observe the rule of law; their actions foreshadowed what would follow for the rest of the decade. The main casualties throughout this period were the people who fled Burma to escape forced labor, rape and death, the destruction of their homes and villages, seeking asylum in Thailand. At the outset, the Thais allowed them to take refuge. However, as their numbers increased and they became serious economic and social problems, the government tightened its border controls and allowed its border guards to turn back refugees, knowing full well the fate that awaited them in the hands of the Burma army. Thousands of refugees who were fortunate enough to find refuge in Thailand accepted any jobs offered and the temporary security they afforded. However, they lived in fear of being forced back to Burma if they protested substandard wages, working and living conditions. Burma demanded their return and did nothing to assure the Thai government and the refugees that, upon their return, they would not be mistreated and would be allowed to return to their traditional lands. They had no protection either from exploitation in the asylum country or from death and/or forced labor in their homeland.

Because Thailand had no agreement with the UN High Commission on Refugees to operate on the Burma-Thai frontier, the international body could do nothing on behalf of the helpless refugees. During this decade, countless young women, recruited mostly from the poor and largely uneducated hill peoples in Burma, were induced to come to Thailand with the promise of good jobs and the chance to learn new skills. However, once in Thailand, they, too, found no protection and help as they were forced into prostitution and many became victims and carriers of AIDS.

During this first decade of the new military dictatorship in Burma, the soldier-rulers

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paid no attention to their treaty obligations, international law, and the quiet advice and suggestions of UN and world leaders who sought to counsel them to modify and stop their inhumane behavior. The military's abuses of the people were so widespread and violent they provoked condemnation from the UN General Assembly, the UN Commission on Human Rights, the International Labor Organization, the European Union and other international and regional bodies. Yet, despite the overwhelming criticism, Burma's rulers continued to act outside of law on the assumption that Art. 2.7 on the UN Charter insulated their internal affairs from the world and gave them some sort of license and immunity to disregard their commitment to the Declaration of Human Rights which their predecessors at the UN in 1948 had signed and treaties on human rights which they were legally obligated to honor.

Throughout the decade the Burmese government did not respect their treaty obligations to honor the territorial integrity of their neighbor as the internal wars in Burma between the army and the ethnic minorities spilled across the border into Thailand. As early as 1989, the Burma army crossed the Moei River - part of the international border between Burma and Thailand - without Thailand's permission to attack Karen defenses from the Thai side. In so doing, it destroyed a Thai village and killed several people. Thailand protested and called a special session of parliament to discuss the situation; following Burma Gen. Saw Maung's offer of an apology and payment for damages, the issue disappeared from public view and parliamentary debates.

The incident quickly proved to be only the first of many intrusions by the Burmese army and/or its new Karen ally.<sup>10</sup> One of the most serious occurred following the attack and capture of the Karen capital, Manerplaw, in 1995. The Burmese army and the Democratic Karen Buddhist Organization (DKBO) pursued the fleeing civilians across the Moei and into Thailand where they attacked and destroyed the camps and seized refugees attempting to escape. The Thai armed forces and border police responded weakly, their key concern was to move the refugees further inland, but the foreign intruders accomplished their mission of demonstrating that the Burmese refugees could not escape their reach. Unlike their response in 1989, Burma never again offered an apology or compensation for damages.

Added to the problem of Burma's military intrusions, the Thai government faced the internal problem of Burmese workers in Thailand taking employment the local people refused, with conditions and wages the locals would not accept. There were calls from many sources inside of Thailand to end illegal immigration and return to Burma those who had no work permits. Many illegal workers were rounded up and deported, but most returned secretly for reasons such as the absence of employment in their homeland, their fears of arrest and being forced to labor for the Burma army without pay and under brutal conditions. Meanwhile, many Thai employers, desperate for workers, pleaded with the government in Thailand, to allow Burmese workers to return and work as before until they could find local replacements.

Displaced persons and refugees are the concern of the UN High Commissioner of Refugees. While Thailand had an agreement with the UNHCR to work along its eastern border and help refugees from Cambodia between 1978 and 1990, during the war in that country, it did not permit the world organization to take any action on Thailand's western frontier. Until very recently, the most the UNHCR could do was to issue a document which identified the holder as a "person of concern," but could take no

direct action in how Thailand handled refugee questions. Since the document was not always recognized by Thai authorities, in reality, the UNHCR could do nothing to help them. Only since 1999 has there been a change, with Thailand allowing the world body to register some refugees on the Burma-Thai border, inspect the refugee camps and help relocate Burmese students, willing to emigrate, to find new homes outside of Thailand. Because the UNHCR can do so little in the face of the limitations placed upon it with the full flood of refugees, it remains unable to give broad and extensive help to the Burmese refugees.

In its effort to permanently close down the black market trade between the two neighbor states which flourished before the Burma army seized control of its side of the border of the Moei River, the Burma government was not eager to see that the Mons, Karens and Karenni restart it. The Thais saw the trade move to Burma's northern border where China became the main partner of both the government and new small black markets. To capture and revive its own trade, Thais built a new "Friendship" bridge across the Moei River to facilitate it. But the Burmese government was slow to allow trade to resume. The Thai government took a further step and halted arms sales to the Burmese ethnic minorities in the hope that the Burma government would read its action as a signal that Thailand was eager to replace the old black-market with formal and legal trade. In 1994, the Thai government went further in accommodating the Burmese. It closed the borders and travel facilities to the NCGUB<sup>11</sup> leaders who made their headquarters at Manerplaw and traveled abroad via Thailand. The closing came at a crucial moment as many of the Burmese leaders were in New York attending the UNGA and were unable to return. Burma's General Khin Nyunt had assured the Thai National Security Council that once the Burman political leaders in exile were separated from the ethnic minorities, the latter would make peace with the military government and end forever the civil war in Burma. Thailand hoped that its action would be reciprocated by the Burmese government opening trade. But it did not achieve the desired results; the civil war continues to the present day and while trade has resumed, it remains limited as the Burma government opens and closes depending on how Thailand responds to each new demand made by the Burma rulers. In 1999, following a crisis in Bangkok where Burmese students seized the Burmese Embassy and which the Thai government officials resolved peacefully, the Burma military rulers openly criticized the way the episode was handled, and, in response, closed trade as well as suspended permission for Thais to fish in Burma waters.

As noted at the outset there are areas along the border which are contested by both sides. In 1992, there was a hill which the Burmese occupied and the Thais claimed. It nearly provoked the two sides to take military action in order to dislodge the other. But rather than fight, they agreed to negotiate and the hill, today, remains an area in dispute and tensions between the states in the area remain high. There have been no recent moves by either side to call for the formation of a joint boundary commission to permanently settle the border location to the satisfaction of both nations.

When the military seized power in 1988, the narcotics industry in Burma was highly developed. Cultivation of opium and its conversion to heroin thrust Burma to the forefront of the international drug market, as the second largest producer in the world. Most of the growing area was in the Wa, east of the Salween River, and the Shan State, both beyond the control of the Burma army. Until 1988, the U.S. provided anti-narcotics assistance to destroy the crop, but the government did not use it, fearing to

send their planes against the anti-aircraft weapons of the Was. At the time, the Wa were under the political control of the Burma Communist Party and formed a major element in its armed forces. But in early 1989, the Was and other ethnic minorities revolted against the BCP and declared themselves independent revolutionary forces. The Burma military leader, Gen. Khin Nyunt, went to the Wa area and entered into a ceasefire agreement with their leaders. In exchange for being allowed to keep their weapons, administer their own area and to have a free hand to pursue their economic interest, they agreed to halt their war against the state and assist it in ending the civil war. The Wa turned their energies to expanding opium production and fought against the armed units of Khun Sa, the Shan opium leader and their chief rival.

During the past decade, the Was expanded their narcotics operations to include manufacture and marketing of methamphetamine pills which quickly found a market in Thailand. Today, they not only flood that country, but Yunnan and other border states as well as a growing market in the world beyond. With the Burma government's approval, the Wa leaders recently moved more than 50,000 of their people away from the northern Wa state to a border area in the Shan State opposite Thailand, making it their major metamphetamine production center. The sale is directed at school children and young adults. The Thai military has called upon its government to take up the issue with their Burmese counterparts and curb the narcotic's entry into their country. The military's statements carried the veiled threats that if the government officials could not do anything, the army might have to do something themselves. At the recently concluded ASEAN Regional Forum in Bangkok, Thai officials described "the methamphetamine plagues as a national security issue."<sup>12</sup> For the last several years, Thailand has looked to its neighbor to curb the growth and manufacture of the narcotic, but the Burmese refused to seriously consider the issue jointly as they argued it was an internal matter. They also said that they were making progress in eradicating narcotics and looked to 2015 as the target date to end all production and sale. Although talks between the two countries have been carried on in the past, no joint action has been proposed or seriously considered. But, on the eve of the July 2000 ASEAN Foreign Ministers' Meeting in Bangkok, the Burma Foreign Minister, U Win Aung, said that his country needed help in stemming the flow of metamphetamine tablets. Narcotics was a topic of discussion at the meeting and it was carried over to the ASEAN Regional Forum where the members decided to make the region drug-free by the middle of the second decade of this century, but announced no specific plans for achieving that end. For now, narcotics suppression is a problem Thailand and each state will face alone. ASEAN, at most, will be the communication link between them.

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Burma-Thai relations today are in an unstable state. The past still lies at the base of their thinking, values and attitudes; the leaders and peoples of the two states still fear and mistrust each other. Yet, for their own good, they know that they must live together as peacefully as possible. For the past decade, they both have violated their common border, bilateral and multilateral treaties and international law in order to achieve ends which appeared at the time to be more valuable. While Thailand moves daily toward an open and more democratic society, Burma remains closed and secretive. It is as unclear to Thailand, as it is to the Burmese people, why Burma needs such a large and bloated army. It is unclear to them why it squanders so much of its limited wealth on military hardware while education, health and other social programs are inadequately funded. Finally, it is unclear why it treats the Burmese people as the enemy and, after nearly twelve years of rule, has made no progress in winning their support

and seemingly does not want it. Recently, the Thai Prime Minister publicly raised the narcotics issue directly with Burmese officials and in his doing so, challenged the ASEAN principle of noninterference in the internal affairs of other states. Thailand's free press has been diligent in reporting and editorializing on this and other issues and its "letters to the editor" are open to all for comment. The actions taken at the Bangkok ASEAN Foreign Ministers' Meeting and ASEAN Regional Forum suggests that while the principle still stands, it no longer is impregnable.

After nearly a dozen years in power, it is clear that Burma does not honor and respect the UN Charter and the institutions created under it. Thus far, it ignores the resolutions unanimously adopted by the General Assembly and the requests of the Human Rights Commission to allow its rapporteur to enter and report on human rights conditions. It denies the contents of the ILO Report on forced labor and makes no effort to end human rights abuses and the army's use of forced labor despite its obligations as a member of ILO to honor its resolutions and decisions. Initially, it denied permission for the International Red Cross to have access to political prisoners and inspect jails; following the Red Cross's withdrawal from Burma, the government changed its policy and quietly allowed the international organization to return and carry out its treaty obligations. However, it violates common Article Three in the Four Geneva Conventions which allows international inspection in internal war, of conditions of civilians and soldiers who are taking no part in the hostilities and to see that such acts as violence against life and person, hostage taking, outrages upon personal dignity and extra judicial punishment are not carried out. The four treaties call for inspections by an "impartial humanitarian body, such as the International Committee of the Red Cross." But none have been allowed and made, and the suffering people caught up in Burma's internal wars have no protection despite the Burmese government's statements that it honors its treaties.

But it is at the state to state level - between itself and Thailand - that Burma's lack of responsibility and willingness to honor the rule of law embodied in agreements is hurting the peoples in both nations. As discussed above, its unwillingness to work with its neighbor to suppress narcotic production and distribution, its further refusal to end its human rights violations - forcing its people to escape its jurisdiction and become refugees in neighbor states, and its violations of the common border make it a threat to its neighbors as its actions are unpredictable and other states cannot adequately prepare for their consequences.

The existence of the rule of law makes state actions predictable and stable, thereby allowing relations to be conducted in an orderly manner. With courts to decide, it makes it possible for states to resolve disputes peacefully and then move on after a settlement, rather than see state relations as a test of armed strength, with the loser looking for another opportunity to redress the earlier outcome. Where it exists and functions well, there usually is a free and vigorous press to present and assess the arguments of both sides and thereby inform the public. Governments are thereby responsible to the people and are limited by law.

The rule of law and its benefits exist in the international arena as within a state. While there is no world parliament to make laws because it is divided into sovereign states, governments use mechanisms such as treaties or agreements, where a compromise can be achieved when disputes arise. Treaties and agreements are recognized in interna-

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tional law as a major source and bind all parties to uphold them. They put international relations on a rational basis and provide a means for predicting future outcomes if similar situations arise.

In short, the rule of law leads to an orderly world, governed by the voluntary agreement of states to uphold the rules and live in peace with one another.

Today, Burma and Thailand face a continuing stream of new issues and crises in their relations. With no rule of law that they both accept, no courts to which they can turn to adjudicate their disputes, and no real will on either side to bury the long past and create a new foundation for their relations based on trust, openness and honesty, the present state of their relations will continue into the future.

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### Endnotes

- \* Professor Josef Silverstein is an academic from the United States of America. He is a well known Burma expert with a long history of involvement in the issues of Burma. The Professor witnessed political changes in Burma from democratic regime to military dictatorship in 1962, as he was teaching at Mandalay University in central Burma during that period. He has written and edited several books and articles on Burma. His book entitled 'Burma: Military Rule and Politics of Stagnation' Ithaca, Cornell University Press 1977, is a well known text.
- 1. "Burma-Thai Friendship," Burma Weekly Bulletin, New Series, Vol.6, no.6. May 23, 1957. p.42
- 2. Much of this section is drawn from the author's Burma: Military Rule and the Politics of Stagnation. Ithaca, Cornell University Press, 1977, Chap. 7.
- 3. Constituent Assembly, The Constitution of the Union of Burma. Rangoon, 1948, Arts. 211, 212.
- 4. Ministry of Information Government of the Union of Burma, Kuomintang Aggression Against Burma. Rangoon, 1953.
- 5. G.H. Jansen, Afro-Asia and Non-Alignment, Faber and Faber, 1966, pp.182-226.
- 6. "Thai-Burmese Friendship Forever," Burma Weekly Bulletin. New Series, Vol. 4, no.38, Dec. 22, 1955, p. 303.
- 7. "Declaration on Foreign Policy," Burma Weekly Bulletin--New Series, Vol.X, no. 45, March 8, 1962, p.388.
- 8. In making his statement, the Burma spokesman, unlike his predecessors at the UN, defended his nation by arguing its right under the Charter to expect noninterference in its affairs by other states. Following his statement, Burma diplomats around the world employed the same approach in their efforts to deflect international criticism. Statement by H.E. U Maung Maung Gyi, Permanent Representative of the United Nations and the Leader of the Delegation of the union of Burma at the Forty Third Session of the United Nations General Assembly, New York 7 October 1988. (mimeo) p. 12. Also see, "Joint Statement by Mr. Chou En-Lai. Prime Minister of China and Mr. U Nu, The Prime Minister of Burma, Issued in Rangoon, New China News Agency, 30 June 1954.
- 9. Union of Burma Investment Law. Law No. 10/88, 1988.

