# Dealing With Past Human Rights Abuses:
## Promoting Reconciliation in a Future Democratic Burma

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### Introduction

As the twenty-first century begins, transitions from repressive rule to democracy have become a worldwide phenomenon. In many cases, the displaced regimes have been characterized by massive violations of human rights. While it is unclear when Burma will be free, it is certain that it will eventually become a democracy. A critical challenge that will arise for the democratically-elected government when it comes to power will be how to deal with past human rights abuses.[1] Burma is not alone – Czechoslovakia, El Salvador, Guatemala, Germany, Honduras, Chile, Columbia, Greece, Germany, Poland, Hungary, the Philippines, Rwanda, Ethiopia, Cambodia, East Timor, Nigeria, Northern Ireland, Sierra Leone and other countries have recently or are presently looking at ways of dealing with these issues.

How a society deals with its past has a major determining influence on whether that society will achieve long term peace and stability. The critical question for such a state is whether or not to prosecute and punish those responsible for past gross human rights abuses. The objectives of policies to deal with past human rights abuses are often to prevent future human rights abuses and to repair the damage that has been caused. The need of victims and the society as a whole to heal from the wounds inflicted upon them by the former regime often has to be balanced against the political reality in which the new government may have limited political power and in which it may have inherited a fragile state. A new state has to be founded on a commitment to human rights and a dedication to the rule of law. Often, however, achieving national reconciliation, building

unity, reconstructing the institutions necessary for stable political and economic systems, and obtaining the resources necessary to fund the transition are seen to be in conflict with dealing with the past.

Knowing about the abuses of the past[2] and acknowledging them seems to be crucial issue in a transitional process.[3] Ignoring history leads to collective amnesia, which is not only unhealthy for the body politic but is essentially an illusion – an unresolved past will inevitably return to haunt the citizens.[4] The establishment of a full official account of the past is increasingly seen as an important element of a successful transition to democracy. Criminal trials are one way in which the facts of past abuses may be established. The establishment of a truth commission is another.

This article looks at the question of transitional justice in a future democratic Burma to determine the possibilities and options for dealing with past human rights abuses.

## Dealing with the past

Dealing with past injustices is a crucial test for a new democratic order. Facing the tension between justice and peace, the transitional process entails tremendous challenges.[5] Countries in such a situation have to resolve similar problems: should they punish human rights violations committed under the old order? Is an amnesty permissible and necessary in the interest of peace, reconciliation and unity? Does a society need an official account and acknowledgement of the wrongs of the past? Must the public sector be purged of supporters of the old regime? How can the victims of human rights violations be assisted in some way and have their dignity restored? To what extent should unjustly expropriated property be restored?

New democracies have various options in dealing with these issues.[6] They make their choices according to the contexts of their transitions, taking into account the seriousness of the crimes committed and the resources available to deal with these issues. The choices made by a future democratically-elected Burmese government will be determined by the type of transition which takes place and the constraints which this may impose.

## The importance of how democracy comes to be established

There are three broad types of political transition from an authoritarian regime to a democratic one:[7] overthrow, reform and compromise.[8]

Being overthrown[9] is the fate of a regime that has refused to reform: opposition forces become stronger and finally topple the old order. In the 'overthrow' model, the dominant forces are staunchly opposed to reform and over time the opposition gains significant political strength while the authoritarian regime loses strength. Democratisation occurs after the authoritarian government collapses or is overthrown and the opposition comes to power. Under these circumstances, the former regime has lost not only power but legitimacy as well. Consequently, the transitional government comes to power with no significant political constraints inhibiting implementation of a legitimate human rights policy. In such a case the new government has the widest discretion to decide how it should deal with the past, including unfettered power to bring the perpetrators of human rights abuses to justice.

When reform is undertaken,[10] the old government plays a critical role in the shift to democracy as, initially at least, the opposition is weak and the old government determines the type and pace of change. Sometimes a group within the authoritarian regime steps forward and leads a movement towards ending the old order and establishing democracy. In this scenario, the old forces still retain control at some level even though they have allowed a democratic government to come to power. This unequal distribution of power is a significant obstacle to exacting transitional justice and the new government's power to implement the human rights policy of its choice is limited. Because such a transformation may have occurred from within the authoritarian regime, there may be a feeling among some that democracy is at the will of the former regime. Since these former leaders retain a lot of power, they have the ability, to a greater or lesser extent, to dictate what happens in the transitional process.

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An example of this, relevant to Burma, is Chile where General Pinochet was able to enact legislation during his tenure to ensure that he would not be prosecuted after a civilian government came to power for human rights abuses. Additionally, the military retained a great deal of power even after the handover of power to the civilian government. There was, therefore, always the fear of another coup d'etat if the military was provoked. As a result, nothing was done to deal with the gross human rights violations allegedly perpetrated by Pinochet for two decades. Only now, as a result of the process in Spain and the United Kingdom, the state in Chile is feeling secure enough to bring Pinochet to book.

Where the reform model of change applies, an amnesty is likely, few prosecutions if any are likely to occur, and the past will largely be ignored.

In countries where change is the result of compromise,[11] the existing regime and opposing forces are equally matched and cannot make the transition to democracy without each other.[12] Such was the case in South Africa. This model therefore entails democratisation by the combined actions of the former regime and

the opposition forces. In compromising itself out of power, the authoritarian regime will generally negotiate protections for itself in terms of amnesties or a promise by the new government not to investigate or prosecute certain past crimes. Therefore, the human rights policies adopted by successor governments in such a situation generally involve institutional measures aimed at deterring future human rights abuses[13] rather than investigating and punishing past abuses.[14]

The nature of the transition to democracy in Burma will determine the extent to which justice can be pursued. If the military is overthrown, at present an unlikely scenario, this will give the widest scope of action to a new government. More than likely the process of change will occur on the basis of reform or compromise or a combination of the two. The critical determinant is the level of power retained by the old order.[15] If the forces of the old order are strong enough, they may simply wait for the new government to make a mistake or push its power too far (especially when it comes to seeking prosecutions). Former leaders may be able to state outright that they will not tolerate being held accountable for human rights abuses committed during their reign. If this happens, the new government will have to make a choice between dealing with the past or succumbing to the pressure exerted by the former regime to deal only cosmetically with the human rights abuses of the past. If it does not deal with the past, its legitimacy could be undermined. If it takes on the challenge of forcing the former regime to account for the past, it runs the risk of becoming susceptible to overthrow. The risks attached to the second option may mean a majority of people in Burma do not favour the pursuit of transitional justice because they fear oppressive forces will once again rise up and assume power.

## Truth, justice and reconciliation

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Broadly speaking, options available to a new democratic society include (1) criminal sanctions, (2) non-criminal sanctions, and (3) the rehabilitation of the society. Usually, the path chosen takes into account three goals: truth, justice, and reconciliation.[16] The type of balance[17] between these three goals is determined to a large extent by the type of transition and thus the limits of the power of the new regime to make unfettered choices.

Truth is knowing about and officially acknowledging past human rights abuse. This official acknowledgement can open a dialogue in the state between individuals, and the various groups in the society.[18] Facilitating an open and honest dialogue can effect a catharsis, and prevents 'collective amnesia which is not only unhealthy for the body politic but also, essentially an illusion – an unresolved past ... inevitably return[s] to haunt [a society in transition]'.[19]

Justice is a critical aspect of ensuring respect for human rights and the rule of law – it is necessary to prevent future violations. Justice deters similar acts in the future and promotes peace and human rights while consolidating the new government as one bound by the rule of law and, therefore, distinctly different to the regime of the past. The degree of justice possible depends on, among other things, historical, political, military and socio-economic factors. It is shaped by the nature of the past the obstacles of the present, and the future needs of the society.[20] The prosecution route does not always lead to positive results for a transitional society. Experiences with war crimes trials, for example, show that it is difficult to meet the hopes and expectations of the victims by these means. Victims are mostly not involved in the trials, and are often denied the cathartic experience of a process that focuses on them as victims. In isolation, trials allow for recognition of only a single version of events.

While trials can help lead to truth, the criminal justice system must adhere to principles of due process and assignment of individual, not collective, responsibility. Trials often limit truth discovery. Critically, in a society in transition, the courts are often composed of judges from the old order. Their decisions may therefore, not always be responsive to the needs of the new democratic order. If new judges have been appointed, they may not be willing to hand down decisions which are too politically controversial. The standards of proof for conviction in a criminal trial are higher than those that must be attained in a civil trial. Thus, guilty verdicts are far from certain. An acquittal can have a devastating effect on victims and the society in general. It must also be remembered that the aim of a trial is to attain a guilty verdict, not to assist victims in their recovery process. There could, therefore, be major failings and disadvantages in the use of the criminal justice system in a transitional society for victims of human rights abuses.

Prosecutions may be ineffective in fragile democracies where regimes may not be able to survive the destabilising effects of politically-charged trials. Many countries emerging from dictatorship are polarised and unstable, and may be further fractured by prosecutions of the previous regime's depredations. Under these circumstances, democratic consolidation can be furthered by implementing an act for reconciliation embodied in an amnesty law covering past human rights violations.[21] In countries where the military still retains enormous and substantial power after relinquishing office, any attempt to prosecute past violations may provoke a rebellion or other confrontations that could weaken the authority of the civilian government. Another constraint is the fact that transitional societies may not yet possess the attributes of a viable democracy – in particular the new government may lack the power to bring the military to account. Another question is whether the new government will have the ability to prosecute many of those involved in human rights abuses. Thus, issues such as resources and the state of the criminal justice system will play a critical role in

determining the number of trials as the state might not have the available human and financial resources to pursue or carry these prosecutions. If the requirement to prosecute everyone who has committed is met, it may place impossible demands on the judiciary. However, criminal punishment is a very effective means of preventing future repression.[22] Knowing that there is a good chance of being prosecuted will deter many who may be tempted to commit human rights abuses.

These are some of the reasons prompting some states to grant amnesty to perpetrators of gross human rights abuses or not to prosecute those who have committed atrocities. A truth commission, on the other hand, analyses various versions of events and can validate more than one version by accepting differing testimony and incorporating all versions into a report that becomes official history. This will be examined in more detail below.

Reconciliation, in the context of a transitional setting, includes both conflict resolution and social rehabilitation. Without long-term peace, something that cannot occur without reconciliation, a nation cannot ensure stability and growth. Critically, new regimes inherit societies fractured by oppressive regimes that have utilised race, religion, ethnicity, and other divisions to gain and maintain power. Such will be the case, at least to some degree, in Burma. Populations subjected to 'divide and rule' tactics are likely to remain divided and to continue to feel deep-seated fear, resentment and other negative emotions against other groups in the society. These are formidable obstacles to reconciliation in any country. Reconciliation is a long-term goal which requires deliberate, measured programmes and processes.

The goals of achieving truth, justice and reconciliation may be in conflict with each other in Burma as they have been in other countries. For example, the pursuit of truth must sometimes come at the expense of justice. Likewise, the pursuit of justice does not always promote reconciliation. Dealing with the unique circumstances of each situation requires balancing truth, justice and reconciliation to achieve the best result...