10. In December 1994, a large body of Karen Buddhists broke away from the predominantly led Karen National Army because of religious differences. Calling themselves, the Democratic Kayin (Karen) Buddhist Organization, they continue to work with the Burma army in its war against the KNU.
11. The National Coalition Government of the Union of Burma (NCGUB) came into existence in December 1990, following the escape of several elected members to parliament, which the military rulers would not allow to form. They took refuge at Manerplaw with the permission of the Karen National Organization and with the backing of the Democratic Alliance of Burma (DAB)--a broad coalition of Burman and ethnic groups--they formed a government to represent the people who elected them.
12. "Asian Nations Agree to Cooperate Against Crime, Drugs," AP, July 27,2000.

## Burma human rights body is not all that is needed

*Khin Maung Win\**

*The Rangoon junta's move to form a commission on human rights is a joke given that the military refuses to enforce current laws and is the perpetrator of gross violations.*

The Australian government has decided to cooperate with the Burmese junta in providing human rights training courses for government officials. The decision was in response to the ruling State Peace and Development Council's (SPDC) indication that it intends to establish a national Human Rights Commission. Canberra's underlying philosophy is that engagement with the Burmese regime will help improve the human rights situation in Burma.

At the moment, the creation of a Human Rights Commission in Burma is an ethical issue. It is also an irony that the initiative would come from no other than the regime which has no legitimacy whatsoever to rule in the first place. Worse is that the SPDC is the culprit and perpetrator of human rights abuses which have been recorded annually by the United Nations.

One could argue that an improvement to human rights takes priority over the issue of political legitimacy. No one will reject the noble idea if it is the real beginning to help improve the human rights situation in Burma. But, there are other urgent matters requiring immediate attention, which should take precedence over the tactical move to create a national human rights watchdog.

### **Rule of law**

Firstly, lack of rule of law encourages the many violations of human rights currently happening in Burma. Obvious examples of authorities' abuse of power outside the due process of law include ignorance of electoral law that the junta itself promulgated; jailing political dissidents and human rights advocates under the so-called Emergency Pro-



vision Act 5 (j); and imposing restrictions upon the movement of elected representatives and the NLD members. Abuses of power by the army and the authorities extend to the innocent civilian population. Forced labour, forced relocation, rape, torture and murder take place on a large scale on a daily basis. All these violations exist because there is no due process of law.

The massive removal of Supreme Court judges, who were known as professional judges in 1998, clearly demonstrates the readiness of the junta to interfere and use judicial appointments as a manoeuvre to influence judges at all levels. No case involving military human rights violations can be independently tried. There is no doubt that Burma's judiciary is totally influenced by the junta.

If the principles of rule of law and due process of law prevail in Burma, a high number of cases of human rights violations would never have occurred. There is no guarantee yet that the proposed Human Rights Commission would help to improve the principles of rule of law and restore due process.

What Burma needs to ease present human rights violations is not to introduce any new human rights mechanism, but to reinforce the due process of law. Burma's legal system is adapted from the British common law system, which fairly guarantees the fundamental rights of people, therefore the basis for the rule of law and all its processes, already exists.

### **Military attitude**

The second issue to address is that the junta, which is entirely composed of military generals, must change its attitude towards people. The SPDC and all its subordinates are busy with attempts to divide the society and create disunity among the diverse peoples of Burma. Giving some people special privileges in return for them not criticizing the government or any junta officials is a commonly used tactic by the junta. While all universities are closed to ordinary students, military universities and colleges are kept open for the military's children. Accordingly, Burmese society has been divided into pro-military and ordinary people.

Discrimination that comes from aspects of religion, race, ethnicity and political belief reflects the attitude of the military junta towards the people. The practice of discrimination intensifies as the SPDC is attempting to conceptualise Burman, a major ethnic group to which most generals belong, as nationalism based on Buddhism, which most generals practice.

While most forced relocation of non-Burman ethnic villages is based on ethnicity, creating hostilities among Buddhist and non-Buddhist societies is due to discrimination on the grounds of religion. Rights, such as the right to obtain a passport, of those whose relatives are involved in the democracy movement are denied. Even worse, the SPDC views as enemies anyone considered to have the potential to challenge the SPDC's power.

As long as this military attitude towards people is unchanged, human rights will not be

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realised. To realise human rights in the long run, Burma needs to make the military change its attitude towards its own people.

### **Basic fundamental freedoms**

The third matter to consider is the urgent need for basic fundamental freedoms. Discussion on, and dissemination of, human rights information must be a freedom. The Universal Declaration of Human Rights has never been translated into Burmese and disseminated among Burmese people officially. Those who disseminate unauthorised information and publications, including human rights information, may be punished under the 1962 Printers and Publishers Act. Discussions of a bill of rights, which is part of the national constitution in most countries, is a crime under Law No 5/96, that bans all citizens from discussing constitutional matters. Any citizen who searches for information, including human rights information, on the Internet can be punished under the SPDC's Computer Law.

Lack of basic fundamental freedom not only weakens the Burmese people's ability to protect their rights, but also encourages on-going human rights violations. What Burma needs to sustain human rights is to reinstall basic fundamental freedoms.

Improving human rights in Burma does not depend on the creation of a Human Rights Commission. Unless the plan for setting up a national Human Rights Commission is, at minimum, undertaken in conjunction with moves to improve the three areas outlined in this article, improving human rights of Burmese people will be merely a dream. So, a future Human Rights Commission can form part of a solution but, on its own, it is not the solution.

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### **Endnotes**

- \* Khin Maung Win is an executive committee member of the Burma Lawyers' Council. This article reflects his personal opinions.

*This article appeared in The Nation of July 18, 2000.*

## Australia takes the wrong road to Rangoon

*Ye Htut\**

*Support for the Burmese regime means Australia is no longer a shining star for the persecuted.*

In the past it was the "ugly American" who sought to contain totalitarianism by pursuing overzealous policies. The United States has learnt dearly from its mistakes. Perhaps the politicians in Canberra haven't noticed.

In Burma, Australia was once seen as a shining star in Asia, a nation that stood steadfastly for democracy and human rights. No public relations campaign was required to build up Australia's image, and activists fleeing Burma sought refuge in Australia as their first place of asylum, rather than in the US or Canada.

The Howard Government has changed all this. First to go was Radio Australia, followed by the special humanitarian programs to help Burmese people. Now it is becoming increasingly difficult for those who have fled to Bangkok to gain asylum in Australia. Canberra also regularly rejects on-shore applications for refugee status.

So it was interesting to read the thoughts of Mr. Downer, the Minister for Foreign Affairs (*Herald*, September 6), as he attempted to justify Australia's "fresh, innovative" approach to dealing with the Rangoon Government to help improve human rights in Burma.

He said: "In the light of a decade of failed approaches to bring about change in Burma, to suggest that our small scale efforts to provide human rights training have failed soon after its started is either very naive or disingenuous."

The plan is to instruct a selection of Burmese government officials about human rights in a classroom in Australia certainly represents an immense challenge. We wish the teachers well and can trust the course will be a most intensive period of instruction over many years.

Mr. Downer also referred to the 5th annual meeting of the Asia Pacific Forum of National Human Rights Institutions held in New Zealand in August. Our representative was also at this meeting, where the Burmese government representative confirmed that Australia was assisting them in establishing a Human Rights Commission.

This is also an intriguing prospect. One can only wonder how this can be achieved in Burma, as the commission will never be fully independent or transparent. A veil of secrecy surrounds its establishment and perhaps the sole intention of establishing the Commission is to legitimise the regime. Again, we wish Mr Downer well but fear his mission is doomed.

We would suggest a different course of action. Any process to establish a Human Rights Commission should go hand in hand with the establishment of a constitution in Burma. We also believe that it is imperative that Aung San Suu Kyi and her National League for Democracy party be part of such a process. Only she has the mandate of the people and a proven commitment towards human rights, and the restoration of democracy in Burma.

We have urged both the Australian government and the Burmese military regime to recognise Ms Suu Kyi and her party as essential participants in the process of establishing a Human Rights Institution in Burma.

Mr Downer should not need reminding that Ms Suu Kyi and the NLD won a landslide victory in 1990 but was blocked from taking power by the military. Many of the elected MPs were jailed and Ms Suu Kyi was kept under house arrest for six years.

And now, in the middle of this controversy about human rights, the regime has used force to restrain Ms Suu Kyi from travelling outside Rangoon. The Nobel Peace Prize winner has been confined to her residence since September 2, out of telephone contact and barred access to diplomats by security forces.

It is interesting to note that Australia did not denounce these actions with the same commitment as the US and Britain. President Bill Clinton and Prime Minister, Mr. Tony Blair, used their speeches at the United Nations millennium summit to denounce the military regime.

So far the Downer approach seems to have fallen on deaf ears. Burma has rejected all criticism of its treatment of Ms Suu Kyi and the NLD, saying the issue is an "internal matter". Indeed, Foreign Minister Win Aung told the millennium summit that his government had merely taken preventive action against those who wanted to lead the country into anarchy.

Australia should immediately withdraw its support for the regime by ceasing all involvement on the setting up of a Human Rights Commission in Burma. Only then will it regain the confidence and goodwill of the Burmese people.

Downer should use his good offices with the regime to seek the lifting of all restrictions imposed on the leaders and activists of the NLD and the cancellation of the virtual state of emergency imposed by the regime. Don't delay. Australia's reputation is at

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**Endnotes**

\* Ye Htut is Joint Secretary of the Burma Lawyers Council.

*This article appeared in The Sydney Morning Herald of September 12, 2000.*

# Forced labour, the ILO and Burma

*Louise Southalan\**

## Introduction

Burma<sup>1</sup> became a member of the International Labour Organisation (ILO) in 1948 and ratified the ILO's Forced Labour Convention 1930 (No. 29) in 1955. The subsequent decades, and particularly the past five years, have seen the ILO repeatedly seek action from Burma's rulers to comply with the country's obligations under the Convention, culminating in a significant resolution in the 88<sup>th</sup> session of the International Labour Conference, the annual meeting of ILO members, in June of this year.

This article seeks to give some background to the issue for readers unfamiliar with the details of these developments. The first section of this article discusses what the military regime in Burma is required to do under the Forced Labour Convention, and considers the recommendations of the ILO's Commission of Inquiry into the issue, which reported in July 1998. The domestic legal arrangements in Burma relevant to forced labour are explained.

The second section of the article discusses the activities of the ILO regarding forced labour in Burma, up to the June 2000 session of the International Labour Conference. Extracts from a number of the relevant documents have been reproduced here, in the hope that they will be of interest and possible use to the reader.

## Section 1- What must Burma do to comply?

### (a) The Forced Labour Convention 1930 (No. 29)

Under the Forced Labour Convention, "forced or compulsory labour" is defined as "all

work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."<sup>2</sup> The Convention does not seek to immediately outlaw all forms of forced or compulsory labour within ratifying states upon ratification. Certain types of forced labour are exempted under the Convention, and the Convention also envisages a potential transition period after ratification.

### Exempted forced labour

The basic obligation of a ratifying state is "to suppress the use of forced or compulsory labour in all its forms within the shortest possible period"<sup>3</sup>, however the Convention provides specifically for the exemption of certain forms of compulsory service which otherwise would have fallen within the general definition of forced or compulsory labour. These forms of labour are excluded from the scope of the obligations imposed on ratifying States, subject to the observance of certain conditions.<sup>4</sup>

The exceptions under the Convention are as follows:

1. Compulsory military service. The Convention exempts "any work or service exacted in virtue of compulsory military service laws for work of a purely military character"<sup>5</sup>
2. Any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country.<sup>6</sup> The Committee of Experts on the Application of Conventions and Recommendations (CEACR), part of the ILO<sup>7</sup>, considered the Convention and noted that three of the exceptions set out in the Convention fall into this category, namely military service, work in cases of emergency, and minor communal services. The Committee mentioned other examples, such as jury duty, assisting a person in danger and assisting with the enforcement of law and order, and pointed out that these exceptions "must be read in the light of other provisions of the Convention and cannot be invoked to justify recourse to forms of compulsory service which are contrary to such other provisions."<sup>8</sup>
3. Prison labour as a consequence of a conviction in a court of law is exempted, provided that it is carried out under the supervision and control of a public authority and that the prisoner is not hired to or placed at the disposal of private individuals, companies or associations.<sup>9</sup>
4. Work or service exacted in cases of emergency, described in the Convention as "in the event of a war or a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population."<sup>10</sup> "The Committee of Experts has pointed out that the concept of emergency - as indicated by the enumeration of examples in the Convention - involves a sudden, unforeseen happening calling for instant counter-measures".
5. Minor communal services of a kind which, being performed by the members of the community in the direct interest of the said community, can therefore be considered as normal civic obligations incumbent upon the members of

the community, provided that the members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services.<sup>11</sup>

### Transitional period

In addition to these exceptions, the Convention allows for a period of transition between the ratification of the Convention and the application of the full terms of the Convention. The transition period is not defined, nor the length of time specified. The Convention does, however, set out conditions which must be observed during the transitional period. During this period, recourse to forced or compulsory labour may be had for public purposes only and as an exceptional measure, subject to the conditions and guarantees set out in the Convention.<sup>12</sup> "These conditions and guarantees aim at limiting the power to exact the work or service in question to specified authorities, to ensure that labour is exacted only in cases of present or imminent necessity for work of important direct interest to the community called upon to perform it, to safeguard the social and physical conditions of the population, and to ensure the observance of certain minimum standards as regards hours of work, weekly rest, remuneration, workmen's compensation, health and welfare. Special conditions are laid down with regard to compulsory portage and compulsory cultivation."<sup>13</sup>

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In 1996 the ILO established a Commission of Inquiry to investigate complaints that Burma was breaching the Forced Labour Convention. The Commission considered the question of whether the transitional period applied in the case of the forced labour that it found existed in Burma. In its observations on the complaint, the Burmese regime did not invoke the Article of the Convention providing for the transitional period. Even if it had, however, it appears that too much time has now elapsed for this provision to be successfully invoked.

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There has been consideration of the applicability of the provisions relating to exemptions and the transitional period by at least two ILO bodies. As will be discussed further below, in 1996 the ILO established a Commission of Inquiry to investigate complaints that Burma was breaching the Forced Labour Convention. The Commission considered the question of whether the transitional period applied in the case of the forced labour that it found existed in Burma. In its observations on the complaint, the Burmese regime did not invoke the Article of the Convention providing for the transitional period.<sup>14</sup> Even if it had, however, it appears that too much time has now elapsed for this provision to be successfully invoked. In considering the matter, the Commission referred to the 1997 comments of the CEACR, that:

Since the Convention, adopted in 1930, calls for the suppression of forced labour within the shortest possible period, to invoke at the current time (67 years after its adoption) that certain forms of forced or compulsory labour comply with one of the requirements of this set of provisions, is to disregard the transitional function of these provisions and contradict the spirit of the Convention.

In the view of the Committee, use of a form of forced or compulsory labour falling within the scope of the Convention as defined in Article 2 may no longer be justified by invoking observance of [the conditions required for using forced labour in the transitional period], although the absolute prohibitions contained in these provisions remain binding upon the States having ratified the Convention.<sup>15</sup>

The Commission concluded that the transitional provisions were not applicable in the case of the forced labour in Burma.<sup>16</sup>



Under Article 25 of the Convention, ratifying states also have the obligation to ensure that the penalties imposed by law for the illegal exaction of forced or compulsory labour are both adequate and readily enforced.

### Countries' obligations

Under the terms of the Declaration on Fundamental Principles and Rights at Work, the obligation to eliminate forced labour is now regarded as being inherent in ILO membership, whether or not a country has accepted the specific obligations arising from the Forced Labour Convention.<sup>17</sup> However, States who have ratified the Convention are required to take effective measures to suppress forced labour not falling within the exceptions set out in the Convention. In the unlikely event that the transitional provisions still applied to a ratifying country, forced labour would be allowable for limited work under certain conditions.

In relation to Burma specifically, the Commission of Inquiry made several findings of fact. This article does not go into the extensive evidence heard by the Commission, which is set out in detail in the report. The relevant findings were that:

1. Forced labour in Burma is widely performed by women, children and elderly persons.<sup>18</sup> It is imposed pervasively on the civilian population by the authorities and the military;<sup>19</sup>
2. The forced labour occurring in Burma does not fall within any of the exceptions of the Convention;<sup>20</sup>
3. The transitional period under the Convention does not apply to the types of forced labour being used in Burma;<sup>21</sup> and
4. The forced labour occurring in Burma violates specific provisions of the Convention.<sup>22</sup>

Accordingly, Burma's obligation is to suppress all the types of forced labour that the Commission of Inquiry found occur in Burma. The next question is what specifically is required in the way of legal action by the regime in Burma. Before considering this, it is necessary to consider the legal arrangements in Burma that exist currently that are relevant to forced labour.

### (b) Situation in Burma

#### (i) Legal situation

Burma was a British colony from the 19<sup>th</sup> century until independence in 1948. Many of the colonial laws are still in force, outdated though they are. They are supplemented by decrees, directives, orders and laws of the current military regime and its predecessors. Burma has had two Constitutions since independence in 1948, and currently has none. Article 29 of the 1947 Constitution, contained in the section entitled "Fundamental Rights", provided that

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...the Commission of Inquiry made several findings of fact... (including): forced labour in Burma is widely performed by women, children and elderly persons- it is imposed pervasively on the civilian population by the authorities and the military; the forced labour occurring in Burma does not fall within any of the exceptions of the Convention; and the transitional period under the Convention does not apply to the types of forced labour being used in Burma; and the forced labour occurring in Burma violates specific provisions of the Convention.

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forced labour in any form and involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall be prohibited.

The article then continues immediately, however, with the following clause:

Explanation - Nothing in this section shall prevent the State from imposing compulsory service for public purposes without any discrimination on grounds of birth, race, religion or class.

Clearly such an article is contrary to the provisions of the Forced Labour Convention, and, on its face, somewhat self-contradictory.<sup>23</sup> Although Burma became a party to the Forced Labour Convention in 1955, this Constitution remained in force until the military seized power in 1962. From 1962 to 1974 Burma was without a Constitution and was ruled by military decree. In 1974 the military-backed party's Constitution was introduced. There was no prohibition of forced labour in this Constitution, and in fact several articles on their face appeared to authorise forced labour, such as Article 168, which provided:

Every citizen shall be under a duty to abide by the provisions of this Constitution, as well as the laws, work discipline, and local rules made for the building of a socialist society, and discharge efficiently such duties as may be assigned to him by the State.

However, the Constitution did contain several Articles setting out labour-related protections for citizens, including the right to enjoy the benefits derived from one's labour in proportion to one's contribution,<sup>24</sup> rest and recreation,<sup>25</sup> fixed working hours and leave as prescribed by law<sup>26</sup> and benefits as prescribed by law for injury due to occupational accidents.<sup>27</sup> Whether forced labour was permitted under this Constitution is arguable.<sup>28</sup>

The military took overt control again in 1988 and for the past 12 years has been ruling without a Constitution. The Acts of real relevance today are two colonial laws introduced by Britain in 1907 and 1908, the Towns Act and the Village Act, which are still in force. These two Acts are drafted in very similar terms, and authorise the authorities to compel members of the public to provide labour and services on demand. The question of the relationship between these Acts and the former Constitutions, and particularly whether the power to requisition forced labour may have been limited by the Constitutions, must, regrettably, be left for another day because of space constraints. Suffice to say that both the Towns Act and the Village Act are considered valid law today by the Burmese regime, and accordingly, international organisations such as the ILO have been required to proceed on the basis that they are valid, although it may be possible to mount an argument as to their legal validity.

### **The Village Act 1908**

The relevant provisions of the Village Act were submitted to the ILO by the military

regime in October 1993 in the following wording:

s8 (1) Every headman shall be bound to perform the following public duties, namely:

- (g) to collect and furnish, upon receipt of payment for the same at such rates as the Deputy Commissioner may fix, guides, messengers, porters, supplies of food, carriage and means of transport for any troops or police posted in or near or marching through the village-tract or for any servant of the Government travelling on duty: provided that no headman shall requisition for personal service any resident of such village-tract who is not of the labouring class and accustomed to do such work as may be required;
- (n) generally to assist all officers of the Government in the execution of their public duties; and
- (o) generally to adopt such measures and do such acts as the exigency of the village may require.

s11 Every person residing in the village-tract shall be bound to perform the following public duties, namely:

- ....
- (d) on the requisition of the headman or of a rural policeman, to assist him in the execution of his duties prescribed in sections 7 and 8 of the Act and the rules made under the Act.

*Explanation:* A requisition under clause (d) may be either general or addressed to an individual.

s12 If any person residing in a village-tract refuses or neglects to perform public duties imposed upon him by this Act or by any rule thereunder, he shall, in the absence of reasonable excuse,<sup>29</sup> the burden of proving which shall lie upon him, be liable:

- (i) by order of the headman, to fine...; or
- (ii) by order of the village committee, on the case being referred to it by the headman, to fine..., or to confinement for a term not exceeding 48 hours in such place as the Deputy Commissioner may appoint in this behalf, or to both; or
- (iii) on conviction by a Magistrate, to fine..., or to imprisonment for a term not exceeding one month, or to both.

Burma Act IV of 1924 repealed s8(1)(h) of the Village Act, which had previously allowed requisition of "labourers for the making or repair of roads, embankments or other public works".<sup>30</sup>

### **The Towns Act 1907**

Section 7(1)(m) of the Towns Act corresponds to section 8(1)(n) of the Village Act and is preceded by a proviso "that no headman shall requisition for personal service any resident of such ward who is not of the labouring class and accustomed to do such

work as may be required."

s9 Persons residing in a ward shall be bound to perform the following public duties, namely:

...

(b) on a general or individual requisition of the headman to assist him in the execution of his public duties.

s9A. If any person residing in a ward refuses/neglects to perform any of the public duties imposed upon him by this Act or any rule thereunder, he shall, in the absence of reasonable excuse, the burden of proving which shall lie upon him, be liable, on conviction by a magistrate, to a fine...

After ratifying the Forced Labour Convention, Burma's successive rulers spent many years insisting that the Towns Act and the Village Act were irrelevant and obsolete in Burma.<sup>31</sup> Despite this, the Acts were never repealed or amended, and in 1993 the regime, in a change of tactic, declared that these Acts were in fact valid and provided a legal basis for the imposition of forced labour.<sup>32</sup> Accordingly, much of the attention of the ILO's efforts towards securing change has focussed on amendment of these provisions, as well as other measures addressing the actual practices by which labour is coerced from people in Burma.

### **Executive Orders - seeking to curb excesses**

During the colonial period, Executive Orders were made under the Village Act, which give guidance as to the intended scope of the powers exercised under the Act. Paragraph 76 of one Executive Order examined by the Commission of Inquiry<sup>33</sup> states that clause (n) of section 8(1) of the Village Act:

...is widely worded and must be worked with discretion. The clause does not cover requisitions for coolies to carry out forest and other departmental work. Services obtained under clause (n) legitimately for what are in fact private purposes, eg repairing the roof of a zayat or clearing a camping ground or carrying a letter (except from village to village in accordance with the custom of the country), should be paid for.<sup>34</sup>

Paragraph 78 of the same Executive Order contains a prescient warning about the potential for abuse of the wide powers conferred under the Act:

Deputy Commissioners should bear in mind that the wide powers conferred upon them and upon Township Officers and headmen by the Village Act should be exercised with judgment and consideration; and that the people of Burma, and especially of Upper Burma, are apt to submit without much complaint to annoyances and extortions which are in reality very burdensome. They should remember that it is their duty to protect the people from such treatment, and to see that subordinate officials are kept in check and are not allowed to abuse

their position and power to the harassment and annoyance of the residents in the tracts committed to their charge.<sup>35</sup>

Paragraph 70 refers to s8(g) of the Village Act and states that "all supplies which it costs money or labour to procure and all carriage should be paid for at full rates"<sup>36</sup>, while paragraph 72 states that "In cases where labour is compulsorily requisitioned under the provisions of section 11(d) read with section 8(1)(g) of the Village Act, the Government accepts the liability to pay compensation for personal injury by accident or sickness arising out of and in the course of the labourers' employment. The conditions of the grant of compensation will be similar to those contained in the Workmen's Compensation Act..."<sup>37</sup>

While the regime has declared that the Towns Act and the Village Act are valid and in force, it has made no comment about the status of the Executive Orders.<sup>38</sup> Of course, these Orders do not bring the provisions of the Acts in line with the Convention; they merely seek to mitigate some of the worst excesses of practices that should, in any event, be unlawful.

### The Penal Code

s374 of the Penal Code, also a colonial law still in force, provides that:

Whoever unlawfully compels any person to labour against the will of that person shall be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both.

Only "unlawful" forced labour is punishable under this section. The Commission of Inquiry pointed out that, given the very wide provisions of the Village Act and the Towns Act, there could be cases of forced labour in breach of the Convention not punishable under the Penal Code, as they were not "unlawful" according to Burmese law.<sup>39</sup>

### Secret Orders

In a somewhat clumsy manoeuvre, presumably in response to growing international attention to the issue of forced labour in Burma, the regime in 1995 presented two directives purportedly issued to its government departments. The first, dated 27 April 1995, it gave to the United Nations Special Rapporteur on Burma, and the second, dated 2 June 1995, it gave to the Director-General of the ILO. Both directives were marked "Secret".

The April secret directive, from the Chairman of the SLORC (as the regime was called at the time), is addressed to the Ministry of Agriculture, the Chairman of the Yangon Division Law and Order Restoration Council and the Commander of No. 11 Light Infantry Division. Its subject is "To stop obtaining labour without compensation from the local people in irrigation projects" and it reads as follows:

1. It has been learnt that some of the local people are very concerned over the

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assignment of each and every family in the task of digging a certain number of pits for making ditches and trenches in the overall construction of dams in Yangon Division.

2. It is hereby instructed to hire paid labourers to carry out these projects and to stop the practice of obtaining labour from the local people without monetary compensation.
3. In so doing, the Ministry of Agriculture is to bear the resulting expenditure.<sup>40</sup>

The 2 June secret directive is addressed to State/Division Law and Order Restoration Councils, with copies to the Ministries of Agriculture, Railways and Construction. It is couched in similar terms:

Subject: *Prohibiting unpaid labour contributions in national development projects*

1. It has been learnt that in obtaining labour from the local populace in carrying out national development projects, such as construction of roads, bridges and railways as well as building of dams and embankments, the practice is that they have to contribute labour without compensation.
2. In fact, these projects have been carried out with a view to furthering the welfare of the local people. As such, it is imperative that in obtaining the necessary labour from the local people, they must be paid their due share.
3. Causing misery and sufferings to the people in rural areas due to the so-called forced and unpaid labour is very much uncalled for. The sufferings of the people may in turn create misperception, misunderstanding and misjudgement of the Government and the Tatmadaw (armed forces).
4. Therefore, it is hereby instructed that the authorities concerned at different levels make proper supervisions so as to avoid undesirable incidents.<sup>41</sup>

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It is interesting to note that the secret orders do not purport to stop the requisition of forced labour, simply to instruct that forced labour be remunerated. On this point, the Commission of Inquiry noted that "Payment does not change the character of forced labour exacted compulsorily or by force, it merely becomes paid compulsory or forced labour."

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### Order 1/99

One more legal development which should be mentioned is Order 1/99, issued by the regime in May 1999, which purports to suspend the exercise of some of the powers to requisition forced labour under the Towns Act and the Village Act. This Order is discussed in Section 2, as it emerged in the context of responses to the Commission of

Inquiry's recommendations.