The goals of achieving truth, justice and reconciliation may be in conflict with each other in Burma as they have been in other countries. For example, the pursuit of truth must sometimes come at the expense of justice. Likewise, the pursuit of justice does not always promote reconciliation.[23] Dealing with the unique circumstances of each situation requires balancing truth, justice and reconciliation to achieve the best result, given the relevant political, social, economic, demographic and other factors. Although it is always valuable to learn from the experience of other countries which have been through a transition to democratic rule, the unique situation in Burma demands a unique solution if it is to stand a chance of success.

How strong the old regime is in the old order is critical in determining the ability of the new government to deal with perpetrators of past human rights violations. Various countries have established processes outside of the criminal justice system for this purpose, one model being a truth and reconciliation commission.

## A truth and reconciliation commission[24]

There are various truth and reconciliation models. The model implemented in South Africa, in addition to dealing with issues of truth and reconciliation, also established a process to grant amnesty to individual offenders. In terms of the legislation, perpetrators had to apply for amnesty and their applications had to comply with various criteria. These criteria included proving a political motive and revealing the complete truth about the crime for which they were applying for amnesty. However, such an institution need not, necessarily, replace criminal prosecutions or grant amnesties. In fact, international law prohibits the granting of amnesty for certain gross violations of human rights.

Truth and reconciliation commissions create records of human rights abuses that are as complete as possible. They often record the nature and extent of the crimes and a full record of the names and fates of the victims. The identities of those who gave the orders and those who executed them have been included in some reports, but others have omitted the names of perpetrators fearing vigilante justice. Some commissions have covered very short periods while others have covered much longer, but still well-defined periods.

A truth and reconciliation commission can be set up in a variety of ways. Tailoring the commission's mandate and powers to both the country's current situation as well as its history provides the best chance for success. A truth and reconciliation commission can facilitate a national catharsis.[25] Should a commission be successful in its work, future generations will be served by the knowledge that the record of past abuses is as complete as it can be. The hope is that such a record, in combination with the recommendations made by the commission, will ensure that such human rights violations do not take place in the future and will also further the development of a human rights culture in the society.

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A properly-constituted commission in Burma would generate public awareness of what really happened. In the absence of the processes envisaged in the workings of such an institution, anger, resentment, hatred, and revenge might be the order of the day. Only by publicly and collectively acknowledging the horror of past human rights violations will it be possible for the country to establish the rule of law and a culture of, and respect for, human rights.

Should a truth and reconciliation commission be established, victims across the spectrum will have a credible and legitimate forum through which to reclaim their human worth and dignity; perpetrators, irrespective of persuasion and motivation, will have a channel through which to expiate their guilt. Failure to establish this kind of process disregards the rights and views of victims, denies the need for a healing process, prevents recovery of the past, imagines that forgive-

ness can take place without full knowledge of whom and what to forgive, and fails to establish human rights values as the core standard for the future.

A truth and reconciliation commission could develop a complete picture of the causes, nature, and extent of gross violations of human rights and, importantly, make this known. It could also provide a mechanism that would facilitate confession of crimes and ease the pressures on the weak criminal justice system. If the route of granting amnesty is chosen, it can assist in this process or suggest sentences for persons who make full disclosure of all the relevant facts relating to acts associated with a political objective. Such a truth and reconciliation commission should establish and make known the fate or whereabouts of victims and restore the human and civil dignity of survivors of abuse by granting them an opportunity to relate their own accounts of the violations they suffered. By recognising and publicising the victim's story, the inherent worth and dignity of the person is acknowledged. In addition, the commission can recommend such reparation measures as are possible in the circumstances.

A commission can also compile a public report detailing its activities and findings and recommend measures to prevent future violations of human rights. Several positive consequences would flow from this. First, it would deter new governmental authorities from committing abuses themselves because they will have to respect the rule of law because mechanisms to ensure accountability will be in place. It would demystify the past and expose the previous regime's brutality and its inability to govern fairly. It would imbue the new government with respectability because, especially by prosecuting the planners of the human rights violations, it would be sending the clear message that no one is above the law, and that ethical values may not be discarded in the name of a political goal. Finally, it would legitimise the new government's actions because it upholds the rule of law.

A possible danger, and something that should be anticipated and proactively addressed, is the fact that a truth and reconciliation commission holds the potential of opening up old wounds, renewing resentment and hostility against the perpetrators of abuses. Therefore, careful planning and preparation is crucial to ensure that the process achieves its aims and objectives. If this is not done, revenge killings may be committed.

It is, of course, vital that such a process is credible and legitimate. Unless this is the case, it will not be accepted by all parties and whatever result it arrives at will be questioned. In other words, it is crucial to ensure that the commission has political legitimacy. In the absence of such legitimacy, whatever record of past human rights abuses the commission produces will be contested and reconciliation will remain a vain hope.

Various key factors have to be considered when establishing a process. For ex-

ample, the choice of the time period over which human rights violations are to be examined will often determine the acceptability of the process. In order to promote reconciliation, it is vital to ensure that the process has political legitimacy.

It is vital to the success of the project that all sectors of the population buy into the process. If the process is not seen to be independent of the government, it will affect the objectivity of the process, at least as far as the perception of the population is concerned.

If such a process is to enjoy legitimacy and fulfil its function of enabling reconstruction, rehabilitation and reconciliation, its establishment must be informed by an understanding of the particularities of the history and transition of the country within which it is to operate. The extent to which a process is established by the new order, in co-operation with those who were vanquished, plays an important part in determining whether such a process can assist in national reconciliation. On the other hand, the extent of the involvement of the vanquished perpetrators also has a bearing on the acceptance of that institution by those who suffered human rights abuses. Great sensitivity is called for in this regard.

Even though there cannot be one final 'objective truth', it is critical that the version of 'the truth' arrived at by the commission embraces the experience of all. Unless the people feel that they have been a part of the process of decision making, they will doubt the integrity and motivations of those setting up the commission and those involved in its processes.

Legitimacy for a commission means that the process is accepted as an objective body capable of finding an unbiased 'truth'. This perception is generally achieved by having a well-balanced commission of highly respected people. A process is perceived to be well-balanced when the individuals serving on it are from a variety of ethnic and political backgrounds and constituencies. The key to legitimacy is that the enquiry must not only be unbiased and non-partisan in fact, but it must also be perceived in this way by the population as a whole.

To attain legitimacy, an enquiry must be an officially designated, non-partisan entity. This means that the process cannot be controlled or influenced by the government or even appear to be under the government's control or influence. To ensure that this is the case, the very creation and setup of the process must be unbiased and, most importantly, perceived as such by the country's nationals. These are extremely relevant questions for societies that have a history of major human rights abuses. A critical overarching factor is democracy without which, whatever path chosen, a society will be unable to deal with its past inclusively. This is critical in Burma with its many ethnic groups. Progress towards an inclusive democracy is the process most likely to achieve long-term sustainable

peace.

## Conclusion

A future democratic Burma will have to plot its course carefully with regard to dealing with the past. Decisions about whether to have trials and, if so, who ought to be tried; or whether to pass or rescind amnesty laws; and whether there should be a truth commission or some similar process are difficult and complex. They must be taken in the context of the unique historical, economic, political and social factors, as well as what would best satisfy the needs of the victims. While there is an accepted and majority view that, for certain crimes, international law puts a duty[26] on a state to prosecute or extradite offenders, in reality the type of justice which a particular country adopts is dependent on the balance of power between the new government and the repressive one it replaces.[27]

The amount of available resources, and competing demands for those resources, are also very relevant in determining whether resolving the past is high on a country's list of priorities. What may be relevant and possible in other parts of the world may not be possible in Burma. In addition, the manner in which change occurs and the power relations that continue to exist in that society after the transition are important factors in these decisions.

Prosecutions are not the panacea to a country's past, as problems and difficulties will arise. Truth commission processes have become more fashionable because, if well resourced and managed, they can achieve much in the life of a nation. A truth commission can analyse various versions of events and can validate more than one version by accepting differing testimonies and incorporating all versions into a report that becomes a part of the country's official history. This process is useful because the society as a whole is able to listen, absorb, and begin the healing process that leads to reconciliation. Without such a dialogue, the pain, anger, and other issues which will arise during a transition may never find a satisfactory outlet. If a way of releasing this pressure is not found, underlying tensions may ferment for a period of time until they erupt, leading to renewed social fragmentation and conflict.

Neither a truth commission nor a process focusing on prosecutions can succeed in isolation. Using both strategies in combination will have a much better effect.

Neither a truth commission nor a process focusing on prosecutions can succeed in isolation. Using both strategies in combination will have a much better effect. A truth commission with amnesty powers can be complemented very well by a clearly stated intention to prosecute those who do not come forward to apply for amnesty. Such a carrot and stick approach can be used to bring more people into the process than would be possible if only one approach was chosen.

There is a need for the symbols, structures and operations of the new state to be founded upon a commitment to human rights and a dedication to the rule of law. Thus, a policy to deal with the past should focus on 1) engaging in a public process to investigate and disclose the complete and unbiased truth about the past to the victims, their families, and society as a whole; 2) doing justice by punishing at least some perpetrators of human rights abuses; 3) recognising the worth and dignity of the victims as human beings by granting reparations, monetary or otherwise, that are feasible and appropriate to acknowledge the harm done; 4) lustration[28] (prohibiting individuals who have committed human rights abuses from holding public office); and 5) utilising a process that will be both credible in itself to all, as well as produce results that will be perceived as legitimate by most citizens.

Although spending significant resources on dealing with the past may seem to be in conflict with urgently beginning the reconstruction of the society, a stable democracy requires national reconciliation, reconstructing political and economic systems, and entrenching a respect for human rights. Securing a foundation for stability in a future democratic Burma will require dealing with those responsible for human rights abuses while at the same time not jeopardising the tenuous position of the new government during the transition.

## Endnotes

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# The Case for Humanitarian Intervention

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> "Count up the results of fifty years of human rights mechanisms, this is a failure of implementation in a scale that shames us all. "[1]
>
> Mary Robinson, UNHRC, 10 December 1998

As the twenty first century begins, the argument that the human rights movement should become more assertive becomes more compelling. As one esteemed jurist put it "the past has been a matter of pleading with tyrants, writing letters and sending missions to beg them not to act cruelly. That will not be necessary of there is a possibility that they can be deterred by threats of humanitarian or United Nations intervention or with nemesis in the form of the International Criminal Court…"[2] Burma provides an excellent case study for testing the viability of such an approach.

The subject of global humanitarian intervention has evoked several warm responses from commentators concerned with human rights situations across the globe. The Canadian initiative has brought this matter to the fore for consideration and debate within the international community. The Canadian initiative has opened up the debate about the establishment of an International Commission that would be charged with broad ranging responsibilities including undertaking a study of rules for global humanitarian intervention to protect civilians from atrocities or any grave violation of human rights, and to make recommendations regarding forms of intervention in the internal politics of countries to restore peace and protect fundamental human rights.

In South East Asia, the idea of armed intervention to save civilians is viewed with great suspicion, however there is also great utility to hold a set of agreed guidelines or principles that will be applied in the event the intervention is required yet not sanctioned, for various political or other reasons, by the United Nations' Security Council. The question that arises is what rules can be framed

and how they are to be implemented? To answer that question another question must also be answered - how does international law deal with intervention?