### (ii) Actual practice

The legal structure outlined above allows forced labour to occur, and sets out procedures for its lawful requisition which do, at least, set some limits on how it may be obtained. The Commission of Inquiry found, however, that in reality labour is extracted from the population freely by military and government officers, without reference to the provisions of the Towns Act and the Village Act. "[I]t thus appears that unfettered powers of military and government officers to exact forced labour from the civilian population are taken for granted, without coordination among different demands made on the same population, and people are also frequently rounded up directly by the military for forced labour, bypassing the local authorities."<sup>46</sup>

The Commission also found that forced labour in Burma is "almost never remunerated nor compensated, secret directives notwithstanding". On the contrary, it often goes hand in hand with the exaction of money, food and other supplies from the civilian population.<sup>47</sup> The Committee found that the punishment for not complying with demands to provide forced labour do not reflect the legal provisions described above.

Failure to comply with a call-up for labour is punishable under the Village Act with a fine or imprisonment for a term not exceeding one month, or both, and under the Towns Act, with a fine. In actual practice, the manifold exactions of forced labour often give rise to the extortion of money in exchange for a temporary alleviation of the burden, but also to threats to the life and security and extrajudicial punishment of those unwilling, slow or unable to comply with a demand for forced labour, such punishment or reprisals range from money demands to physical abuse, beatings, torture, rape and murder.<sup>48</sup>

### (c) Findings and recommendations of the Commission of Inquiry

The report of the Commission of Inquiry is very comprehensive. Its findings and recommendations are central to all later developments regarding forced labour in Burma. Accordingly, it is worth reproducing some of the findings here.

535. All the information and evidence before the Commission shows utter disregard by the authorities for the safety and health as well as the basic needs of the people performing forced or compulsory labour. Porters, including women, are often sent ahead in particularly dangerous situations as in suspected minefields, and many are killed or injured this way. Porters are rarely given medical treatment of any kind; injuries to shoulders, backs and feet are frequent, but medical

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treatment is minimal or non-existent and some sick or injured are left behind in the jungle. Similarly, on road building projects, injuries are in most cases not treated, and deaths from sickness and work accidents are frequent on some projects. Forced labourers, including those sick or injured, are frequently beaten or otherwise physically abused by soldiers, resulting in serious injuries; some are killed, and women performing compulsory labour are raped or otherwise sexually abused by soldiers. Forced labourers are, in most cases, not supplied with food - they sometimes even have to bring food, water, bamboo and wood to the military; porters may receive minimal rations of rotten rice, but be prevented from drinking water. No clothing or adequate footwear is provided to porters, including those rounded up without prior warning. At night, porters are kept in bunkers or have to sleep in the open, without shelter or blankets provided, even in cold or wet conditions, often tied together in groups. Forced labourers on road and railway construction have to make their own arrangements for shelter as well as all other basic needs.

536. In conclusion, the obligation under Article 1, paragraph 1, of the Convention to suppress the use of forced or compulsory labour is violated in Myanmar in national law, in particular by the Village Act and the Towns Act, as well as in actual practice in a widespread and systematic manner, with total disregard for the human dignity, safety and health and basic needs of the people of Myanmar.

537. Concurrently, the Government violates its obligation under Article 25 of the Convention to ensure that the penalties imposed by law for the illegal exaction of forced or compulsory labour are both really adequate and strictly enforced. While section 374 of the Penal Code provides for the punishment of those unlawfully compelling any person to labour against the will of that person, that provision does not appear to be ever applied in practice, even where the methods used for rounding up people do not follow the provisions of the Village Act or the Towns Act, which are in any event never referred to in practice.

For the purposes of this article, the crucial part of the Commission's report are its recommendations, which are contained in paragraph 539:

In view of the Government's flagrant and persistent failure to comply with the Convention, the Commission urges the Government to take the necessary steps to ensure:

- a. that the relevant legislative texts, in particular the Village Act and the Towns Act, be brought into line with the Forced Labour Convention, 1930 (No. 29), as already requested by the Committee of Experts on the Application of Conventions and Recommendations and promised by the Government for over 30 years, and again announced in the Government's observations on the complaint. This should be done without further delay and completed at the very latest by 1 May 1999;

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“In conclusion, the obligation under Article 1, paragraph 1, of the Convention to suppress the use of forced or compulsory labour is violated in Myanmar in national law, in particular by the Village Act and the Towns Act, as well as in actual practice in a widespread and systematic manner, with total disregard for the human dignity, safety and health and basic needs of the people of Myanmar.”

*Finding of the Commission of Inquiry*

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- b. that in actual practice, no more forced or compulsory labour be imposed by the authorities, in particular the military. This is all the more important since the powers to impose compulsory labour appear to be taken for granted, without any reference to the Village Act or Towns Act. Thus, besides amending the legislation, concrete action needs to be taken immediately for each and every of the many fields of forced labour examined in Chapters 12 and 13 above to stop the present practice. This must not be done by secret directives, which are against the rule of law and have been ineffective, but through public acts of the Executive promulgated and made known to all levels of the military and to the whole population. Also, action must not be limited to the issue of wage payment; it must ensure that nobody is compelled to work against his or her will. Nonetheless, the budgeting of adequate means to hire free wage labour for the public activities which are today based on forced and unpaid labour is also required;
- c. that the penalties which may be imposed under section 374 of the Penal Code for the exaction of forced or compulsory labour be strictly enforced, in conformity with Article 25 of the Convention. This requires thorough investigation, prosecution and adequate punishment of those found guilty. As pointed out in 1994 by the Governing Body committee set up to consider the representation made by the International Confederation of Free Trade Unions under article 24 of the ILO Constitution, alleging non-observance by Myanmar of the Forced Labour Convention, 1930 (No. 29), the penal prosecution of those resorting to coercion appeared all the more important since the blurring of the borderline between compulsory and voluntary labour, recurrent throughout the Government's statements to the committee, was all the more likely to occur in actual recruitment by local or military officials. The power to impose compulsory labour will not cease to be taken for granted unless those used to exercising it are actually brought to face criminal responsibility.

The Commission also recommended that the Government indicate in its regular reports to the ILO (required under the ILO Constitution article 22) measures taken by it to give effect to the provisions of the Convention during the period of review.<sup>49</sup>

## Section 2 - Activities of the ILO on this issue

This section will first give a brief overview of the three main bodies of the ILO and then discuss developments from when the Commission of Inquiry reported up to June 2000.

### (a) Structure of the ILO

The ILO has a tripartite membership of workers, employers and governments. It is composed of three main bodies<sup>50</sup>:

1. The International Labour Conference (ILC). This meets annually in June and is attended by representatives from each member state, being two government delegates, one employer delegate and one worker delegate, as well as technical advisors. The ILC acts as a forum to discuss labour questions, and establishes and adopts international labour standards.
2. The Governing Body is the executive council of the ILO which meets three times per year. It is composed of 28 government members (10 of whose seats are permanently held by States of chief industrial importance), 14 worker members and 14 employer members. The Governing Body takes decisions on ILO policy and elects the Director-General.
3. The International Labour Office ("Office") is the permanent secretariat of the ILO, which is led by the Director-General. The Office undertakes activities under the scrutiny of the Governing Body.

In addition, the ILO has a regular Committee of Experts on the Application of Conventions and Recommendations (CEACR), referred to in Section 1, which meets regularly.

### (b) The Commission of Inquiry

The Commission of Inquiry is really the starting point for discussing the ILO's action regarding forced labour in Burma. As mentioned in section 1, the Commission was established in 1996 after a complaint under Article 26 of the ILO's Constitution against Burma for non-observance of the Forced Labour Convention.

**Article 26** allows any member to file a complaint with the Office if it is not satisfied that any other member is securing the effective observance of any Convention which both have ratified. The Governing Body must then establish a Commission of Inquiry to report on the matter, although before doing so it may take other steps such as contacting the government in question.

**Article 33** provides that in the event of any Member failing to carry out within the time specified the recommendations, if any, contained in the report of the Commission of Inquiry, the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith.

In March 1997, the Governing Body set up a Commission of Inquiry to assess the issues raised in the complaint.<sup>51</sup> The Burmese regime did not authorize the Commission of Inquiry to visit Burma, indicating that "such a visit would not contribute much to-

wards resolving the case" and "would interfere in the internal affairs of the country."<sup>52</sup>

The Commission presented its comprehensive report in July 1998 and made the recommendations and findings referred to in Section 1. The time limit the Commission set for compliance with the recommendations was 1 May 1999 at the latest. In accordance with the ILO's Constitution, the report was sent to the Burmese regime by the Director-General. The stage was set.

### (c) Response to the Commission of Inquiry

In the wake of the Commission of Inquiry's report came a period of waiting to see how the Burmese regime would react. The first indication came by way of a letter from the regime to the Director-General of ILO dated 23 September 1998, extracts from which are reproduced here:

You will recall that Myanmar Government formed a High-Level Coordination Committee comprising senior officials from several Government Ministries to deal with the activities of the Commission of Inquiry. This Committee examined the details contained in the report of the Inquiry Commission.

The Coordination Committee considers that the information provided by some organizations from anti-government circles was politically motivated, highly biased, lacking objectivity and without any goodwill on the part of those organizations.

The Coordination Committee wishes to point out that the Myanmar Government has always been working at its utmost and in good faith for the cause of the country. There could be many different interpretations over a certain event. But it is a fact that the Government has been emphasizing on infrastructural development and socio-economic development programmes in various parts of the country including the remote border regions.

...

I should like to call your attention to the fact that as stated in my previous correspondence to you, the Myanmar authorities have reviewed the Village Act and the Towns Act several times on their own initiatives so as to bring in line with present-day conditions in the country as well as to fulfil Myanmar's obligations (as a party to the Convention) or (as a Member of the International Labour Organization).

The authorities, therefore, will do their utmost to complete the process within the time frame referred to in the report. I may add that we do not see any difficulty in implementing the recommendations contained in paragraph 539 of the report.<sup>53</sup>

The Governing Body took note of this letter and requested the Office to submit to it by 21 May 1999 or earlier a report on the measures taken by the Government of Myanmar to give effect to the recommendations contained in the report of the Commission of Inquiry.

### Order 1/99

On 1 May 1999 the Commission of Inquiry's time frame for compliance with the recommendations passed. At the 274<sup>th</sup> Session of the Governing Body, on 21 May 1999, the Director-General submitted the requested report, which covered the period August 1998 to 18 May 1999. On 18 May the Burmese regime had forwarded to the Office an Order it had issued on 14 May, entitled "Order Directing Not to Exercise Powers Under Certain Provisions of the Town Act, 1907 and the Village Act, 1907", known as Order 1/99. This Order provides as follows:

1. The Government of The Union of Myanmar, the Ministry of Home Affairs hereby issues this Order under the directive of the Memorandum dated 14-5-99, Letter No. 04/Na Ya Ka (U)/Ma Nya of the State Peace and Development Council.
2. Under Section 7 of the Towns Act, 1907, powers have been conferred on the Chairmen of the Ward Peace and Development Councils to enable them to execute their public duties. Among such powers, the right to requisition for personal service of the residents of the ward is provided in Sub-section (1)(l) and (m) of Section 7. It is provided in Section 9 that residents of the ward shall fulfil the duty assigned under the said power and it is provided in section 9A that on failing to fulfil such duty, action may be taken against them.
3. Similarly, under Section 8 of the Village Act, 1907 also, powers have been conferred on the Chairmen of the Village Tract Peace and Development Councils to enable them to execute their public duties. Among such powers, the right to requisition for personal service of the residents of the village tract is provided in Sub-section (1)(g), (n) and (o) of section 8. It is provided in section 11 (d) that the residents of the village tract shall fulfil the duty assigned under the said power and it is provided in section 12 that on failing to fulfil such duty, action may be taken against them.
4. In order to make the Towns Act, 1907 and the Village Act, 1907 conform to the changing situation such as security, administrative, economic and social conditions within the internal domain of the State, the Ministry of Home Affairs has been scrutinizing and reviewing as to how the said Acts should be amended, inserted and deleted, in coordination with the relevant ministries, Government departments and organizations.
5. As such, this Order is hereby issued directing the Chairmen of the Ward and Village Tract Peace and Development Councils and the responsible persons of the Department of General Administration

and the Myanmar Police Force not to exercise powers under these provisions relating to requisition for personal service prescribed in the above-mentioned Towns Act, 1907 and the Village Act, 1907, until and unless any further directive is issued, except for the following circumstances:

- (a) requisition for personal service in work or service exacted in cases of emergency on the occurrence of disasters such as fire, flood, storm, earthquake, epidemic diseases that would endanger the existence or the well-being of the population;
  - (b) requisition for personal service in work or service which is of important direct interest for the community and general public and is of present or imminent necessity, and for which it has been impossible to obtain voluntary labour by offer of usual rates of wages and which will not lay too heavy a burden upon the present population.
6. Any person who fails to abide by this Order shall have action taken against him under the existing law.

*(Signed)* Col. Tin Hlaing  
Minister  
Ministry of Home Affairs

The Director-General noted in his report that as at 18 May 1999, neither the Village Act nor the Towns Act had been amended, as requested in the recommendations of the Commission of Inquiry, nor had any draft law proposed or under consideration for that purpose been brought to the knowledge of the ILO.<sup>54</sup> He did discuss Order 1/99, and noted that it reserved the exercise of powers under the relevant provisions of the Village Act and the Towns Act in several ways.<sup>55</sup> "In the first place, the Order reserves "any further directive" that may be issued to exercise the powers. Secondly, the Order makes two exceptions under (a) and (b) whose language corresponds in part to the Forced Labour Convention, 1930 (No. 29). Exception (a) reproduces the essential wording of the exception from the scope of the Convention made in its Article 2(2)(d). Exception (b) reflects part of Article 10 of the Convention which reads as follows:

#### Article 10

1. Forced or compulsory labour exacted as a tax and forced or compulsory labour to which recourse is had for the execution of public works by chiefs who exercise administrative functions shall be progressively abolished.
2. Meanwhile, where forced or compulsory labour is exacted as a tax, and where recourse is had to forced or compulsory labour for the execution of public works by chiefs who exercise administrative functions, the authority concerned shall first satisfy itself --
  - (a) that the work to be done or the service to be rendered is of important direct interest for the community called upon to do

- the work or render the service;
- (b) that the work or the service is of present or imminent necessity;
  - (c) that the work or service will not lay too heavy a burden upon the present population, having regard to the labour available and its capacity to undertake the work;
  - (d) that the work or service will not entail the removal of the workers from their place of habitual residence;
  - (e) that the execution of the work or the rendering of the service will be directed in accordance with the exigencies of religion, social life and agriculture.

It will be noted that conditions made in paragraph 2(d) and (e) of Article 10 of the Convention have not been retained in exception (b) of the Order of 14 May 1999.<sup>56</sup>

The Director-General went on to note that, more importantly, Article 10 of the Convention refers to the progressive abolition of forced labour envisaged under that Article. As discussed in Section 1 of this article, the Commission of Inquiry noted that Article 10 contains guarantees and conditions to restrict the use of forced labour during the transitional period, and the CEACR has noted that it is now too late to invoke the argument that the transitional period applies.<sup>57</sup> The Director-General concluded that

in providing for the exercise of powers to impose compulsory labour under an exception patterned after Article 10, paragraph 2(a) to (c) of the Convention, the Order of 14 May 1999 does not provide for the action called for by the Commission of Inquiry in its recommendations under paragraph 539(b) to ensure "that in actual practice, no more forced or compulsory labour be imposed by the authorities, in particular the military". Furthermore, it needs to be remembered that the Order of 14 May 1999 is limited to the exercise of powers under the Village Act and the Towns Act, while the Commission of Inquiry pointed out in its recommendations that in national practice "the powers to impose compulsory labour appear to be taken for granted, without any reference to the Village Act or the Towns Act". Thus, wider concrete action needs to be taken, in conformity with the Commission's recommendations, "to ensure that nobody is compelled to work against his or her will."<sup>58</sup>

On 7 June 1999 the Burmese regime issued a memorandum to the Governing Body, which stated that the Director-General's report was

...full of unfounded and biased charges deliberately levelled at Myanmar and the Myanmar Government.

The alleged facts in this report are manifestly false accusations concocted with evil intent to bring about the destruction of Myanmar by Myanmar expatriate organizations abroad and renegade groups that oppose all measures undertaken by the Myanmar Government. They

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"...the Commission of Inquiry pointed out in its recommendations that in national practice 'the powers to impose compulsory labour appear to be taken for granted, without any reference to the Village Act or Towns Act.' Thus wider concrete action needs to be taken, in conformity with the Commission's recommendations, to ensure that nobody is compelled to work against his or her will."  
*Extract from Report of the Director General—ILO*

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are also based on blatantly false accusations made verbally, in writing and in the form of announcements by the National League for Democracy (NLD)...<sup>59</sup>

In this memorandum, the regime took issue with the Director-General's conclusion that it had not complied with the recommendation of the Commission of Inquiry to bring the Towns Act and the Village Act into conformity with the Forced Labour Convention. It argued that actual amendment of the Acts was not required for compliance with the recommendation.

The recommendations made by the Commission were: firstly, that the Village Act and Towns Act be brought in line with Convention No. 29. The essence of the recommendation "brought in line" is in the domain of Convention No. 29. But on the other hand, it is the domain of national law or municipal law as to how to put into effect the provisions of the Convention which is not in the domain of the Convention. At this juncture, it is to be pointed out that legal systems of the world differ from State to State. One legal system in a State cannot be the same with the system of another. The *modus operandi* for putting in effect the essence of the Convention into national law might be different between two States.

Myanmar in its own legal system has on 14 May 1999 put a "stop" to the offending provisions of the above two laws through an Order from the Legislature to the ministry concerned not to exercise powers for the offending provisions under these two laws. In Myanmar's legal system, the State Peace and Development Council is the Legislature of Myanmar. As in all other countries under constitutional law, it is above the Executive. Executive encompasses the various ministries which includes the Ministry of Home Affairs, which implement these two laws. The Memorandum of the State Peace and Development Council was issued on 14 May 1999 and under it the Ministry of Home Affairs issued Order No. 1/99 of 14 May 1999 ordering all implementing authorities not to exercise powers under Towns Act, section 7, subsection (1)(l) and (m), and section 9 and 9A, and similarly in the Village Act, section 8, subsection (1)(g), (n) and (o), and section 11(d) and section 12. This Order has the force of law to stop all implementing authorities from exercising the offending powers of these provisions.

Thus, under our legal system this measure is taken in compliance with the related recommendation of the Commission of Inquiry.<sup>60</sup>

The memorandum did not address the points raised by the Director-General's report as to the reservations of the powers under the Towns Act and the Village Act, nor the inappropriateness of patterning the order after the conditions laid down for the "transitional period" under the Forced Labour Convention. It also did not address the question of why, having based the exceptions on Article 10, it then left out some of the required conditions from that Article to protect labourers.

In November and December 1999, under the regular procedures of article 22 of the

ILO Constitution, the CEACR assessed the observance by Burma of the Forced Labour Convention, and the implementation of the recommendations of the Commission of Inquiry. The CEACR considered the content of Order 1/99 and the regime's claims in its memorandum of 7 June, noting, as had the Director-General, that restrictions on exercising the powers to requisition forced labour were to be effective only "until and unless any further directive is issued". It also considered the two exceptions under the Order, particularly exception (b), which it concluded was incompatible with the Convention for several reasons, including that while exception (b) reflected part of Article 10, it did not observe the conditions in Article 10 that "that the work or service will not entail the removal of the workers from their place of habitual residence" and "that the execution of the work or the rendering of the service will be directed in accordance with the exigencies of religion, social life and agriculture."<sup>61</sup> The Committee reiterated the Director-General's observation that, in addition, the exceptions in Order 1/99 also did not reflect the transitional character of Article 10, despite being patterned upon that Article.<sup>62</sup>

The Committee then considered the regime's claims in the memorandum that Order 1/99 "specifically orders... that any and all unpaid or compulsory labour be terminated henceforth." The Committee reported that

In fact, the Order does not refer to "any and all unpaid or compulsory labour", but only to the exercise of powers under the Village Act and the Towns Act. The Commission of Inquiry pointed out in paragraph 539(b) of its report that in national practice "the powers to impose compulsory labour appear to be taken for granted, without any reference to the Village Act or the Towns Act." This is confirmed by information available on actual practice followed by military authorities since the publication of the report of the Commission of Inquiry..., including orders for the contribution of labour issued both before and after 14 May 1999 without ever referring to the Village Act or the Towns Act or any other legal basis.<sup>63</sup>

The Committee also commented upon the regime's claims in the memorandum regarding paragraph 6 of Order 1/99, which it says "places beyond all reasonable doubt that offenders will be punished under section 374 of the Penal Code".

The Committee notes that section 6 of Order 1/99 refers neither to the exaction of forced labour nor to punishment under section 374 of the Penal Code, but specifically to failure to abide by the Order and to action "under existing laws". The Committee further recalls that the Order does not generally prohibit the exaction of forced or compulsory labour, but specifically restricts the use of powers under the Village and Towns Acts, while military orders calling for the supply of forced labour do not refer to any legal basis.<sup>64</sup>

The Committee also addressed the regime's denials that forced labour occurred, and took

due note that the Government in its statement denies what has been established both by the Commission of Inquiry's findings of July 1998



and by a wealth of concurring information for the period August 1998 to April 1999 supplied by a variety of sources, as well as copies of orders from the army itself or representatives of the administration, as reflected in the Director-General's report of 21 May 1999. The Committee further notes that the assertions quoted above from the Government's memorandum of 7 June 1999 are contradicted inter alia by copies of military orders issued at about the same time that have been submitted by the [International Confederation of Free Trade Unions].<sup>65</sup>

The Committee's conclusion was in agreement with that of the Director-General that Order 1/99 did not constitute compliance with the recommendations of the Commission of Inquiry.<sup>66</sup> The next issue was how the bodies of the ILO would deal with this failure.

#### (d) The 1999 resolution and decision

The annual International Labour Conference met in June 1999 and took a significant step on the issue by passing a resolution<sup>67</sup> whereby the ILC

1. Deeply deplores that:
  - a. the Government has failed to take the necessary steps to bring the relevant legislative texts, in particular the Village Act and Towns Act, into line with the Forced Labour Convention, 1930 (No. 29), by 1 May 1999, as recommended by the Commission of Inquiry;
  - b. at the end of the twentieth century, the State Peace and Development Council (SPDC) has continued to inflict the practice of forced labour — nothing but a contemporary form of slavery — on the people of Myanmar, despite repeated calls from the ILO and from the wider international community for the past 30 years;
  - c. there is no credible evidence that those exacting forced labour in Myanmar have been punished under section 374 of the Penal Code.
2. Reaffirms that this issue should be further considered by the Governing Body in November 1999.
3. Resolves:
  - d. that the attitude and behaviour of the Government of Myanmar are grossly incompatible with the conditions and principles governing membership of the Organization;
  - e. that the Government of Myanmar should cease to benefit from any technical cooperation or assistance from the ILO, except for the purpose of direct assistance to implement immediately the recommendations of the Commission of Inquiry, until such time as it has implemented the said recommendations;

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“... at the end of the twentieth century, the State Peace and Development Council (SPDC) has continued to inflict the practice of forced labour - nothing but a contemporary form of slavery - on the people of Myanmar, despite repeated calls from the ILO and from the wider international community for the past thirty years...”

*extract from resolution adopted by the International Labour Conference at its 87th Session, June 1999.*

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- f. that the Government of Myanmar should henceforth not receive any invitation to attend meetings, symposia and seminars organized by the ILO, except such meetings that have the sole purpose of securing immediate and full compliance with the said recommendations, until such time as it has implemented the recommendations of the Commission of Inquiry.

In November 1999 the Governing Body followed up on the resolution of the ILC by passing a decision in the same terms as the resolution, which required that the Director-General ensure that the Office did not undertake work or issue invitations contrary to the resolution. This situation was to remain until the Governing Body had noted the implementation of the recommendations.<sup>68</sup> The Governing Body also requested the Director-General to provide an update to his earlier report on measures taken by the regime to implement the recommendations of the Commission of Inquiry.

The Director-General was due to report to the Governing Body again by the end of February 2000. The regime decided to persist in its argument that Order 1/99 was a sufficient measure. On 21 January the regime wrote to the Director-General stating that the Ministry of Home Affairs had reviewed the Village Act and the Towns Act "with a view to either amend or supplement or repeal the two acts in conformity with the changing security, administrative, economic and social situations and conditions." The result of the review process had been Order 1/99, which the regime reiterated had been well publicised by way of press conference at the ASEAN Labour Ministers' Meeting in May 1999, as well as circulated to various state bodies and authorities. The letter also stated that in the event of any complaint of forced labour, action would be taken under s 374 of the Penal Code. As at the date of the letter, no complaints had been received. The letter concluded with the claim that "it is now amply clear that positive and effective measures have been virtually taken in accordance with the ILO Convention, 1930 (No. 29)."<sup>69</sup>

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The Director-General referred to the regime's letter and summarised the situation as follows: "In its letter of 21 January 2000, the Government confirms that, having reviewed the Village Act and the Towns Act...it chose to neither amend nor repeal the offending provisions, thus failing to act upon the first recommendation of the Commission of Inquiry."

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On 25 February 2000 the Director-General reported again to the Governing Body. He referred to the regime's letter and summarised the situation as follows: "In its letter of 21 January 2000, the Government confirms that, having reviewed the Village Act and the Towns Act...it chose to neither amend nor repeal the offending provisions, thus failing to act upon the first recommendation of the Commission of Inquiry."<sup>70</sup>

### **Wrestling over the purpose of a technical mission**

The ball was now again in the regime's court. It opted for a new approach. In October, between the passing of the ILC resolution and the Governing Body decision, the regime initiated correspondence with the Director-General. The letter opened with the declaration that Burma has "had excellent cooperation with the ILO in the cause of promoting labour rights", and continued with a proposal that the Office send a technical team to visit Burma. Neither the Forced Labour Convention nor the Commission of Inquiry were mentioned in the letter, simply that the proposed visit would "give us an opportunity to discuss matters of mutual interest and to exchange views on ways of increasing cooperation with your Office."<sup>71</sup>

The reply from the Office was sent on 16 December, after the decision of the Governing Body, in the following terms:

I refer to your letter of 14 October 1999 inviting the International Labour Office to send a technical team in order to discuss matters of mutual interest.

As you are aware, the Office acts subject to the directions of the Constitutional organs of the International Labour, namely the General Conference and the Governing Body. In the light of the decisions previously taken by these organs, the only matter of mutual interest which the International Labour Office may discuss with your Government is the immediate implementation of the recommendations of the Commission of Inquiry established to examine the observance by the Government of the Forced Labour Convention, 1930 (No. 29), with a view to ensuring full compliance with the said Convention.<sup>72</sup>

The regime replied on 27 March with the comment that the proposed visit of the technical team will "enable us to exchange views on matters of mutual interest, including the measures taken by Myanmar with regard to Convention No. 29".<sup>73</sup>

On 28 March the Governing Body decided to include in the agenda of the ILC in its 88<sup>th</sup> Session, in June 2000, an item entitled "Action recommended by the Governing Body under article 33 of the Constitution - Implementation of the recommendations contained in the report of the Commission of Inquiry on Forced Labour in Myanmar (Burma)". The Governing Body also approved a resolution recommending the ILC adopt measures under Article 33 of the ILO's Constitution.

The Director-General of the Office responded to the regime by letter 31 March, referring to these developments, as well as the previous resolution of the ILC regarding limitations on assistance by the ILO to Burma. He stated that "the Office is prepared to field - upon your Government's request - a technical cooperation mission. The sole object of such a mission would be to provide direct assistance to implement immediately the recommendations of the Commission of Inquiry under the terms of the resolution adopted on this subject..."

Subsequent correspondence ensued, with the regime continuing to seek to broaden the purpose of the mission to general matters, going beyond the implementation of the recommendations, and the Director-General insisting that the mission could only take place if the implementation of the recommendations were its sole purpose.<sup>74</sup>

With the Office due to report to the Governing Body by mid-May, and the ILC due to consider action under Article 33 in June, time was running out for the regime. The ILO would not send the mission for any purpose other than that in the resolution. The regime's obvious reluctance to acknowledge explicitly the mandate of the mission, combined with its wish to avoid the exclusion that would surely follow if it did nothing, resulted in a rather vague letter of 8 May 2000 to the Director-General, fudging explicit acknowledgment of the purpose of the mission:

I wish to refer to your letter of 3 May 2000 concerning the possibility

of fielding a technical cooperation mission to Myanmar.