Article 2 (4) of the United Nations (UN) Charter prohibits any armed attacks which are inconsistent with the Charter's purpose. Article 2 (7) states that in matters which are essentially within the domestic jurisdiction of any state, the UN cannot intervene nor require the nation in question to submit such matters to settlement. But this restriction does not apply to all circumstances. Intervention on grounds of self-preservation, enforcement of Treaty rights, and protection of persons and property abroad have all been justified and legitmised. Another justification of intervention is based on grounds of humanity. Great Britain, France and Russia jointly intervened in the war between revolutionary Greece and Turkey to put a stop to abominable atrocities by Turks. The bloody tyrants of Uganda Idi Amin was removed by Tanzania and the US invasion of Grenada in 1983 got rid of the insurgents who murdered their elected Prime Minister. All such courses of action were on their face, apparently unlawful , however they were clearly morally justified in the face of the Security Council's failure to take action. Ostensibly the basis for action was to vindicate under international law the right to participate in democratic government as articulated in Article 21 (1) and (3) of the Universal Declaration of Human Rights.

In the nineteenth century, the British Navy assumed something of an enforcement role across the seas. It intercepted slave ships, freed the victims and even established schools to promote their education. This could possibly be categorized as the first example of a humanitarian enforcement mission. Later, the notion of the " right of humanitarian intervention in the internal affairs of a state" evolved, to deal with situations where it was deemed that domestic state's or government's rule over some or all of its citizens was perceived as barbaric. In the current situation of Burma, the application of these principles and that of international law is best summarized by one international jurist: "On any sensible reading, Article (2) of the Universal Declaration and the Charter principle of self-determination of people, invalidates all military regimes run by savage soldiers in places like Burma, where the patient courage of Aung San Suu Kyi, an elected leader detained by military despots, has elicited much sympathy but not much action."[3]

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Looking back at the development of the principles underpinning intervention, one gains an interesting insight into the types of situations where action is taken and, where it is not. By way of background, in 1898, the United States declared war on Spain on the basis that its oppressive role in Cuba shocked the moral sense of the people of the United States. In this circumstance, it was the conduct of the domestic government that shocked the conscience of those who chose to act, that formed the basis to legitimize action, not through any legal obligation.

Theodore Roosevelt's 1904 State of the Union message expressed a similar sentiment, when he said

> " …there are occasional crimes committed on so vast a scale and of such peculiar horror as to make us doubt whether it is not our manifest duty to endeavour at least to show our disapproval of the deed and our sympathy with those who have suffered by it - in extreme cases action may be justifiable and proper. What form the action shall take must depend on the circumstances of the case; that is, upon the degree of the atrocity and upon our power to remedy it. "

After some time of apparent procrastination, in 1976, the Security Council declared that apartheid was a " grave threat to the peace " and urged the member states of the United Nations to support the African National Congress. The formula " never tolerate interference in internal affairs " has become frayed. The protective shield of state sovereignty is wearing thin, in the face of systematic crimes against humanity, often splashed across television and computer screens, newspapers and via the internet, into every corner of the globe. Human rights abuses has gradually become a legitimate subject of international concern and falls within the realm of defence of international law. The Charter permits Security Council intervention under Chapter VII in the event of human rights violations on a scale which threatens world peace. In other words, Article 2 (7) of the Charter can be overridden by Chapter VIII Article 55 of the Charter which expressly makes observance of human rights a condition necessary for peaceful relations. Hence, in the case of non-observance, there is a threat to peace and therefore grounds for intervention will arise. Human rights have become over time a matter of global concern, and a mechanism for international intervention as a last resort in the affairs of states has finally evolved. This legal mechanism can be triggered to challenge the sovereign right of the States to oppress groups of their own people.

In recognizing the promotion and respect of human rights and fundamental freedoms as one of its principal objects, the Charter marks a further step in the direction of elevating the principle of humanitarian intervention. The right to be free from genocide, racial discrimination, slavery, forced labour, torture, coercion, forced displacement, child labour, disappearances, vindictive prison sentences, etc all come within the concept of the paramount dignity of human rights. The breach of these principles, for example by condoning torture as a tool of the State, despite its prohibition under international law, elevates such conduct from an 'internal affair' to an affront to the broader global conscience - that being, an international matter which may be considered to warrant intervention. Of course, this broad principle operates within the confines of the principle of *jus cogens*[4] ( principles which have been accepted by the international community as a whole ). The recent Pinochet case exemplifies this shift as has

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been commented, " The way in which a state treats its own citizens within its own borders has become a matter of legitimate concern to the international community…" it is now true that in some circumstances such crimes will in reality attract a universal jurisdiction.

Another recent illustration of this shift away from the narrow confines of United Nations politics and international law, is the recent intervention in Kosovo. The UN Charter did not 'cover the field' in terms of expressly allowing for the NATO bombings. The initiative was taken pursuant to a rule under international customary law and through a political alliance of significance, crystallizing the independence of other regional -based organization from that of the UN Charter. As stated by the International Court of Justice in their hearing of the Nicaragua matter "The UN Charter ---- by no means corners the whole area of the regulation of the use of force in International relations ".

Furthermore, Havel in relation to NATO's intervention updated the definition of intervention. This new approach incorporated the evolving principle of humanitarian necessity, whereby force of a proportionate kind may be used to prevent a humanitarian catastrophe. In the circumstances, NATO had to act without a Security Council mandate because any resolution to that effect would have been vetoed by Russia and China.

Yet again, on the other side of the globe, when Indonesian militias were killing East Timorese after their official and sanctioned Referendum in August-September 1999, the UN's dubious stand, illuminating its preoccupation with China's power of veto in the Security Council, was overcome by an innovative and fresh strategy. This new initiative, involving action without forcing the matter to veto is of great interest. Australia and New Zealand called for an ad hoc " coalition of the willing " to go into East Timor. Indonesia announced it would not permit foreign troops. President Clinton finally acted and threatened Indonesia with sanctions against loans and aid unless a UN Peacekeeping Force was allowed entry. The matter came within Chapter VII and China's veto was immobilized. In the case of Burma, like East Timor, there is no constitutionally confusing situation. Nation building begins for these people when the 1990 Election mandate and crucial right to self-determination is acknowledged by the international community - if intervention is required to restore democratic rule, it must be explored.

The examples of Kosovo and East Timor herald a new age where enforcement should be adopted, on the basic principles of humanity and human rights rather than the observation of political and 'black letter legal' constraints. It should no longer be necessary for people to fight and die for their basic international legal rights. These examples indicate a step towards a world where an enforcement system which will do this for them.

However, one superpower cannot be given the prerogative to determine the humanitarian necessity for any intervention. The United Nations body, with its Charter was founded half a century ago and its rules cannot continue to remain rigid notwithstanding the changing climate.

States rather than individuals have been the subjects of international law. However, due to modern developments and new circumstances, international law has appeared to have yielded to the needs of people residing in such a globalized system. In accordance with this, in some circumstances, individuals have become subjects of international law also. Whilst the UN is specifically pledged to promote universal respect for human rights and fundamental freedoms, the individual lacks procedural capacity under international law. Hence, there is a need to set out the ground rules of engagement. In this context, Burma is an interesting case study.

The UN Secretary-General has made a proposal to the current Chairman of the Association of South East Asian Nations (ASEAN) Standing Committee that an ASEAN Troika be set up to help resolve the political deadlock in Burma. The aim of such an initiative would be to ultimately bring about dialogue between the ruling junta and the opposition movement, the National League for Democracy (NLD), headed by leader Daw Aung San Suu Kyi. The concept of an ASEAN Troika was agreed upon by the 10 member countries in July 2000 at their ministerial meeting, in Bangkok.

The US President has warned the junta that "those who rule Burma should know --- all of us are watching carefully what happens." Burma's junta's Foreign Minister's rather predictable response was that Rangoon would not bow to any outside pressure. It is undoubtable that the proposed ASEAN Troika will not receive the requisite support to ensure its adoption, due to the various political alliances across this complex region. This will be yet another grave disappointment, in the face of many such as attempts to achieve constructive engagement, the economic sanctions adopted by big powers, quiet diplomacy and Australia's unprincipled engagement - all of which have failed to bring about the restoration of democracy within Burma.

It is clear that any initiative proposed at the Security Council level will be aborted by China's veto. The international community seems to have been hamstrung by such regional politics being played out in the United Nations forum, regarding Burma. It is a challenge to address these barriers which must be taken up by the international community not solely for the sake of Burma but for the larger cause of establishing an international mechanism to enforce measures against violations of human rights by a state against its people. Developments afoot should be analysed and, where possible, supported. The case of Burma is an eminently suitable one as a case study. The arguments for international humanitarian intervention both on facts and law are both compelling and vast.

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The junta's systematic violations of human rights, their flagrant disregard of the 1990 democratic election results and their failure to adopt a Constitution all demonstrate clear and unambiguous breaches of the UN Charter.

The time has come for a major initiative, formed by a 'coalition of the willing' a peaceful and responsible approach that costs nothing in terms of lives or capital. Such an approach should not require the consent of the military junta. The matter is seemingly simple – civilians under military rule subjected to brutal and inhuman suppression are entitled to immediate protection.

For the past nine years the UN has adopted resolutions condemning the violations of human rights and seeking some kind of political settlement. On 8 November 2000 it passed the strongest resolution so far and condemns the regime's persecution of democratic opposition. This is yet another step nearer to intervention, providing another cogent ground for the establishment ad hoc body to intervene on the principle of international customary law.

The immediate need is to have UN presence inside Burma, to monitor abuses and prevent an outbreak of Civil War. The junta's ongoing suppression and attempts to undermine and abolish the NLD and general pro-democracy movement, is leading the country towards an uprising of volcanic proportions. There will be no sense in sending a peacekeeping force after widespread bloodshed. Action is required, and it is required immediately. The international community and an ad hock " like-minded coalition " of regional interests, must engage the military junta to prevent further catastrophe. Calling for dialogue has reached its practical zenith or limitations. Burma has become a test case for ascertaining the sovereignty of people in contradistinction to sovereignty of State.

## Endnotes

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1. Geoffrey Robertson, *Crimes Against Humanity*, 1999, page 35.
2. Robertson, ibid page 453
3. Robertson, ibid page 165
4. *Jus cogens* refers a principle of international law which cannot be set aside by agreement or acquiescence; a peremptory norm of general international law. It is also fundamental substantive rules of international law.

# Rival Constitution Writing Processes: A Problem in National Reconciliation in Burma

*Khin Maung Win**

One of the major issues proving to be an obstacle to the achievement of national reconciliation in Burma is the rival constitution writing processes initiated by opposing forces. As the competing political forces use the constitutional drafting process as a political football, the chance for dialogue and prospects for national reconciliation remain dim.

The State Peace and Development Council's (SPDC) constitution drafting process, which started in January 1993, emerged as a method utilized by the junta to deter the National League for Democracy (NLD) from taking power. As the junta strictly controls the entire constitution writing process, other forces including the NLD and ethnic organizations who have signed ceasefire agreements with the junta, have been denied the right to freely participate in the junta initiated process.

Whilst formerly armed ethnic groups have agreed to give up their weapons for a range of reasons, no group has ceased its opposition to the perceived domination of Burmans, an ethnic group composing a majority, and their general opposition to inequality among the different ethnic groups. All ethnic groups consider that the constitutional principles laid down by the junta's National Convention are lacking not only in ethnic rights, but also democratic rights for the people as a whole. The key strength that the junta currently wields regarding their own constitution drafting process is the political power to realize the constitution drafting process.