I thank you for your clarification, particularly the willingness to field a technical cooperation mission at our request. Accordingly, may I invite you to send this technical cooperation mission at a mutually convenient date.<sup>75</sup>

The Director-General, however, left no room for doubt in his reply, which opened with the following:

I acknowledge receipt of your letter of 8 May by which your Government requests the ILO to field a technical cooperation mission to your country whose sole object, having regard to the terms of my letter of 3 May, will be to provide direct assistance to implement immediately the recommendations of the Commission of Inquiry under the terms of the resolution adopted by the International Labour Conference at its 87<sup>th</sup> (1999) Session.<sup>76</sup>

The regime responded on 20 May 2000 with assurances that the mission would be afforded full cooperation during its visit.<sup>77</sup> The technical mission was very quickly arranged and arrived in Burma on 23 May and departed on 27 May so as to be able to report to the June ILC session in time.

#### (d) The technical mission and subsequent events in the June ILC

During the visit, the members of the technical mission met with a range of regime ministers and bureaucrats, foreign diplomats, a senior monk, the opposition National League for Democracy and Secretary 1 of the military regime, Lieutenant-General Khin Nyunt.<sup>78</sup> The mission offered suggestions about the type of measures that would be required to implement the recommendations, including a suggestion that Order 1/99 be replaced by an order from the regime "instructing state authorities, and in particular military authorities, border security forces and their officers, not to requisition persons to provide labour or services for any purpose, nor to order others to requisition such labour or services, regardless of whether or not payment was made for said labour or services, except in cases of emergency (as listed in Order 1/99). It was suggested that it should be made clear in the Order that this prohibition included, but was not limited to, the requisition of labour or services for a range of specifically limited purposes. Finally, the prohibition was to be complemented by positive indications for state authorities or officers requiring labour or services for any purpose to make prior budgetary arrangements to obtain these by a public tender process or by providing market rates to persons wishing to offer their labour or services."<sup>79</sup>

During the mission's meetings, the response from regime officials was to deny that forced labour occurred in Burma. The only recognition of the issue came from Secretary-1 of the regime, who "acknowledged that there might have been recourse to so-called forced labour when work was being carried out on the infrastructure, [but] these practices had ceased before the ILO report had been completed."<sup>80</sup>

The mission reported that it was allowed the freedom to meet everyone it requested during the four days. Just as it was taking its leave from Burma, the mission received a letter from the Minister of Labour, Major General Tin Ngwe, addressed to the Director-General of the ILO, which set out the cooperation the mission had received from the regime and then continued:

It is our hope that through the discussion and the cooperation the mission enjoyed during the sojourn in Myanmar, we have been able to show that Myanmar is sincere in its efforts to resolve the issue of the allegations of forced labour.

I would also like to take this opportunity to inform you that we have taken and are taking the necessary measures to ensure that there are no instances of forced labour in Myanmar. Allow me to say that Myanmar would take into consideration appropriate measures, including administrative, executive and legislative measures, to ensure the prevention of such occurrences in the future.

In this regard, the talks held between Myanmar and the ILO technical cooperation mission have been most useful in providing a better understanding of the issues involved and it is our ardent hope that this process of consultation and technical cooperation within the framework of the ILO recommendation will continue in working toward the resolution of the matter. On my part, I look forward to meeting you during the coming ILC.<sup>81</sup>

This letter and the freedom given to the technical mission were the focus of much attention and debate during the meeting of the ILC the following month.

### **The Selection Committee**

At the June 2000 session of the ILC, one of the items on the agenda was measures recommended by the Governing Body under article 33 of the Constitution with regard to Burma's implementation of the Commission of Inquiry's recommendations. The Governing Body recommended to the ILC that it adopt measures including some or all of the following:

- a. to decide that the question of the implementation of the Commission of Inquiry's recommendations and of the application of Convention No. 29 by Myanmar should be discussed at future sessions of the International Labour Conference, at a sitting of the Committee on the Application of Standards specially set aside for the purpose, so long as this Member has not been shown to have fulfilled its obligations;
- b. to recommend to the Organization's constituents as a whole – governments, employers and workers – that they: (i) review, in the light of the conclusions of the Commission of Inquiry, the relations that they may have with the member State concerned and take appropriate measures to ensure that the said Member cannot take advantage of such relations to perpetuate or ex-

tend the system of forced or compulsory labour referred to by the Commission of Inquiry, and to contribute as far as possible to the implementation of its recommendations; and (ii) report back in due course and at appropriate intervals to the Governing Body;

- c. as regards international organizations, to invite the Director-General: (i) to inform the international organizations referred to in article 12, paragraph 1, of the Constitution of the Member's failure to comply; (ii) to call on the relevant bodies of these organizations to reconsider, within their terms of reference and in the light of the conclusions of the Commission of Inquiry, any cooperation they may be engaged in with the Member concerned and, if appropriate, to cease as soon as possible any activity that could have the effect of directly or indirectly abetting the practice of forced or compulsory labour;
- d. regarding the United Nations specifically, to invite the Director-General to request the Economic and Social Council (ECOSOC) to place an item on the agenda of its July 2000 session concerning the failure of Myanmar to implement the recommendations contained in the report of the Commission of Inquiry and seeking the adoption of recommendations directed by ECOSOC or by the General Assembly, or by both, to governments and to other specialized agencies and including requests similar to those proposed in paragraphs (b) and (c) above;
- e. to invite the Director-General to submit to the Governing Body, in the appropriate manner and at suitable intervals, a periodic report on the outcome of the measures set out in paragraphs (c) and (d) above, and to inform the international organizations concerned of any developments in the implementation by Myanmar of the recommendations of the Commission of Inquiry.

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The Chairman of the Committee presented an amended draft resolution for consideration by the Committee. This provided that the measures recommended by the Governing Body would be suspended for a further five months, until 30 November 2000, unless before this date, the Governing Body were "satisfied that the intentions expressed by the Minister of Labour of Myanmar in his letter dated 27 May have been translated into a framework of legislative, executive and administrative measures that are sufficiently concrete and detailed to demonstrate that the recommendations of the Commission of Inquiry have been fulfilled and therefore render the implementation of one or more of these measures inappropriate."

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The first step of the ILC prior to the plenary session of all delegates was to form a Selection Committee to consider the Governing Body's recommendations and report to the ILC as a whole. The Selection Committee met on 7-9 June, and had before it the recommendations of the Governing Body and the report of the technical mission (including a copy of the letter from the regime's Minister of Labour of 27 May)<sup>82</sup>. Debate in the Committee was vigorous, and early in proceedings it became apparent that consensus on the Governing Body's recommendations was unlikely. The worker delegates supported the recommendations in full, as did some governments, whilst the ASEAN governments and some others opposed the recommendations. The ASEAN governments put up a motion that the whole issue be deferred to the next meeting of the Governing Body, which was rejected. The employer delegates appeared to support the recommendations of the Governing Body but favoured a compromise as a means of achieving consensus. The main point argued was whether the visit of the technical mission and the letter of 27 May represented a change in attitude by the Burmese regime, or amounted to nothing.

The issue was resolved when the Chairman of the Committee presented an amended draft resolution for consideration by the Committee. This provided that the measures recommended by the Governing Body would be suspended for a further five months, until 30 November 2000, unless before this date, the Governing Body were "satisfied that the intentions expressed by the Minister of Labour of Myanmar in his letter dated

27 May have been translated into a framework of legislative, executive and administrative measures that are sufficiently concrete and detailed to demonstrate that the recommendations of the Commission of Inquiry have been fulfilled and therefore render the implementation of one or more of these measures inappropriate."<sup>83</sup> The draft resolution also authorised the Director-General to respond positively to any requests for assistance and cooperation made by the regime for this purpose.

This, then, was the draft resolution submitted to the Conference to consider. Its adoption by the Selection Committee was described by the Burmese Minister of Labour in his opening speech to the Conference as "a most unfair and unwarranted action." He stated that "it is our firm belief that this unwarranted state of affairs arose because of politically motivated actions by certain powerful countries and groups who are opposed to Myanmar."<sup>84</sup>

Debate on the draft resolution put forward by the Selection Committee was, again, vigorous, concentrating largely on the question of whether the recent developments amounted to a change by the regime, whether it was appropriate to invoke the powers under Article 33, and whether other developing countries should fear such a precedent. To attempt to give the flavour of the debate, extracts from some of the speeches are given here<sup>85</sup>.

### **Extracts from speeches of some of those opposing the resolution**

**The Government delegate from Malaysia** spoke on behalf of the Governments of Indonesia, the Philippines, Singapore, Viet Nam, Cambodia, the Lao People's Democratic Republic and Burma. "The visit and the report of the ILO technical cooperation mission to Myanmar mark important progress in efforts to secure the commitment of the Government of Myanmar to resolving the forced labour issue. This new development and, in particular, the sincerity and willingness of the Government of Myanmar to cooperate in finding a solution to this problem represent a significant change and a major step forward... The measures envisaged may have far-reaching ramifications, and could seriously undermine all the efforts taken thus far to resolve this question."

**The Government delegate from the Philippines** "ASEAN was not asking that the sword of article 33 be turned into plough shears, only that the sword be placed in the scabbard while cooperation with Myanmar is being worked out. Should cooperation fail, then the sword remains available to the Conference."

**The Government delegate from India** "We are opposed to the punitive measures recommended by the Selection Committee as, in our view, the ILO's objectives and workers' rights can best be promoted through dialogue and technical cooperation, not through punitive measures or the threat of such measures. The desirability of such measures is all the more doubtful at a juncture when a process of dialogue has already been initiated through the visit of the technical cooperation mission. We also have grave doubts about the desirability and legislative authority of the recommended measures that seek to take the issue to other organizations outside the ILO."

**The Government delegate from Pakistan** "First, we oppose a sanction-based approach. Therefore, we believe that measures should not be adopted under article 33 of

the Constitution... Today, adopting measures under this article would send an extremely negative signal to member States of the Organization that are willing to cooperate and work with the ILO to implement international labour standards. Secondly, Myanmar has recently welcomed the technical cooperation mission and has expressed its clear willingness to work with the ILO to eliminate forced labour... Those who are proposing action on the resolution proposed by the Selection Committee, must realize that such confrontation will only create fissures in the Organization, and can hardly serve the purpose of promoting ILO standards."

**The Government and substitute delegate from Cuba** "...[I]t is for the ILO to deal with labour standards within the framework of its own procedures. Therefore, transferring those responsibilities, or establishing links with other international bodies for this purpose is not in keeping with the ILO's mandate. The most effective way of achieving the objectives of improving the situation in Myanmar would be through cooperation and dialogue. We feel that these means have not been exhausted yet. The decisions which have been proposed should be put off."

**The Government delegate from Thailand** "Who among us would give wholehearted and voluntary cooperation with the sword of Damocles hanging over their heads? The Thai Government is of the conviction that the ILO should try its utmost to foster the voluntary cooperation of all its member States."

**The Burmese regime's delegate** "This a time for soul searching. We must search our hearts and minds and think deep within our hearts. We must weigh more carefully whether the path of confrontation and coercion recommended in the resolution is, I quote, "wise and expedient". Or, whether the path of dialogue and cooperation is better, and more likely to produce fair results desired by us all. Let us not talk about the past. Let us talk about the present. More importantly, let us talk about the future... To cast doubts on Myanmar's intentions and to insist on extreme measures will not serve the cause of the workers. Instead of imposing sanctions, a more reasonable course, in the view of most delegations, is the corporate approach proposed by the ASEAN member States, which is to continue the ongoing process of dialogue and cooperation, and to review progress at the November session of the Governing Body. Never in the history of the ILO has article 33 been invoked to impose sanctions on a member State. This should never occur... The sanctions contemplated under article 33 are contrary to the spirit of the ILO Constitution... [T]he application of sanctions will be tantamount to the ILO assuming the powers of the United Nations Security Council. More importantly, it will set a dangerous precedent. Any developing country may fall victim to this mechanism... The resolution would certainly have far-reaching legal implications... The moral and political implications of the resolution are also disturbing. It is hoped that the Conference will choose the path of dialogue and cooperation, rather than the path of confrontation and coercion."

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"It is an historic day. Article 33 is being applied for the first time. I do not believe any reasonable government has anything to fear from that... You have to have gone through a decade of something as heinous as forced labour, you have to have had a major Commission of Inquiry and ignored its findings for several years, to even be a candidate for this kind of resolution"

*Workers' delegate, United Kingdom.*

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#### **Extracts of speeches of those supporting the resolution**

**The Workers' delegate (and leader of the Workers' group) from the United Kingdom** "It is an historic day. Article 33 is being applied for the first time. I do not believe any reasonable government has anything to fear from that... You have to have gone through a decade of something as heinous as forced labour, you have to have had



a major Commission of Inquiry and ignored its findings for several years, to even be a candidate for this kind of resolution"

**The Employers' delegate (and leader of the Employers' group) from Germany**

"It is not a question of punishment. People have talked about punishment, but this is a sovereign, independent country, and nobody can impose their will on the Government of Myanmar. Punishment is not something that is within the mandate of the ILO. We do not have the right to sanction, and we do not want to have such a right. It would be pointless and counterproductive. Nor is this a question of economic sanctions... My friends in the group, even those from developing countries, have understood this point very well, and they fully support the position of the Employers. It is not a question of having some kind of scenario where you have the powerful countries against the small countries. We have a majority here of small, developing countries, and such scenarios would simply prevent us from taking any action at all."

**The Government delegate from Portugal (on behalf of the European Union)**

made a declaration to which the Central and Eastern European Associated States and the Associated States of Cyprus, Malta and Turkey also subscribed. "...[T]he European Union feels that concrete measures under article 33 of the Constitution of our organisation should be adopted by this Conference... It is not a double penalty, but an appropriate response to an extreme situation. Article 33 exists for exceptional situations, such as this, where serious violations of human rights persist despite the continued efforts of the Organization. It is, in our opinion, the minimum that one can and should do in the light of the indignity of forced labour of which the people of Burma are victims... We do not feel, as in the case of any compromise, that the document submitted is perfect. We do not feel, for example, that the very general promises set out in the letter from the Minister of Labour of Burma to the Director-General "reflect a welcome intention on the part of the Burmese authorities to take measure to give effect to the recommendations of the Commission of Inquiry." Nonetheless, we are open to accepting the compromise and to giving the Burmese authorities one last chance by granting an additional deadline..."

**The Workers' delegate from Malaysia**

"The ILO has given ample time to the Government of Myanmar since last year when we discussed this topic. Last year, in this august house, we deliberated, we decided, we voted and we gave the Myanmar Government a year to correct themselves, to make a change. Some countries are now calling for the Myanmar Government to be given still more time. If the Myanmar Government is serious about this problem, it can demonstrate that within one month, not one year; they can do it tomorrow if they want to. If the Myanmar Government, or any other government, asks for one more year, I do not think anything will change, even if it is given ten years, if it is not sincere. I do not think they can ratify or implement this Commission of Inquiry's findings."

**The Government adviser from Canada**

"Article 33 was included in the ILO Constitution to deal with countries that fail to comply with the recommendations of the Commission of Inquiry, within the time specified in those recommendations. Canada believes that the lack of concrete response so far by the Burmese authorities and the seriousness of the situation with regard to the continued existence of forced labour in Burma fully justify the invoking of this article. At the same time, in a spirit of compromise, we are prepared to give some time to Burma before the measures provided for

under article 33 take effect."

**The Government delegate from the United States** "[L]et us consider the argument that we are being hasty. On the contrary, the action before this Conference comes after a very, very long time, and after the repeated rejection by the Burmese regime of the validity of this Organization's concerns expressed over literally decades to the Committee of Experts, the Committee on the Application of Standards and the Committee on Freedom of Association. A rejection repeated as recently as last Friday, when the Burmese representative again denounced the proposal presented by [the] Chairperson [of the Selection Committee], and denounced the Selection Committee for approving it. We are here today two years after the report of the Commission of Inquiry which recommended that forced labour in Burma be immediately stopped. We are here after two subsequent Reports by the Director-General, one in May 1999, and one in February of this year, that forced labour has not been stopped. We are here a year after the emergency resolution passed by last year's Conference, and we are here because the Governing Body in March determined, after the most thorough consideration, to recommend action under article 33 of the Constitution. Again let us recall what the Commission of Inquiry said and consider whether they would accuse us of haste... No, we have not acted hastily. Perhaps the record will show we have acted, if anything, too slowly... As for the alleged new-found interest in dialogue, unfortunately we think the record hardly shows the change of attitude that some suggest... Finally, as to those who would say that our action will not be effective in stopping forced labour in Burma, they might well be correct, although they are surely wrong that we will get better results from doing less."

**The Workers' delegate from Pakistan** "During the course of the discussions in the Selection Committee, we in the Workers' group...felt that we should give an opportunity to the Government of Myanmar to take advantage of the technical cooperation, instead of adopting a resolution. This has been deferred. There is thus no victimization or any sort of sanction, or any intimidation of developing countries."

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### The voting

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The resolution itself was then voted upon. The quorum was 271 and the required two-thirds majority was 150. The resolution was passed with 257 votes in favour, 41 against and 31 abstentions. Interestingly, the Thai government delegation abstained from voting, whilst other ASEAN governments opposed the resolution.

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Indonesia, the Philippines, Singapore and Viet Nam proposed amendments that would delay consideration of the resolution until the next Governing Body meeting. These were defeated on a vote, with 52 in favour, 242 against and 27 abstentions.

The resolution itself was then voted upon. The quorum was 271 and the required two-thirds majority was 150. The resolution was passed with 257 votes in favour, 41 against and 31 abstentions. Interestingly, the Thai government delegation abstained from voting, whilst other ASEAN governments opposed the resolution<sup>86</sup>.

The Burmese regime delegate responded, "This action by the Conference is most unfair, most unreasonable and most unjust. This resolution is totally unacceptable to my delegation. For these reasons, my delegation totally and categorically rejects the resolution and dissociates itself from it and any activities or effects connected with it. Nevertheless, I should like to express our hope that the avenue of cooperation has not been completely closed. We have indicated our willingness to cooperate in good faith on our part on the basis of the letter of the Minister of Labour, dated 27 May 2000, provided

that the other side reciprocates this spirit and refrains from taking coercive measures."<sup>87</sup>

## Conclusion

The issue of forced labour involves basic questions of respect for human dignity and the rule of law. The regime's refusal to abolish forced labour is linked to its heavy reliance on force and repression in all aspects of life. The international developments regarding forced labour in Burma have brought this to the fore, and represent a significant step for the ILO, which has never before considered taking measures against a member State under Article 33. Numerous and lengthy procedures by the ILO preceded this step, however, and there is a strong argument that if the ILO did not now move in this direction, nothing else it could do would bring about change. Failure to act in these circumstances fuels the argument that international organisations have largely been paper tigers regarding gross abuses of rights in Burma.

The months until November 2000 will be crucial to Burma's place in the international community. If the regime follows its recent pattern, its response over these few months will be to take some small, ineffective step that it will then use to claim that the Article 33 measures are unjustified. It may, however, revert to its earlier stance of rejection of the ILO's activities, as it did with the Commission of Inquiry, whose hearings it declined to attend.

If the Governing Body decides in November to implement the ILC's resolution regarding measures under Article 33, it will place the question of isolating the regime on the agenda of other international bodies. It may also bring the issue to the fore within ASEAN. Already the June proceedings have placed countries such as Thailand in a difficult position, which it resolved by breaking ranks with its ASEAN partners on the vote on the resolution. It is to be hoped that the current momentum arising from the Commission of Inquiry may lead to further change, and ultimately to the abolition of forced labour in Burma.

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## Endnotes

- \* Louise Southalan is a legal researcher with the Burma Lawyers' Council, Bangkok office. The author wishes to thank Mr BK Sen for the idea for this article and for his most useful comments and suggestions.
- 1. Many of the ILO documents referred to in this article use the name Myanmar rather than Burma, although in the text of the article itself the name Burma is used.

2. Article 2, para 1
3. Article 2, para 1
4. For further discussion see the Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organisation to examine the observance by Myanmar of the Forced Labour Convention 1930 (No. 29), Geneva, 2 July 1998 (hereafter "Commission of Inquiry report"), paragraphs 207 et seq
5. Article 2, paragraph 2(a). For discussion of this provision see paragraphs 208 and 209 of the Commission of Inquiry report.
6. Article 2, paragraph 2(b). For discussion of this provision see paragraph 210 of the Commission of Inquiry report.
7. This is discussed in section 2 of the article.
8. Commission of Inquiry report, paragraph 210, referring to the 1979 General Survey on the abolition of forced labour, paragraph 68.
9. Article 2, paragraph 2(c).
10. Article 2, paragraph 2(e)
11. Article 2, paragraph 2(e)
12. Article 1, paragraph 2.
13. Commission of Inquiry report, paragraph 215
14. Commission Inquiry report, paragraph 503
15. Commission of Inquiry report, para 218, citing Report of the Committee of Experts 1998 p 100
16. Commission of Inquiry report para 472
17. See Provisional Record 8 of the 88<sup>th</sup> Session of the ILC, June 2000, Report of the ILO technical cooperation mission to Myanmar (hereafter "PR8")
18. Commission of Inquiry report para 531
19. Commission of Inquiry report para 528
20. Commission of Inquiry report paras 485-502
21. Commission of Inquiry report para 503
22. Commission of Inquiry report paras 504-513
23. The author is not aware whether this article was ever interpreted by the courts in a manner that reconciled the two clauses.
24. Article 148(a)
25. Article 150(a)
26. Article 150(b)
27. Article 151(a)
28. The author is not aware of any case-law on this topic, and would be grateful to receive any information about such case-law.
29. The Commission of Inquiry report, at paragraph 241, notes the indication by Daw Aung San Suu Kyi that "such things as having to gather in the harvest, or needing to work in the field, would have been accepted as "reasonable excuse" under the original section 12 of the Village Act, as reproduced above, but that nowadays, this provision translated into Burmese has left out the phrase "in the absence of reasonable excuse", so "under this law, the authorities are able to force the people in the villages to do anything they like...". The Commission did not have at its disposal the Burmese text of the Village act, nor of the Towns Act (the English text of which likewise referred to the absence of reasonable excuse)".
30. Commission of Inquiry report paragraph 242, citing documents H9 at p 5843 and H10 at 5858
31. For details see Commission of Inquiry report para 237
32. Commission of Inquiry report para 237
33. Commission of Inquiry report paragraphs 243-4, referring to documents H7 at p 5802 and H10 at pp 5869, 5870-5871.
34. *ibid*, paragraph 76
35. Cited by the Commission of Inquiry report, paragraph 243
36. Commission of Inquiry report, paragraph 243
37. Commission of Inquiry report para 247, citing document H10 at p 5870

38. Commission of Inquiry report para 248
39. Commission of Inquiry report para 478
40. See the Commission of Inquiry report paras 245-6
41. Appendix XII to the Commission of Inquiry report
42. Commission of Inquiry report para 473
43. Commission of Inquiry report para 474
44. Commission of Inquiry report para 539b
45. Commission of Inquiry report para 245
46. Commission of Inquiry report para 529
47. Commission of Inquiry report para 532
48. Commission of Inquiry report para 530
49. Commission of Inquiry report paragraph 540
50. For background information see the ILO's website about its structure: [www.ilo.org/public/English.depts/fact.htm](http://www.ilo.org/public/English.depts/fact.htm)
51. Commission of Inquiry report paras 524-5
52. "Measures recommended by the Governing Body under article 33 of the Constitution - Implementation of recommendations contained in the report of the Commission of Inquiry entitled *Forced Labour in Myanmar* (Burma)", provisional record 4 for the 88<sup>th</sup> Session of the ILC, June 2000 (hereinafter "PR4")
53. Document PR4 - part B (see fn 53).
54. "Report of Director-General to the members of the Governing Body on measures taken by the Government of Myanmar following the recommendations of the Commission of Inquiry established to examine its observance of the Forced Labour Convention, 1930 (No. 29)", reproduced as Appendix I to the document GB.276/6 (report of Governing Body, 276<sup>th</sup> Session, November 1999) para 11
55. see paras 48 et seq.
56. Director-General's report (see fn 55), paras 49-51
57. Director-General's report (see fn 55) para 52.
58. Director-General's report (see fn 55) paras 54-55
59. "Memorandum of the Government of Myanmar on the Report of the Director-General to the members of the Governing Body dated 21 May 1999", Appendix II of GB.276/6
60. *ibid*
61. CEACR Individual Observation concerning Convention No 29, Forced Labour, 1930 Myanmar (ratification: 1955), submitted to 88<sup>th</sup> Session of ILC, June 2000, ("CEACR report"), para 11
62. CEACR report (see fn 62), para 14
63. CEACR report (see fn 62), para 15
64. CEACR report (see fn 62), para 29
65. CEACR report (see fn 62)
66. CEACR report (see fn 62), para 33
67. Resolution on the widespread use of forced labour in Myanmar adopted by the International Labour Conference at its 87<sup>th</sup> Session (June 1999)
68. Decision of the Governing Body adopted at its 276<sup>th</sup> Session, November 1999 concerning the application of the Conference Resolution, Second sitting; GB.276/6, para. 10, and statement by the Legal Adviser
69. Appendix II to report of Second report of the Director-General to members of the Governing Body on measures taken by the Government of Myanmar following the recommendations of the Commission of Inquiry established to examine its observance of the Forced Labour Convention, 1930 (No. 29), 25 February 2000.
70. Second report of the Director-General, *ibid*, para 8.
71. Letter from U Soe Nyunt to Director-General dated 14 October 1999, annexed to document PR4 of the 88<sup>th</sup> session of the ILC.
72. Letter from Kari Tapiola, Executive Director for Fundamental Principles and Rights at Work, dated 16 December 1999, annexed to document PR4 of the 88<sup>th</sup> session of the ILC.
73. Letter from U Soe Nyunt to Director-General ILO dated 27 March 1999, annexed to docu-

- ment PR4 of the 88<sup>th</sup> session of the ILC.
74. Letter from U Soe Nyunt dated 19 April 2000, letter from Director-General ILO dated 3 May 2000, both annexed to document PR4 of the 88<sup>th</sup> session of the ILC.
  75. Letter from U Soe Nyunt dated 8 May 2000, annexed to document PR4 of the 88<sup>th</sup> session of the ILC.
  76. Letter from Director-General ILO dated 10 May 2000, annexed to document PR4 of the 88<sup>th</sup> session of the ILC.
  77. Letter from U Soe Nyunt dated 15 May 2000, annexed to document PR4 of the 88<sup>th</sup> session of the ILC.
  78. Document PR8 (see fn 18)
  79. Document PR8 (see fn 79)
  80. Document PR8 (see fn 79)
  81. Document PR8 (see fn 79), Appendix 2
  82. Fourth report of the Selection Committee, document PR 6-4 for the 88<sup>th</sup> Session of the ILC, June 2000
  83. Appendix to document PR 6-4 (see fn 83)
  84. Speech of U Ngwe Tin, Minister of Labour, see the ILC website: <http://www.ilo.org/public/english/standards/relm/ilc/ilc88/index.htm>
  85. <http://www.ilo.org/public/english/standards/relm/ilc/ilc88/com-seld.htm>
  86. <http://www.ilo.org/public/english/standards/relm/ilc/ilc88/pdf/v-myanm.pdf>
  87. <http://www.ilo.org/public/english/standards/relm/ilc/ilc88/com-seld.htm>

## Commentary on the recent NLD litigation

*B.K Sen\**

"We will take all possible measures to establish the necessity for the Rule of Law. It is in this spirit that we have notified the State Peace and Development Council and the Multi Party Election Commission of our own intention to file suits against them in accordance with the Specific Relief Act, although we are aware of the stranglehold that the military Junta has on Burma's judicial processes."

*Daw Aung San Sue Kyi July 16, 2000*

Below are some comments regarding the current legal course of events adopted by the National League for Democracy (NLD) and further additional commentary regarding two recent and pertinent international incidents.

The NLD has recently initiated legal proceedings, seeking specific relief against both the military junta and the Election Commission. The nature of the proposed litigation pertains to the failure of both the aforementioned parties to perform their respective duties regarding the 1990 election.

By way of background, a brief chronology of the events relevant to the case is presented below.