When Daw Aung San Suu Kyi was released from house arrest in 1995, the NLD firstly called upon the junta to reform its National Convention in order to allow

the NLD to become fully involved in the junta's constitution drafting process. As the junta refused, 85 NLD delegates attending the National Convention prior to Daw Aung San Suu Kyis release boycotted the National Convention. The NLD later declared that they will also draft a new constitution. In response to the NLD's plan, the junta promulgated Law No. 5/96 prohibiting everyone including NLD members and elected representatives from drafting, debating or even discussing a future constitution, outside the junta's National Convention.

Again in September this year, the NLD reconfirmed that they will go ahead with the plan to draft a future constitution. The NLD's plan emerged as a legitimate political initiative in response to the junta's unfair and exclusive writing process. The response is also indicative of their ongoing struggle against the current regime. The strength of the NLD's constitution drafting process lies not in its current power to realize the process but rather its political legitimacy to do the job.

Since 1989, exile opposition groups under the banner of the National Council of the Union of Burma (NCUB) have also been sponsoring a drafting of what they call a constitution for future Burma. This process has been ongoing for some time and involves continuing debate, consultation and seminars to brainstorm and discuss constitutional principles that will ensure unity among ethnic groups. The NCUB is gradually extending the participation of ethnic and democratic forces that are not yet part of its drafting process. The strength of the NCUB's process, which does not enjoy the political legitimacy as that of the NLD, is to provide the foundations for a long term vision of resolving the 'ethnic question' and to sustain genuine reconciliation among the different groups.

No group currently conducting its own constitution writing process can claim absolute control over the actual document that will emerge as a foundation for new form of government when transition comes. What is essential prior to reaching this stage is agreement between the various groups as to how a constitution is to be drafted and what the main constitutional principles should look like.

Each one of the above three processes has its shortcomings and its unique strengths. Since each process is competing with each other, each process has become exclusive of the others, regardless of its initial intention. Under such an atmosphere of rivalry, no group may singly and definitively produce a constitution conducive to national unity. A combination of all three processes is necessary to put all strengths—power to implement the process, legitimacy to do the job and vision on the 'ethnic question'—together, leading to the adoption of a constitution that enshrines the achievement of national unity.

As many ethnic groups remain dissatisfied with the constitutional principles proposed by the abovementioned processes on the issue of equality among the ethnic groups, most major ethnic groups such as the Karen, Shan, Chin, Arakan, Kachin and Karenni are in the process of, or are commencing, writing state constitutions which reflect their own views and ideals. What can be interpreted from the junta's constitutional principles is that it has no commitment to granting equal rights to ethnic minorities with majority Burmans.

Although almost the entire opposition movement agrees that Burma should have a federal system of government which divides political power between national and state levels of government, no agreement on key federal issues such as the division of power, has yet been reached. The lack of such agreement leads ethnic groups to produce their own versions of state constitutions, each interpreting the proposed federal system in their own way. While some ethnic groups are firmly committed to a unified federation, some prefer to exercise the right to secede on the basis that ethnic rights are not fully supported.

Numerous and differing interpretations of the proposed federal model from each ethnic group may not be helpful to the achievement of harmony between the two levels of government and may even lead to secessionist movements from certain ethnic groups within the country.

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Unless the SPDC, NLD and NCUB work together on one common, genuine and inclusive constitution drafting process, bringing to that single process all the strengths of each perspective, national reconciliation will remain in doubt. Furthermore, unless agreement is reached on how to divide powers between national and the state level governments, again, national reconciliation will remain in question. The question of Burma's national reconciliation is also the question of how rival constitution drafting processes can be reconciled.

**Endnote**

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# The International Labour Organisation Makes History

*Jane Carter**

> "The struggle of people against power is the struggle of memory against forgetting"
>
> Milan Kundera

As a country that has long suffered extreme and systematic repression and isolation, Burma's[1] struggle against the power of its military regime has long appeared to have been shelved from the sights and respective minds of the international community. However, in the wake of the International Labour Organisation's recent and unprecedented resolution to support wide-ranging sanctions against the military regime, perhaps a glimmer of hope can be gleaned in this struggle against the systematic violations of human rights inside Burma.

Readers of the September issue of this journal would recall the comprehensive article written by Ms Louise Southalan entitled *'Forced labour, the ILO and Burma.'* That article, amongst other things, examined in detail the domestic legal arrangements in Burma, the Forced Labour Convention 1930 (No. 29) and provided background information on the developments that have led up to the historic resolution.

This brief article is intended merely to provide an update on the recent decision of the Governing Body of the International Labour Organisation (ILO)[2] regarding the issue of forced labour in Burma. It also seeks to assess the role regional and geo-politics has played throughout the ILO decision-making process which led to the adoption of the resolution of 16 November 2000 by the ILO's Governing Body.[3] Finally, the article attempts to look forward, to examine briefly

the next step in the implementation of this remarkable resolution.

## Background

By way of background, the forced labour matter arose on the basis of a complaint lodged with the International Labour Organisation Conference on 20 June 1996.[4] Twenty five workers' delegates presented a complaint under Article 26[5] of the ILO Constitution against the government of Burma for non-observance of the Forced Labour Convention, 1930 (No. 29). As the oft-quoted jurist once said "the road to hell is paved with good Conventions[6]" – this rings true for the situation in Burma with abundant volume and clarity. Although Burma ratified this Convention in 1955,[7] there has been no evidence of compliance with the requirements of the Convention of the past 45 years. In fact, the ruling military junta has only show complete contempt and disregard for this fundamental human right.

The complaint stated that:

> "...Burma's gross violations of the Convention have been criticised by the ILO's supervisory bodies for 30 years…
>
> The Government has demonstrated its unwillingness to act upon the repeated calls addressed to it by the ILO's supervisory bodies to abolish and cancel legislation which allows for the use of forced labour and to ensure that forced labour is eliminated from practice. In these circumstances, the Committee on Applications has again expressed deep concern at the systematic recourse to forced labour in Burma…
>
> It is clear that the practice of forced labour is becoming more widespread and that the authorities in Burma are directly responsible for its increasing use, and actively involved in its exploitation…
>
> …Forced labour is being used systematically… in an increasing number of areas of activity. Large numbers of forced labourers are now working on railway, road, construction and other infrastructure projects, many of which are related to the government's efforts to promote tourism in Burma. In addition the military is engaged in the confiscation of land from villagers who are then forced to cultivate it to the benefit of the military appropriators. The current situation is that the government of Burma, far from acting to end the practice of forced labour, is actively engaged in its promotion, so that it is today an endemic abuse affecting hundreds of thousands of workers who are subjected to the most extreme forms of exploitation, which all too frequently leads to loss of life."[8]

In March 1997, the ILO Governing Body established a Commission of Inquiry to investigate the complaint and examine Burma's observance of its obligations in respect of the forced labour Convention. The Commission conducted a lengthy and thorough investigation, collected over 6000 pages of documents pertaining to the matter, and heard testimony from over 250 eyewitnesses with experience of the use of this draconian practice. The Inquiry then released a report in 1998 revealing its findings. Those findings may be best summarised by quoting a passage from the report, which discussed in general terms the outcome of the Inquiry as it" reveals a saga of untold misery and suffering, oppression and exploitation of large sections of the population inhabiting Burma by the Government, military and other public officers. It is a story of gross denial of human rights to which the people of Burma have been subjected, particularly since 1988 and from which they find no escape except fleeing the country."

The Commission of Inquiry concluded in its report that there was overwhelming evidence to establish that there is widespread and systematic use of forced labour throughout Burma by the Burmese authorities and military. As readers of the former article will recall, the recommendations of the Committee of Inquiry were that the Commission urged the junta to make the necessary legislative, executive and administrative changes to ensure compliance with the forced labour convention. Specific reference was made to the Village Act and the Towns Act, both statutory laws that presently breach international law. In addition, the recommendations also included that no more forced or compulsory labour be imposed by the authorities, particularly by the military and that penalties to be imposed for the use of forced labour be enforced with thorough investigation, prosecution and punishment of those found guilty. Prior to this, on June 17 1999 the ILO Conference had suspended Burma from receiving ILO technical assistance or attending ILO meetings on the basis of the junta's 'flagrant and persistent failure to comply' with the forced labour convention.

The June 2000 Conference[9] resolved that it could not abstain from the immediate application of the measures recommended[10], to secure compliance with the recommendations of the Commission of Inquiry "unless the Burmese authorities promptly take concrete action to adopt the necessary framework for implementing the Commission of Inquiry's recommendations, thereby ensuring that the situation [of workers affected by various forms of forced or compulsory labour] will be remedied more expeditiously and under more satisfactory conditions for all concerned."[11]

## The October Technical Mission

In what appears to be a protracted game of passing responsibility, the ILO Con-

ference entrusted the Governing Body with the task of examining the legislative, administrative and executive framework "which must be sufficiently concrete and detailed to demonstrate that the recommendations of the Commission of Inquiry have been fulfilled."[12] Under the terms of the resolution, the measures approved by the Conference were to take effect on 30 November 2000 unless, before that date, the Governing Body became convinced that an overall framework of measures of the kind referred to in the Commission of Inquiry's report had been implemented, rendering the implementation of one or more of those measures inappropriate.[13]

In response to the Conference's adoption of the said resolution, the Governing Body determined to send yet another ILO Technical Co-operation mission to Burma. The second ILO Technical Co-operation mission was then sent to Burma in October 2000.[14] The ball was unambiguously placed in the Governing Body's court – if it determined on the basis of the Technical Mission's findings that appropriate and concrete measures had not been adopted by the Burmese regime in the intermittent five month period, the measures approved by the Conference – including sanctions – would then be considered. The Governing Body would decide whether and to what extent the terms of the resolution adopted by the Conference at its 88th Session had been satisfied.

On the basis of the report of the ILO Technical Co-operation Mission,[15] the Governing Body concluded that it was not satisfied that actions taken by Burma to date met the recommendations of the Commission of Inquiry. Whilst the experts found that Burma had made some progress in amending laws to end forced labour, it also found that not enough had been done towards putting these changes into practice. The report stopped short of condemning the junta, however it did state for the record its disappointment with the authorities' lack of response to the ILO's recommendations.

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The report analysed the legislative, executive and administrative measures required to abolish the use of forced labour in Burma in law and in practice. In terms of legislative reform, specific regard was given to measures taken to bring the Village Act and Towns Act into conformity with the Convention and thereby give effect to the ILO Conference resolution. The mission explored and analysed the possible obstacles and opportunities for the attainment of that goal.

The mission reported that the Burmese authorities argued they could not directly amend the Acts in question, on the basis that they lacked the legal power to do so as they were not an elected government.[16] The junta sustained the argument that their initiative to issue Order 1/99[17] was sufficient to ensure compliance with the Commission of Inquiry's recommendation. Order 1/99 directed all the authorities concerned not to exercise certain powers granted under

the Acts in question to requisition labour.[18] The mission endeavoured to obtain amendment or withdrawal of the provisions from the statutes. Whilst this was not achieved, the supplementary Order produced directs all competent authorities without restriction not to requisition labour or services, notwithstanding the relevant provisions of the Village Act and Towns Act. In terms of substance, Order 1/99 only partially rectified the fact that the Acts authorised the requisition of labour under conditions inconsistent with those provided for under the Convention.

The mission then considered statute based laws other than the Towns Act and Village Act, which also require attention in terms of rendering all practices of forced labour under the Convention illegal under domestic law. As stated in the report, the Commission of Inquiry had found that labour is requisitioned without reference to these Acts, particularly by the military.[19] On this basis, the mission argued that it would be desirable, in the interests of greater legal certainty, to provide for a more general prohibition of all forms of forced labour. Such a course of action would extend section 374 of the Penal Code, which provides for sanctions only in the case of *illegal* requisitions of labour, to cover *all* requisitions including those outside the scope of the Village and Towns Acts. The 'Order supplementing Order 1 /99' (as discussed further on page 6 of this article) achieved this broad aim that is, it provided that the requisitioning of forced labour is illegal and is an offence under the existing laws of Burma. The technical mission reported that this subsequent Order is intended to have general applicability and not be confined to the scope of Order 1/99. The technical mission found that "progress has been made in the area of legislation in bringing Burma legislation into line with Convention No. 29, even if the way chosen for correcting the offending provisions of the Towns Act and Village Act is not that of a direct amendment but the indirect way of seeking to deprive the provisions in question of legal force[20]."

In considering the executive and administrative measures, the mission's report was more damning. It found that "at the time of completing this report, progress is far less in evidence [*in comparison to progress regarding legislative initiatives*] in terms of appropriate executive measures and the accompanying administrative and budgetary measures."[21] The technical mission re-emphasised the necessity of "going beyond legislative changes and adopting concrete measures in all areas affected by forced labour to ensure that in actual practice, no more forced or compulsory labour be imposed by the authorities."[22] The types of action required included instructions issued to all levels of the military, measures to inform the public and effective sanctions to be imposed against those who violate the law in this regard.

The mission proposed a supplementary Order to give more 'explicit instructions to all the authorities concerned... not to impose or order the imposition of forced labour, and to specify the practices covered by this prohibition in order

to dispel the all too prevalent uncertainty regarding the distinction between forced labour and voluntary labour noted by the Commission of Inquiry."[23] This proposal was not adopted. In brief, the mission was disappointed with the junta's failure to make any significant progress in this area of reform.

Before considering the mission's recommendations, it is worth considering the Burmese authorities' 'last minute' attempt to appease the ILO mission. As the mission was about to board the plane to leave Burma, it received another Order from the Minister of Labour entitled 'Order Supplementing Order No. 1/99.' The document amongst other things, conceded that the question of an ILO presence would be considered favourably by the authorities in the future, without providing any commitment or undertaking. The mission responded that agreeing to such a presence (the Order did not in fact go that far) "would not in itself remedy any deficiencies in the framework which would have to be put in place before the matter was brought before the Governing Body for consideration."[24] Furthermore, the text of the document also provided that the military would itself take responsibility for reinforcing the legislative document, providing a broad ban on the use of forced labour, with a separate instruction *enacted in its own name, the SPDC.* The Governing Body clearly determined that this measure was too little too late. In its concluding commentary, the mission determined to focus its observations more broadly and provided little substantive response to this late breaking development.

The mission took a cautious approach, indicating its disappointment with Burma's progress in terms of implementing the recommendations, particularly regarding the area of administrative reform, whilst noting that change would take some time and the actual impact in practical terms will not always be immediately clear. It therefore warned that at the time of reporting it was difficult to assess the extent to which the use of forced labour is imposed. The report concluded with the compelling statement: "However, in order to conclude that the implementation of one or more of the measures agreed by the Conference would be inappropriate, the Governing Body must be satisfied that the intentions expressed by the Minister of Labour in his letter of 27 May[25] are 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."[26]

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The Governing Body supported the full implementation of the resolution of the International Labour Conference, adopted in June 2000. On the basis of the mission's report, the Governing Body determined that the junta had not complied with the ultimatum served upon it in the Conference's resolution. The thrust of the resolution is compel the government of Burma to comply with its international obligations under Convention Number 29, the forced labour Convention. Human rights activists and the global community more generally have acknowledged this as a representation of a principled stand against the Burmese

regime and its systematic perpetration of human rights violations. This may signal the downfall of the illegitimate military power in Burma.

## The resolution

On 16 November, the Governing Body[27] at its 279th session resolved to invoke Article 33 of its Constitution, inviting its member States to impose wide-ranging sanctions against Burma to eradicate the 'widespread and systematic' use of forced labour. This decision has both profound political and historical significance.

Firstly, Article 33 has never before been invoked in this history of the ILO's existence. The decision to take such action is unprecedented. The Governing Body, acting on advice of the Technical Mission and recommendations of the International Labour Conference, also found that Burma had so flagrantly violated the international Convention against forced labour that sanctions had to be imposed to respond to the situation.

Secondly, the decision is remarkable in the sense that it requires substantive and unambiguous measures, which have taken effect as from 30 November 2000. The resolution calls on Burma to 'take concrete actions' to implement the recommendations of the 1988 Commission of Inquiry. An important element of this is that it is a decision of a tripartite international organisation, not one whose membership is confined to nation states. In this context, the decision is of a different and far broader paradigm as it encompasses governments, industry and workers' representatives. It follows that the multilateral sanctions agreed upon will also have a broader and arguably more significant impact than those generally imposed upon by nation states.

The resolution is framed in such a way that it provides broad scope for sanctions. Rather than the myriad of resolutions condemning and deploring certain conduct or omissions, this decision is intended to translate into formal action. Thus, after a protracted series of reports, investigations, resolutions and debate, the governing body called on the 174 member states to review their relations with Burma and take appropriate measures to ensure that these relations do not perpetuate or extend the system of forced or compulsory labour.

The Governing Body opened the way for the full implementation of the resolution of the International Labour Conference adopted in June 2000 at its 88th session. The resolution is aimed at compelling the Government of Burma to comply with the forced labour convention and calls on Burma to 'take concrete actions' to implement the recommendations of the 1998 Commission of In-

quiry. The action allows for a series of measures to be implemented. Those measures are broad ranging in scope and deal with the myriad of relationships Burma may have with the ILO's constituents – particularly member states, as well as international organisations, other branches of the United Nations and specialised agencies. The measures that could be implemented include the following:

- keeping under review the implementation of the Commission of Inquiry's recommendations at future sessions of the Conference so long as Burma has not be shown to have fulfilled its obligations;
- recommending to the organisation's constituents – governments, employers and workers - that they *review their relations* with Burma and take appropriate measures to ensure that such relations do not perpetuate or extend the system of forced or compulsory labour in that country;
- inviting the Director-General of the ILO to inform *international organisations* working with the ILO to reconsider any co-operation they maybe engaged in with Burma 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;
- inviting the Director-General to request the *United Nations Economic and Social Council (ECOSOC)* to place on the agenda of its July 2001 session an item concerning the failure of Burma to implement the recommendations 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 other specialised agencies to ensure that by their involvement they are not directly or indirectly abetting the practice of forced labour;
- requesting the Director-General to submit to the Governing Body a periodic report on the outcome of measures directed to international organisations and the United Nations and to inform those entities of any developments in the implementation by Burma of the recommendations of the Commission of Inquiry.[28]

The geo-politics played out behind the scenes of this remarkable decision may also have profound implications for regional politics. In the weeks preceding the ILO's historic decision, much political pressure was exerted on the ILO by several members of the Association of South East Asian Nations (ASEAN) block, in defence of their fellow member's failure to take action on this matter. The efforts of several ASEAN nations such as Malaysia, Indonesia, the Philippines, Singapore and Vietnam united to argue, albeit unsuccessfully, that Burma had made progress towards conforming with the forced labour convention.[29]

Furthermore, these nations also attempted to apply pressure on other ASEAN member nations, such as Thailand, to adopt a united ASEAN position in de-

fence of Burma. Whilst Thailand is not a member of the ILO Governing Body[30], a united ASEAN position may have proved a considerable factor against achieving consensus on the resolution. However, Thailand resisted the Malaysia-led bid to protect the Burmese junta, and took a firm and unyielding position regarding the proposed resolution and action of the ILO.

As reported in *The Nation* in the lead up to the Governing Body's vote[31] Thailand objected to a common voice on the matter of forced labour in Burma. Thailand had reportedly instructed its representatives at Geneva that Thailand would only support a common ASEAN statement on the issue if the following four conditions were incorporated into any proposed statement:

1. Burma must allow the ILO to establish a presence in the country;
2. The ILO's technical co-operation mission must be given permission to conduct regular visits to Burma without having to notify Rangoon ahead of time;
3. A credible mechanism be created that can receive complaints from individuals or groups over violation of laws concerning forced labour;
4. Sanctions against Burma should not be lifted until the international community is satisfied with administrative and legal measures issued by the ruling junta and that all legal measures undertaken by regime produces real results.

Thailand's direct opposition to that of other key ASEAN nations such as Malaysia, may be indicative of internal tensions within the regional alliance. This recent issue may prove to be a divisive wedge between the neighbouring Asian countries. The quite recent inclusion of Burma within ASEAN has not been without its negative internal implications and international repercussions. Notwithstanding this, the very fact that Thailand has demonstrated a firm opposition to initiatives to protect Burma in this context may also indicate a stronger commitment to eradicate the use of forced labour within Burma. The alternative perspective is that Thailand's position on this matter is purely motivated by national interest and security, given that it bears the economic pressures associated with an estimated one million illegal Burmese refugees fleeing the repressive junta and arriving across its border.[32]

The quite recent inclusion of Burma within ASEAN has not been without its negative internal implications and international repercussions. Notwithstanding this, the very fact that Thailand has demonstrated a firm opposition to initiatives to protect Burma in this context may also indicate a stronger commitment to eradicate the use of forced labour within Burma.

**Response by the junta**

The junta's response has been predictable, downplaying the economic effects of the decision and decrying the ILO as a biased, unfair tool solely representing the interests of the Western and developed nations. "The resolution cannot hurt us too much as it does not carry much weight and individual countries are not obliged to comply with ILO's urgings," Deputy Foreign Minister Khin Maung Win told a press conference. "Trade patterns are mostly with neighbouring

countries who are not obliged to follow the resolution," he said.

## The future - where to from here?

As AFL-CIO President John Sweeny stated, the sanctions approved by the ILO are "only a starting point…Nations are urged to halt any aid, trade or relationship that helps Burmese leaders remain in power."[33] Whilst the United States has already imposed restrictions on US investment in Burma, this has not been entirely successful and some US based companies have not been prevented or deterred from trading and doing business with the junta. Unlike other resolutions adopted by branches of the United Nations, the ILO has adopted a strategy of minimal prescription and has left it to governments, employers and trade unions to determine their own method of compliance with the spirit and letter of the resolution adopted. Another significant feature of the resolution will be any future action that may be adopted by the General Assembly, ECOSOC, or any other United Nations bodies, as referred to in the resolution. Further future action may include even broader sanctions for instance.

The success of the measure adopted by the ILO will naturally turn on the level and rigour with which the ILO's membership adopts and implements the resolution. This includes whether neighbouring countries will elect to impose economic sanctions against Burma. Broader trade and investment sanctions should be imposed to ensure that no area of the economy profits from the use of forced labour. Some commentators argue this is a significant step towards restoring democracy within Burma and will pave a way towards the respect and protection of human rights for all people within Burma.