- ◆ September, 1988: Law No 1/88 was issued, establishing the Election Commission.<sup>1</sup>
- ◆ May 1990: General Election was held and results were announced.
  - The Election Commission was duty bound to convene the National Assembly from amongst the elected members under Election Law 14/89.<sup>2</sup>
  - The Election Commission failed to perform its duty.
- ◆ July 1990 State Law and Order Restoration Council, SLORC (predecessor of

SPDC) subsequently abrogated the obligations of the Election Commission with respect to the national election and, by announcement No 1/90<sup>3</sup>, vested itself of the power to exercise those duties.

Over ten years has now passed since the SLORC/SPDC vested itself with the power and responsibility to convene the National Assembly from the elected members of the 1990 election.

### **Technical points of law which may arise**

The Burmese Civil Procedure Code (the Code) governs all civil suits and prescribes, amongst other things, that a legal notice is mandatory to file a suit against the government. The NLD served the requisite notice in July and the prescribed period of time (two months) has now expired. The next stage in initiating the proceedings under the Code is to file the suit. One of the preliminary issues will turn on the meaning afforded to the term notification, under section 80 of the Code<sup>4</sup>. Upon the serving of the summons on the defendants (in this case the SPDC & Election Commission), they may raise threshold jurisdictional issues. What is undoubtable is that the case will become a pivotal national legal issue. The judiciary, in one sense, will also be on trial, as the Burmese people and international community will be observing, and demanding that it is both transparent and impartial in its role. Regardless of the outcome, of critical import is that the judicial process is seen to be independent and upholds the rule of law. Given the current emasculated legal system, operating under what can only be described as martial law, the challenge is of great magnitude.

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### **Possible grounds upon which a case can be made**

Section 45 of Specific Relief Act<sup>5</sup> empowers the High Court to make orders, directing holders of public offices to perform specific acts, defined by the court and the nature of the relief sought. The key requirement the court considers regarding the making of such orders is that the office holder's franchise would be injured by not performing the specific act. On the facts at hand, the specific office holders are the Chairman of the SPDC (formerly know as SLORC) and the Election Commission. The specific action sought is, in very general terms, the implementation of the 1990 election results and the fulfilment of the military regimes' election process to restore democracy in Burma.

Another avenue that could be explored is under contract law, on the basis that the SPDC and Election Commission breached its promise in their failure to implement the 1990 election result. The Contract Act Burma (1872) provides that the requisite elements of promise and consideration form an agreement<sup>6</sup>. The Statute definition is broad in its scope<sup>7</sup> and arguably includes a promise of the nature made by the SPDC to the people of Burma, to acknowledge and implement the election result.

We need not go into a didactic discussion on the doctrine of consideration. It is settled law that a positive promise is enforceable, without consideration. The mechanism is promissory estoppel. Detrimental reliance is the essential ingredient of promissory estoppel. A general doctrine of estoppel has evolved as a body of law under which sub-



stantive rights have been created (in recognition of obligations made by the promisor).<sup>8</sup>

The key question to be resolved, in the event that this doctrine was applied to the present facts, is whether detrimental reliance can be established. What is detrimental reliance? It is reliance on the promise(s) of the promisor, the breach of which causes detriment to the promisee. Basically it is an act arising from the unconscionable conduct of the breach of the promise. In the case before us, an argument would be made out that the promisors' (SPDC & Election Commission) conduct has been unconscionable and that the promises made under Statement 5/88 of the SPDC and the obligations set out under the Election Law, are enforceable under law.

One may ask whether the parties in this case in fact intended to create legal relations by the promises made. It is clear under the common law, the basis of the legal system in Burma, a positive intention to create a legal obligation is not a required element of contract law. A deliberate promise seriously made is enforceable, irrespective of the promisor's view regarding his legal liability. As this discussion has attempted to illustrate, the civil suit, in whichever form it is made out, will encounter some legal obstacles.

### **Previous litigation attempt**

In 1988, the NLD filed a direct complaint in the Supreme Court against senior office holders in the regime including Chief Lt. General Khin Nyunt. In brief, the nature of the complaint alleged breaches of the Burma Penal Code for intimidation, coercion, illegal force and detention of NLD members.

Upon filing the complaint, the complainant was examined under oath<sup>9</sup>. The court subsequently exercised its power under section 202 (1)<sup>10</sup>, directing the matter to be the subject of a police investigation, to ascertain the truth or falsehood of the allegations.<sup>11</sup> The court dismissed the case under section 203, upon receipt of the investigation report.<sup>12</sup> However, dismissal did not turn on whether sufficient grounds had been made out by the complaint. The case was dismissed on a technical point and the court did not consider the merits of the grounds of the complaint. The technical error found by the court was that no prior sanction, as required under the law, had been taken<sup>13</sup>. Arguably, the court should have directed the complainant to apply for sanction, with the proceedings pending, until such time as sanction was obtained or rejected. Given that the direction of an investigation implies that a prima facie case had been made out by the complainant, the imminent trial should not have been vitiated purely on a technical ground of irregularity.

In the 1988 case the relevant sanctioning authority was the Home Ministry, an apparatus of the military junta. A petition and copy of the complaint would have had to been filed with the Home Ministry, whose discretion it would have been to determine whether or not to provide the sanction. The farcical nature of the system would have the actual accused, Chief Lt. General Khin Nyunt himself, determining whether or not to afford the sanction. For all practical purposes, the sanction provision has given impunity to state officials from prosecution, for their varied and extensive abuses of law. Furthermore, the whole concept of requiring a sanction as a preliminary stage in the legal process, is repugnant to the very foundation of a legal society as it is contrary to the doctrine of separation of powers. The mandatory intervention of government in

the administration of justice, frustrates the operation of law and jeopardises the impartiality of the judicial process.

### **Functus Officio**

"having discharged his duty ..... the agent or official has no further authority in a matter"<sup>14</sup>

Another legal principle upon which the military rulers' retention of power can be undermined is that of *functus officio*. This principle means that whenever an executive body reserves for itself (or is empowered through statute or some other legal source) the power to control and/or administer a matter, and its term of power is fixed under its constitution (or some other binding source), upon expiration of its term the body automatically becomes inoperative and no longer enjoys the powers it was afforded. It no longer has any legal claim to continue in its administration.

The SLORC, by its notification of 18 September 1988, announced that it assumed all power in the state so as to carry out the following tasks immediately

"...to restore law, order peace and tranquillity...(and)... to stage democratic multiparty general elections after fulfilling all the above-stated responsibilities..."<sup>15</sup>

Further, on 23 September 1988, the coup leader, General Saw Maung, announced

"All the Armed Forces personnel, my colleagues and I, would like to solemnly promise not to hold onto power for a long time. We will not break this promise for any person. Moreover, we additionally promise that the Armed Forces, after transferring power to the democratically elected government which will emerge from a free and fair election, shall only perform its principal tasks of defence, security of the State and maintenance of law and order."

On any reading of the announcement, twelve years cannot have been contemplated as an acceptable period of time in the context of the promise made. By virtue of its unilateral declaration, the SLORC/SPDC made a commitment with regard to its status, namely that it was in power only for a limited period, with the purpose of holding a general election to determine the successor. As a response to the offer, the pro-democracy movement signified its acceptance by registration of political parties. In part performance of the undertaking, the military junta held a general election, the result of which it notified. The election determined the successor by a significant mandate in favour of the NLD.

Following the completion of the multiparty general election of May 1990 and the announcement of the results, and in accordance with the principle of *functus officio*, SLORC therefore ceased to hold any legal authority as the election divested it of its power. The argument therefore runs that the SPDC must forfeit all its powers in accordance with the results of the said election. Whilst the applicability of the principle of *functus officio* to the political context may raise contentious issues, it may be an argu-

ment that merits further consideration.

### Doctrine of Necessity and Legitimacy.

The recent military coup in Pakistan which ousted the former Prime Minister Nawaz Sharif, whilst reprehensible by its very nature, raises some interesting points in considering the situation in Burma. There are parallels between the two nations, not only confined to their shared British colonial history, but also more recently with their experiences of flawed democracies, secession and military coups. Commentary in this article is confined only to the latest Pakistan coup, 12 October 1999.

The coup leadership, by issuing an executive order, constituted itself as the ruling regime in Pakistan. Subsequently, Pakistan's Supreme Court unanimously ruled that the regime had a legitimate right to assume power, confined to a period of three years.

The decision, affording a military regime in the circumstances described above, genuine political power, was clearly a contentious one. As the opposition, the Pakistan's People's Party described the decision as a 'great disappointment to the people of Pakistan.'

In assessing the decision of the Supreme Court, the following issues require consideration. Firstly, the decision can only be interpreted as a regression in terms of the international democracy movement, as it effectively was a judicial validation of the military take-over. Furthermore, the decision arms the military government with full legislative powers to implement its agenda including an authority to amend the suspended Constitution, demonstrating the rewards that may be conferred from a military coup. Another perspective on the decision may argue that its effect has been positive in the sense that it has removed political uncertainty. Furthermore, the decision confines the regime to a three year time frame, and within such time it must conduct a national election and restore democratic rule.

Regardless of one's personal perspective of the decision, it has enunciated some broad boundaries that might well be applied to the situation in Burma. The military junta in Burma has now ruled, without a constitution, for 38 years. The doctrine of necessity, upon which the Pakistan decision is based, extends to situations of grave emergency, where there is a complete breakdown of law and order, to prevent collapse or disintegration of a State<sup>17</sup>. In those circumstances, a military take-over may be considered legally sustainable but only for a limited period. In accordance with these principles, the court also ruled that within three months prior to the expiration of the fixed three year period, the military must conduct an election. The protracted period of time within which the SPDC has maintained power is unprecedented in modern history. In the face of this recent decision, the rhetoric of the doctrine of necessity in terms of legitimating the junta's rule in Burma is farcical. Again, both under principles of international law and the regime's own domestic election laws, the transition to a democracy is long overdue.

The recent protracted political crisis in Fiji, whilst peculiar to that nation's domestic situation, also adopted similar principles to Pakistan in the wake of its recent coup. The prescribed period of rule for the interim government, headed by a civilian, has been set down for two years, within such time fresh elections are to be held.

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It is the author's view that the doctrine of necessity is fundamentally flawed in the sense there is no independent tribunal or authority to determine precisely what circumstances might fall inside, and perhaps more importantly, outside the definition. Furthermore, the doctrine itself is subject to the doctrine of supremacy of civilian governance however, this may not always translate in terms of political realities. The 1990 election and the Burmese junta's refusal to acknowledge it is a key case in point. Both under international and domestic law, the military junta is without legitimacy.

### Postscript

At the time of publishing, several developments pertinent to the issues raised in this article have occurred. Amongst those, one of the most compelling was a statement by the current President of the United States, who warned the junta that "those who rule Burma should know that all of us are watching carefully.." Canada has also introduced an initiative to establish an International Commission, with a view to analyzing, amongst other things, the framework within which humanitarian intervention can occur.

It is the author's view that a comprehensive assessment of the current United Nations Charter and the body of international law more broadly as it applies to the peculiar circumstances in Burma - particularly in the context of the junta's illegitimacy - is warranted. Coupled with consideration of the recent international precedents involving intervention, such an exploration could engender a broader debate on the issue humanitarian intervention within Burma.

### Endnotes

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- \* Mr BK Sen is a Senior Legal Officer with the Burma Lawyers Council, he has practised in both Burma and India and was a council member of Burma's Bar Council and joint secretary of Burma's High Court Bar Library in the 1970s.
1. SLORC Law 1/88 dated September 2, 1988 - Multiparty General Election Law. Chapter 3 provides the duties and powers of the Election Commission. Arguably the most pertinent element of this law is the requirement to hold a free and fair election.
  2. Election Law 14/89 dated 31 May 1989. Chapter 2, clause 3 provides that in consonance with this law, the National Assembly shall be convened from amongst the members elected in the General Election.
  3. Announcement 1/90 which stated that the SLORC 'shall carry on convening of National Assembly, as per provision of Section 3 of the Election Law No. 3/89.
  4. It is worth noting that there will not be any legal impediment such as the sanction to prose-

- cute as there was in the previous case – discussed below.
5. s 45 of Specific Relief Act provides that "The High Court may make an order requiring any specific act to be done... by any person holding a public office...provided that an application for such order be made by some person whose properly, franchise or personal right would be injured by the forbearing or doing (as the case may be) of the said specific act. and that in the opinion of the High Court such doing or for bearing is **consonant to right and justice**.
  6. s 2 (e) Contract Act **1872** provides that every promise and every act of a promise, forming the consideration for each other, is an agreement. Under 2(d) of the Act, when a promisor promises to do something, such a promise is called consideration for the promise.
  7. Under article 10 of the Act all agreements are contracts if they are for lawful consideration.
  8. It is worth noting that promissory estoppel differs from estoppel under section 115 of the Evidence Act, although the principle is the same. A suit cannot be filed under s115 of Evidence Act as it is rule of evidence which has to be applied in the trial of the suit.
  9. Under section 200 of the Burma Criminal Procedure Code, a Magistrate taking cognisance of an offence on complaint shall at once examine the complainant on oath.
  10. s 202 (1) provides that the magistrate may postpone the issue of process for compelling the attendance of the person complained against and direct an inquiry or investigation by a police officer for the purpose of ascertaining the truth or falsehood of the complaint.
  11. Unless a prima-facie case had been disclosed in the complainant's statement on oath, the court would not have directed a police investigation.
  12. Section 203 states that if there is no sufficient ground for proceeding, the court may dismiss a case.
  13. Regarding the issue of prior sanction the court reasoned that section 197(1) of the Criminal Procedure Code states 'where any public servant is accused of any offence alleged to have been committed by him while acting or purporting to act in discharge of his official duty, no court shall take cognisance of such offence except with the previous sanction of the President of the Union.' Section 21(9) defines 'public servant', which clearly includes individuals who hold offices such as that of Khin Nyunt.
  14. "The CCH Macquarie Dictionary of Law", Published by National Library of Australia
  15. Announcement No 1/88 of the State Law and Order Restoration Council, 18 September 1988, General Saw Muang, Chairman of the SLORC. In its announcement of 1/90, 27 July 1990, following the general election, SLORC contended that the handover of power should be suspended until a new Constitution is approved and reinforced its status as a military government with legislative, judicial (and executive) power. A subsequent declaration issued by SLORC (1/90) decreed a 'National Convention' would first have to be established to develop the guidelines for the new Constitution.
  16. The author wishes to make clear that his discussion of the doctrine should not be construed as support for the doctrine itself, nor for the forcible seizure of power.