Whilst the move is welcomed, caution may well be exercised when assessing the true impact that such a resolution may in fact to the people of Burma. In this context, it is important to consider the words which framed the Chairman's comments when the resolution was passed. He emphasised the importance of ensuring that the Director-General continued to "extend a co-operative to the government of Burma in order to promote the full implementation by that government of the recommendations of the Commission of Inquiry."[34]

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Despite this, it is clear that companies who continue to do business inside Burma will face the heavy and often costly responsibility of explaining themselves to the world. It is crucial that human rights organisations, international agencies and the media continue to maintain pressure on multinational companies and recalcitrant nation states to ensure that the impact of sanctions adopted against Burma is not reduced or countered in any way. A strategic and comprehensive imposition of broad-based economic sanctions in addition to those already imposed by the United States and European Union may well prove to be

the death knell for the Burmese regime's illegitimate reign.

The International Confederation of Free Trade Unions (ICFTU) has already warned governments and business that it will impose strong industrial action against any companies or states that continue to maintain relations with the Burmese junta. The ICFTU, as the largest trade union body in the world, wields extensive industrial power. It has stated that it "plans to obtain the rapid withdrawal of those foreign investors whose presence has the direct or indirect effect of aiding or abetting forced labour."[35] The ICFTU has determined to target private companies involved in the oil and gas, timber, rice, textile, tobacco and tourism industries. Investigations by the ICFTU suggest that up to three hundred companies, including several mutli-national companies may be involved in the Burmese economy in some way. The international organisation has adopted a multi-pronged approach to the issue and has already begun lobbying at the political and diplomatic levels, as well as adopting its industrial campaign. It has also called on all tour operators to cancel planned trips to Burma on the grounds that forced labour is still being used to sustain the tourism infrastructure.[36]

The next deadline for Burma is the March 2001 meeting of the Governing Body, at which the Director-General will report again on any developments in terms of Burma's initiatives to comply with the recommendations of the Commission of Inquiry. The ICFTU has heralded this progressive step as signalling that the "international community has now banished the Burmese dictatorship[37]" – time will tell whether the proposed sanctions will have such an effect. However, in the interim, the role of United Nations and international agencies, human rights organisations, nation states and the broad international community to monitor and enforce the November resolution is pivotal to ensure that the crimes against humanity perpetrated with impunity by the Burmese junta are stopped once and for all.

## Endnotes

* Jane Carter is a legal researcher with the Burma Lawyer's Council, Bangkok office.

1. Many of the ILO documents referred to in this article use the name Myanmar rather than Burma. However the text in this article uses the name Burma.

2. The ILO is the arm of the United Nations where representatives of government, trade unions and employers / businesses participate.
3. As had already been requested by the Committee of Experts.
4. This complaint was preceded by a former complaint in January 1993, by the International Confederation of Free Trade Unions (ICFTU). In November 1994, the Governing Body adopted the report of the Committee it had established to examine the representation made by the ICFTU. However, it has been a concern of the ILO Committee of Experts for the Application of Conventions and Recommendations since 1964.
5. Article 26 of the ILO Constitution provides an avenue under which any Member can file a complaint with the International Labour Office if it is not satisfied that any other Member is effectively observing a Convention which both have ratified. The Governing Body must refer the complaint to a Commission of Inquiry and may also elect to communicate with the Government in question.
6. Bert Rolling, *The Law of War and National Jurisdiction since 1945* (Hague Academy, Recueil des Couis, 1960), p 445 reproduced in Geoffrey Robertson QC *Crimes Against Humanity – The struggle for global justice*, 1999, Penguin Books Ltd, London, page 167.
7. As noted in the afore-mentioned article, the obligation to eliminate forced labour is now regarded as being inherent in ILO membership.
8. Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organisation, to examine the observance by Burma of the Forced Labour Convention, 1930 (No.29). Document GB 273/Myanmar, page 7.
9. International Labour Conference 88th Session May-June 2000.
10. In the event of Burma's non- compliance with the resolution, specific measures would be implemented. The measures provided for in the resolution are provided in detail in page 8 of this article. In brief, they included reviewing Burma's implementation of the recommendations of the Commission of Inquiry; recommending to the ILO's constituents that they review their relations with Burma to ensure any such relations do not perpetuate or extend the system of forced labour; inviting the Director-General of the ILO to inform international organisations working with Burma to cease any arrangements that directly or indirectly abet the use of forced labour; requesting the United Nations Economic and Social Council (ECOSOC) to consider Burma's failure to implement the recommendations of the Commission of Inquiry; and requesting the Director-General to submit periodic reports on the outcome of measures directed to international organisations and the United Nations to inform those entities of any developments in the implementation by Burma of the afore-mentioned recommendations.
11. International Labour Office, Governing Body 279th Session Document GB. 279/6/2. November 2000, page 1.
12. Document GB. 279/6/2, page 1.
13. Document GB. 279/6/2, page 2.
14. The mission's mandate was simply to report objectively to the Governing Body on the progress and outcome of the discussions it held with Government authorities for the Governing Body in November to assess the degree

to which the requirements had been fulfilled. It had no mandate to negotiate a compromise with the military junta. The first technical mission was in May 2000.

15. Report of the ILO Technical Cooperation Mission to Myanmar (Friday 20 October - Thursday 26 October 2000). GB.279/6/1.
16. GB 279/6/1 page 3.
17. Order 1/99 is the 'Order directing not to exercise powers under certain provisions of the Town Act 1907 and the Village Act 1907.' Order 1/99 was issued by the Burmese junta in May 1999, in response to the ILO's Commission of Inquiry. The order in effect reduced the scope of the offending statutes, the Village and Towns Acts. However, it reserved the exercise of powers under the relevant provisions of the Acts in several ways. Furthermore, the Order was not equivalent to a legislative amendment, as requested in the recommendations of the Commission of Inquiry.
18. It is worth noting that the Committee of Experts on the Application of Conventions and Recommendations noted that this could lead to the risk of a return to the previous state of affairs in its *Report of the Committee of Experts on the Application of Conventions and Recommendations*, Report III (Part 1A), International Labour Conference, 88th Session, 2000 pages 107-112.
19. GB 279/6/1 page 4
20. GB 279/6/1 page 9
21. GB 279/6/1 page 9
22. GB 279/6/1 page 5
23. GB 279/6/1 page 5
24. GB 279/6/1 page 9
25. The intentions of the Minister for Labour, Major General Tin Ngwe as expressed in his letter of 27 May 2000 are duplicated in Ms Southlan's article. In brief, they signalled what was interpreted by some of the members of the ILO as a change in attitude by the Burmese regime. The letter indicated a willingness on the part of the junta to take the necessary measures (legislative, administrative and executive) to eradicate any instances of forced labour within Burma. This letter followed the first technical cooperation mission sent by the Director General to Burma in May 2000.
26. GB 279/6/1 page 9
27. The Governing Body is the executive body of the ILO. It meets three times a year and takes decisions on ILO policy, decides the agenda of th International Labour Conference, adopts the draft programme and budget for the organisation and elects the Director General.
28. Resolution adopted by the International Labour Conference at its 88th Session June 2000 .Press release, ILO *ILO Governing Body opens the way for unprecedented action against forced labour in Myanmar* 17 November 2000 (ILO/00/44).
29. In the June 2000 meeting of the International Labour Conference, all ASEAN members except Thailand which abstained, voted against the resolution.
30. The Governing Body's composition is of 56 titular members comprised of 28 Governments, 14 employers' organisations representatives and 14 workers' organisations' representatives; and 66 deputy members comprised of 28

Governments, 19 employers and 19 workers. Ten of the titular government seats are permanently held by the following States Brazil, China, France, Germany, India, Italy, Japan, the Russian Federation, the United Kingdom and the United States. The other government members are elected by the Conference and presently are: Algeria, Burkina Faso, Canada, Chad, Croatia, Ethiopia, Ghana, Guatemala, the Islamic Republic of Iran, the Republic of Korea, Malaysia, Namibia, Peru, Saudi Arabia, Slovakia, Switzerland, Trinidad, Tobago and Venezuela.

31. *The Nation* 'Thais oppose ASEAN bid to fend off ILO move' 16 November 2000.
32. The ICFTU has estimated that 80 per cent of Burmese refugees in Thailand were subjected to forced labour before fleeing their country. The ICFTU has reported that there are up to 1.5 million such refugees living in Thailand in 2000.
33. The Washington Post November 26 2000, Final edition Editorial 'A rebuke to forced labour.'
34. Press release, International Labour Organisation, *ILO Governing Body opens the way for unprecedented action against forced labour in Myanmar* 17 November 2000, (ILO/00/44) http://www.ilo.org.public/english/bureay/inf/pr/2000.
35. Press release, ICFTU *Global union campaign targets foreign investments in Burma* 1 December 2000.
36. Press release, ICFTU *Burma-forced labour: unions welcome ILO resolve* 16 November 2000.
37. Press release, ICFTU 16 November 2000.

# Law-Making and Law Enforcement in Burma:
## The Military Junta's Failure in Regard to Forced Labour

*Janelle Saffin**

The Tatmadaw in Burma have control of executive, legislative and judicial power and the Parliament has not met since before the Tatmadaw seized power by military coup d' etat on the 18th September 1988, installing the State Law and Order Restoration Council (SLORC), predecessor of the present State and Peace and Development Council (SPDC). The SPDC is the creature of the Tatmadaw (Burma's Armed Forces), as was the Tatmadaw's Burmese Socialists Program Party's (BSPP) Revolutionary Council that ruled Burma for many years up until 1988. For functional purposes they are one and the same group, in essence a military junta exercising the power of dictatorship.

The SPDC has very publicly demonstrated that they have put a lot of effort into assuring the international community that:

1. they do not condone the practice of portering (slave labour)
2. they have issued 'Orders' prohibiting such practices
3. laws that permit slave labour have been amended
4. the ILO's reports, resolutions and ensuing actions are politically motivated
5. there is in fact no slave labour in Burma

Their halting and confused attempts to persuade the international community that forced labour does not exist flies in the face of evidence to the contrary. It is hard not to conclude that the SPDC does not exert as much control in the Tatmadaw ranks and local SPDC committees, in the regions and villages they would have us believe. Their leadership has been ineffective. They appear to lack the legislative competence to make appropriate laws that the public can be certain of, also the legal infrastructure or will to have them enforced. The alter-

native conclusion to that of incompetence and lack of control, is that the SPDC is simply attempting to deceive the international community.[1]

With regard to legal matters in Burma under the control of the SPDC junta, there is no debate, no draft bills, no scrutiny, no review, (public nor judicial) no appeal, no safeguards, no rule of law. The Tatmadaw government is a military dictatorship.[2]

In May and October 2000 high ranking Tatmadaw government representatives including Secretary 1 Lt-General Khin Nyunt, Ministers for Foreign Affairs, Home Affairs and Labour, accompanied by officials from the Attorney-General's, Foreign Affairs and Home Affairs departments met with the ILO's Technical Cooperation Mission. The Tatmadaw government obviously treated this matter seriously to have allowed such a senior ILO delegation to visit Burma.

This is set against a background replete with irrefutable direct and indirect evidence that slave labour in Burma is still widely practised, with orders still being issued by local Tatmadaw and SPDC forces. This is particularly so in the regions where many of Burma's ethnic nationalities population lives.

The Tatmadaw government on the one hand condemns the ILO report and actions as one-sided, the accusations of slave labour as having 'political motives', and based on 'wrong information sent by groups of runaways, insurgent organisations and groups of elements opposed to the Government', and on the other hand it has made an enormous effort to quell international concern. To date though their efforts have neither yielded the result that they apparently desired, which is to stop the opprobrium of the international community expressed in the ILO's unprecedented Article 33 resolution in the form of a sanction, since their 1919 beginnings, and importantly nor has it brought about the cessation of slave labour.

Their approach to law-making and law enforcement has been described by commentators as "whimsical" and such a description is borne out by examining their reaction to the ILO concerns and subsequent attempts to 'correct' the situation. The evidence seems to suggest both incompetence and lack of control, yet equally suggests that it is deliberatively deceptive.

Following the ILO's first formal report on the situation in Burma (July 1998) the Tatmadaw government announced that the practice had ceased and that it had 'dropped' the offending sections of the Township (1907) and Village (1908) Acts and that these Acts were a legacy of the colonial administration, thereby not something that the Tatmadaw government took responsibility for, despite the Tatmadaw having been ruling Burma for the past thirty-eight (38) years. These particular sections facilitated and permitted the government to demand

people's labour for state infrastructure projects.

On the 1st May 1999 the Ministry of Home Affairs issued Order No 1/1999 'prohibiting the use of forced labour'. On the 27th October 2000 the same Ministry issued an Order supplementing Order 1/1999 to in their words, "To prove Myanmar's commitment to preventing forced labour"[3] Four days later on the 1st November 1999 the SPDC issued in their words "a separate order underscoring the need to follow the order issued by the Ministry of Home Affairs".[4]

At the same media conference with Lt-Col Tin Oo Staff Officer Grade 1 of the Office of Strategic Studies acting as the Master of Ceremonies, the Tatmadaw government informed the community that the General Administration Department, the Myanmar Police Force of the Ministry of Home Affairs and the Ministry for Progress of Border Areas and National Races and Development Affairs "issued separate orders concerned with the matter".[5]

There has been a plethora of Ministers, Departments, Police Force, the SPDC themselves issuing orders prohibiting the use of slave labour. This highlights a number of issues concerning the competence of the Tatmadaw's law-making and enforcement powers. The issuance of 'Orders' is the standard procedure by which the Tatmadaw government makes laws, with Ministries issuing 'Notifications' frequently classified as 'enabling legislation'. Given the above approach to the ILO matter and the prohibition of slave labour it appears that many institutions or individuals in senior positions can make laws as well, without the obvious concomitant delegated regulation review. According to rule of law principles regulation-making can be delegated, but subject to democratic checks and balances, but law-making can never be delegated.

It should come as a surprise to many international observers then, that the Tatmadaw and the Tatmadaw Government presided over by Senior General Than Shwe known to rule with an iron fist exerting absolute control over every aspect of Burmese life, has found it necessary to have caused the issue of so many orders and even complementary orders from so many central, regional and local departments, forces and agencies.

It then becomes self evident that the Tatmadaw government is unable to have its 'laws' implemented, that its territory and local units, the local Tatmadaw and SPDC committees have either deliberately ignored the Orders issued by the Ministry of Home Affairs,....

It then becomes self evident that the Tatmadaw government is unable to have its 'laws' implemented, that its territory and local units, the local Tatmadaw and SPDC committees have either deliberately ignored the Orders (in effect violated the law) issued by the Ministry of Home Affairs, its supplementary order (itself surprising as it was obviously recognised by the Ministry that their order was being ignored and indeed violated), the SPDC order, the General Administration Department, the Myanmar Police Force of the Ministry of Home Affairs, and the Ministry for Progress of Border Areas and National Races and Development Affairs. This convoluted law- making cum enforcement process begs the question. Is the Tatmadaw insincere and are the above mentioned actors

party to the deception?

The surprise then regarding the Tatmadaw government's response to the ILO's condemnatory reports and now sanctions imposed at the ILO's 279 th session on the 16th November 2000, is the fact that they have prima facie taken both strong and multi-faceted actions to prohibit slave labour, by passing many orders, complementary orders and made many pronouncements, yet still the practice prevails. Is their stranglehold on the three governmental arms of power weakening or proving too difficult to manage. Could this then be the cleavage in their competence to govern that can only go deeper?

The Tatmadaw government does of course maintain absolute power but it is not so obvious that it has such absolute control, given their inability to control the law-making and enforcement procedures. This scenario serves to highlight the confused situation that exists in Burma over the last twelve years where in essence the nation has been delegalised.

If a regular law making process existed, such as the convening of the Pyithu Hluttaw (People's Assembly/Parliament) and there are Members of Parliament elect, having been elected on the 27th May 1990 in Burma's internationally recognised multi party general elections, ready to fulfil the duties for which they were elected and regular governmental institutions empowered to act rationally, then efforts to prohibit forced labour could be tackled in a framework where the responsible institutions could exercise their power to ensure that the wishes of the legislature were followed. Even the Tatmadaw government must be increasingly aware of the problems arising from their flawed attempts at law-making and enforcement.

If a regular law making process existed,... and there are Members of Parliament elect, having been elected in 1990 in internationally recognised multi party general elections, ready to fulfil the duties for which they were elected and regular governmental institutions empowered to act rationally, then efforts to prohibit forced labour could be tackled in a framework where the responsible institutions could exercise their power to ensure that the wishes of the legislature were followed.

The more that the SPDC/Tatmadaw government engages and opens up to the international community the more that is exposes its institutional incapacity and its collective and individual incompetence. This is acutely transparent in the exercise of power in the legislative and legal spheres.

The ILO sanctions raise a seminal matter regarding the human rights of the people of Burma, starkly illuminating the Tatmadaw government's institutional governance incapacity and incompetence. Burma desperately requires a fully functioning legal system that is underpinned by the rule of law, not by the rule of military. To effect this Burma needs to have democracy restored. This is, of course, the crux of the matter.

The rule of law cannot flourish with a 'government' that concurrently exercises the three heads of government power, namely the executive, legislative and judicial. Given the domestic and international concern regarding the lack of democracy and rule of law in Burma and the massive human rights violations, this observation is an attempt to introduce the reader to the practical effect of a

'government' that exercises all those heads of power in a dictatorship form, itself a form of government anathema to the rule of law.

## Endnotes

* Honourable Janelle Saffin, Member of the NSW Legislative Council, is an Executive Committee Member of the Burma Lawyers' Council.

1. They are certainly not deceiving the people of Burma, who are daily conscripted into forced labour.
2. Tatmadaw leader Senior General Than Shwe is also the head of the SPDC with the title of Prime Minister. The SPDC use the terms SPDC and Tatmadaw government interchangeably. In a media release issued by the Ministry of Foreign Affairs dated 17th November 2000, a public media conference held at the Myanmar Radio and Television Station (MRTV) in Pyay Road Rangoon on the 18th November 2000, also broadcast on MRTV and a piece printed in the Tatmadaw's newspaper The New Light of Myanmar on the 19th November 2000, Tatmadaw Deputy Minister for Foreign Affairs U Khin Maung Win referred to the government as the 'Tatmadaw government'. The media was all directed to the ILO's sanction resolution of the 16th November2000 vis-à-vis Burma.
3. U Kin Maung Win, Deputy Foreign Affairs Minister, media conference MRTV 18th November 2000.
4. ibid
5. ibid

# Constructive Engagement: A Critical Evaluation

*Minn Naing Oo**

## Introduction

"Constructive Engagement is a euphemism for doing business with thugs," so proclaimed former Senator Daniel Patrick Moynihan in referring to the US policy towards China. While this may be the view of its outspoken opponents, the proponents of Constructive Engagement defend it with equal fervor as an enlightened approach, and one that is frequently the only realistic option, in dealing with rouge states in the post-Cold War era of globalization.

In essence, Constructive Engagement is a policy which advocates the maintenance of an economic and diplomatic relationship with an authoritarian state as opposed to imposing sanctions and embargoes on it. It has been described as "promoting economic and political ties, while at the same time pressing for democracy, open markets and human rights".[1] Its advocates believe that in encouraging and participating in the opening up of a country to foreign investments, it will also be facilitating the opening up of the country to more information, as well as foreign liberal influences and views promoting a greater awareness of human rights and democratic values.[2] By remaining "engaged" with the rouge state, Constructive Engagement advocates also believe that countries are more likely to be able to exert influence over its government and push it along the path to political and social reform.

This paper seeks to evaluate Constructive Engagement critically with a focus on its implementation by ASEAN and the United States vis-à-vis Burma and China respectively.

## The report card on Constructive Engagement in Burma and China

It has been almost a decade since the ASEAN nations commenced their policy of Constructive Engagement with Burma and 6 years since the Clinton administration did the same with China. It is timely now to examine if it has been successful in achieving better treatment of human rights and democratization in these 2 countries.

### Burma

By most accounts, Burma's human rights record has not improved at all since 1990. The latest reports by the Special Rapporteur of the UN Commission on Human Rights on the situation of human rights in Burma lists a litany of unabated human rights violations including suppression of political activity, torture, non-observance of due process in the judicial system, imprisonment of political opponents, forced relocation, extra-judicial killings and forced labor. Even on the economic front, the Special Rapporteur reports that it is "in a very weak state, characterized by extreme poverty, lack of food security. . ."[3] Burma has also incurred ILO sanctions for its practice of using minorities and the poor to do forced labor. The junta's delegation simply responded by announcing in Geneva that it would refuse all future collaboration with the ILO.[4] The only "improvement" to speak of is that the International Red Cross has been permitted to visit select prisons and detention centers.[5]

In essence, Constructive Engagement is a policy which advocates the maintenance of an economic and diplomatic relationship with an authoritarian state as opposed to imposing sanctions and embargoes on it. It has been described as "promoting economic and political ties, while at the same time pressing for democracy, open markets and human rights".

It is clear that Constructive Engagement has not worked at all in bringing about human rights reform in Burma. On the contrary, the regime, as shown by its attitude towards the ILO sanctions, may have grown even bolder in its repression, strengthened perhaps by the knowledge that it can always turn to its ASEAN neighbors for support and assistance.

### China

Despite the Clinton administration's efforts, Constructive Engagement has not seen much success in bringing about change in China either. The White House's report on the human rights situation in China admits:

> "Despite the clear expansion of personal freedom for huge numbers of Chinese citizens associated with economic reform over the past several decades, China continues to curtail freedom of speech, expression, assembly, association and religion. China maintains a one-party state that tolerates no organized opposition. Authorities engage in the extrajudicial

> arrest and detention of political and religious activists and restrict religious and spiritual practices".[6]

The latest Country Report on Human Rights Practices on China issued by the State Department in fact states that "the Government's poor human rights record deteriorated markedly throughout the year, as the Government intensified efforts to suppress dissent, particularly organized dissent."[7] The Report goes on to describe the persecution of religious groups and "particularly serious human rights abuses. . . in minority areas, especially in Tibet and Xinjiang, where restrictions on religion and other fundamental freedoms intensified." [8]

In the midst of this gloomy picture, Constructive Engagement supporters take comfort from the fact that China this year signed the UN Covenant on Civil and Political Rights and the UN Covenant on Economic, Social and Cultural Rights and that the economic well-being of many Chinese citizens continue to improve.[9] It should be noted though that the signing of the Conventions does not mean anything unless it is backed up by action to safeguard the rights enumerated in them. In this regard, the latest reports by the State Department and NGOs[10] do not give reason for optimism.

Economically, there can be little doubt that Chinese citizens now have greater opportunities than they did 10 years ago. That may be cited as an improvement on the record. However, the state continues to retain tight control over communications and information, with restrictions on the Internet and censorship of newspapers.[11] The expected information boom that was to accompany economic progress has not yet fully materialized. Further, many of the big players in the economy remain state enterprises. Any gains in the economic arena are in any case far outweighed by the "deteriorating" (to paraphrase the State Department's Report) human rights record. Constructive Engagement must accordingly be judged to have failed to bring about any real tangible improvement in the treatment of human rights.

## Of disguises and double standards

### ASEAN-Burma

The most obvious objective for the ASEAN countries in pursuing Constructive Engagement is economic. Burma is a country rich in natural resources and her population of 50 million provides a potential market for the ASEAN countries' products and services as well as a source of cheap labor. What was touted was a symbiotic relationship which would not only be good for Burma, but beneficial to the ASEAN members as well. In fact, in economic terms, this was precisely what happened. Singapore and Thailand are now 2 of Burma's largest trading

partners, after China, and with the Asian economies recovering, trade between the other ASEAN members and Burma can be expected to grow to even higher levels. A related consideration was that if ASEAN did not trade with Burma, Chinese business interests would simply take advantage of the situation to establish a monopoly.

A second possible objective of the Constructive Engagement policy is the achievement of political and strategic aims. Burma lies at a strategic location, nestled between China, South East Asia and India. She also has a coastline of some 1,700 miles which China could use to gain access to major waterways. Given her strategic importance, the ASEAN leaders must have been wary that China would cultivate Burma as an ally and try to assume an even greater influence in the region, posing a potential threat to regional stability and security.[12] There was ample reason for the ASEAN leaders to be concerned. Since 1991, the 2 states had been getting ever closer, beginning with the signing of an economic and military cooperation pact in that year. The junta had also bought Chinese arms worth almost US$ 1 billion.[13]

It is reasonable to conclude from the above that in deciding on Constructive Engagement, economic benefits as well as the potential threat of China to regional stability and security are likely to have been equally important considerations to ASEAN, if not more so, than promoting human rights and democracy.

**US-China**

In adopting Constructive Engagement as the policy instrument of choice, the Clinton administration touted a free market economy and trade liberalization as the means to achieve political reform in China. However, it was not merely benefits to the people of China that the US was interested in. This is plain from the following extract taken from the State Department's Report :

... in deciding on Constructive Engagement, economic benefits as well as the potential threat of China to regional stability and security are likely to have been equally important considerations to ASEAN, if not more so, than promoting human rights and democracy.

> "The United States seeks constructive relations with a strong, stable, open, and prosperous China that is integrated into the international community and acts as responsible member of that community. The U.S. needs a constructive working relationship with China because:
>
> - The People's Republic of China (P.R.C.) plays a major role in the post-Cold War world;
> - It is the world's most populous nation (about 1.2 billion people) and the third-largest in land mass (after Russia and Canada);
> - It has nuclear weapons, is a growing military power, and plays a key role in regional stability;
> - As one of the five permanent members of the UN Security Council, China has veto power over Security Council

resolutions dealing with key multilateral issues, including international peacekeeping and the resolution of regional conflicts; and

- China is undergoing extraordinary economic growth and promises to be a preeminent economic power early in the next century." [14]

It is clear that US economic, political and strategic interests stood to gain from engaging China in a friendly relationship as well. In fact, it can be argued that the de-linking of human rights and trade shows clearly the true intentions of the administration. This argument becomes even more compelling when one considers that the US pursues completely divergent and inconsistent approaches in dealing with other less important regimes.

**Double Standards**

Although in their records of human rights violations, the Burmese military junta and the Chinese Communist Party in power are equally notorious, the US chose to treat the two countries differently. With respect to Burma,

> "[t]he United States has responded to the regime's continued failure to end its repression and move towards democratic government with strong measures, including: suspension of economic aid and withdrawal of Burma's eligibility for trade and investment programs; an arms embargo; blocking assistance from international financial institutions; downgrading our diplomatic representation to Charge d'affaires; visa restrictions on senior officials and their families; and a ban on new investment by U.S. persons."[15]

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..... President Clinton had said that relations between the Burmese government and the US would improve only if there was "a program on democratization and respect for human rights." Surely, the question is: why not the same for China?

China however has drawn a different response from the US to its notorious human rights record. In place of "strong measures" is Constructive Engagement, a policy that is aimed at more economic and political cooperation and dialogue, not less. This is especially ironic when one considers that with respect to Burma, President Clinton had said that relations between the Burmese government and the US would improve only if there was "a program on democratization and respect for human rights."[16] Surely, the question is: why not the same for China? China has **no** program for democratization, and the Chinese Communist Party has certainly not given any indication that it has even remotely considered turning China into a democracy. Further, by the State Department's own reports, China's human rights record remains atrocious. The inconsistency in approaches smacks of hypocrisy and is sufficient to dispel any notion that Constructive Engagement is a policy that is primarily concerned with human rights and democratic reform. In fact, this view is supported by economic data as well as the strategic considerations outlined above.

China is clearly much more economically important to the US than Burma. In 1997, the year when the US imposed the latest sanctions on Burma, the US imported US$12.862 **billion** and exported US$62.558 **billion** worth of goods to China.[17] In contrast, the US imported US$114.90 **million** worth of goods and exported US$19.9 **million** worth of goods to Burma.[18] The contrast could hardly have been more stark. For the year 2000, it was reported that the bilateral trade volume between China and the US was expected to hit US$73.5 billion, an all-time high figure.[19]

The ASEAN nations are no less guilty of hypocrisy. They participated in imposing sanctions on South Africa. It is hard to imagine how the apartheid regime is more repressive than the military junta now running Burma. They also did not speak of "non-interference" in domestic affairs then. If the ASEAN countries were true believers in Constructive Engagement as the engine of change, they would have applied it to South Africa as well. That they did not speaks volumes.

## Constructive Engagement as a credible alternative to sanctions

It is convenient to start off this discussion by quoting the Thai Deputy Foreign Minister :

> "The choice of whether to use sanctions or constructive engagement has implications beyond the issue of persuading a non-conformist regime to adopt the norms of the majority.
>
> First, it affects the welfare of the people in the target country. Constructive engagement allows the majority of the population to carry on their lives without undue hardship. Sanctions, on the other hand, hurt the most vulnerable sectors of society first and hit them the hardest. And as long as the target government can suppress the opposition and maintain its grip on power, sanctions are unlikely to persuade the regime to loosen up.
>
> Second, the choice of policy affects the overall bilateral relations of the countries concerned. Not only do sanctions not work, they also poison the climate and make dialogue more difficult. Where sizable economic stakes are involved, sanctions can hurt both sides deeply, while having none of the effect intended. Tit for tat measures can divert trade to other countries that have no similar compunction to impose sanctions, and may escalate out of proportion into something neither side wants.

> Engagement, at the very least, keeps the lines of communication open. The interaction and discourse that are a natural part of any relationship allows the exchange of ideas. And ideas that come from friends are more easily accepted than those that come from perceived foes.
>
> The choice between sanctions and constructive engagement also has broader geopolitical ramifications. Where the non-conformist country is a major power or a pivotal player in the regional security equation, its response to the imposition of sanctions can be unpredictable, with disturbing implications for the region. Constructive engagement, meanwhile, allows the countries immediately concerned to maintain a dialogue with the target country and to gradually build confidence, even if only at a rudimentary level."[20]

I shall begin my analysis by examining the above arguments critically. I will then go on to examine the merits of other arguments both for and against Constructive Engagement.

**Constructive engagement betters the lives of the people while sanctions hurt them**

One main argument that opponents of sanctions cite is that sanctions hurt the most vulnerable segments of the population while not having any appreciable adverse effect on the ruling class. Iraq and Cuba are frequently mentioned in this connection. In contrast, it is said that Constructive Engagement, because it brings in trade and commerce, provides jobs and betters the lives of the ordinary people.

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A related argument which is used by advocates of Constructive Engagement is that foreign companies have a positive impact on the local civil society. Foreign companies offer better working conditions, training and technology transfer, higher wages, health and education benefits. Ernest Bower, president of the US-ASEAN Council argues that American foreign investment in Burma "is an extremely effective means of advancing economic and social development, and should not be abandoned in favor of measures which have no chance of success,".[21]

In China's case, NYU professor Doug Guthrie, writing in Foreign Policy in Focus, has this to say:

> "My research on Chinese factories shows that those which have formal relationships with foreign (particularly Western) firms are

> significantly more likely to have institutionalized formal organizational rules, they are almost 20 times more likely to have formal grievance filing procedures, they are more likely to have worker representative committee meetings, and formal hiring procedures. They pay significantly higher wages (about 50% higher), they are more likely to adopt China's new Company Law, which binds them to the norms of the international community, and they are more likely to respect international legal institutions."[22]

Despite views like the above, many remain convinced that sanctions are the only means to achieve political reform in an authoritarian state. They point to South Africa as a case in point. Archbishop Desmond Tutu has asked the world now to again treat Burma as South Africa and impose tough sanctions on her:

> "International pressure can change the situation in Burma. Tough sanctions, not constructive engagement, finally brought the release of Nelson Mandela and the dawn of a new era in my country. This is the language that must be spoken with tyrants -- for, sadly, it is the only language they understand."[23]

Aung San Su Kyi has also echoed the call for sanctions against Burma. Neither Reverend Tutu nor Aung San Su Kyi dispute that sanctions can hit the general population hard. However, they and many others are convinced that sanctions will ultimately starve the regime of political legitimacy and economic sustenance and force its capitulation.

Apart from South Africa however, the verdict on the effectiveness of sanctions is still out. Cuba and Iraq are examples of sanctions having little effect on the regimes there.

**Constructive engagement benefits the peoples of both countries economically**

It is argued that sanctions, by definition, takes trade away and hurt not only the economy of the target country, but that of the sanctioning country as well. In contrast, Constructive Engagement, which encourages economic exchange and trade, benefits both economies. This argument is not necessarily true because it assumes that engagement opens up the country to a true market economy fueled by the engine of private enterprise. However, in the case of authoritarian states such as Burma, that is often not the case.

In authoritarian or Communist states, the economy is largely state-controlled with limited private enterprise. Most of the major business entities that foreign

investors will deal with are likely to be state-owned enterprises or businesses allied to the regime rather than private entrepreneurs, the true engines of commerce in a truly free market economy. This means that real beneficiaries of the business are the government and its cronies. Although it may be argued that there would be a trickle down effect, this is not likely to be as substantial as if the country were a true market economy. Indonesia provides a good example in this regard. While the Suharto regime and its cronies got richer and richer from dealing with foreign businesses, the majority of the people did not get to reap the benefits. Unless the market is truly opened up in the authoritarian states and private enterprise is allowed to flourish, the argument that Constructive Engagement and foreign investments bring economic benefits to the people rings hollow.

Sanctions may not work too because there would always be other countries that are willing to trade with the rouge regime and circumvent the sanctions. Constructive Engagement advocates therefore argue that trade is the better alternative.

This view has some truth if the sanctioning country imposes the sanctions unilaterally and cannot get the support of the other major trading partners of the rouge country. If the sanctions are multilateral however, like in the case of South Africa, and especially if the rouge state's main trading partners are participants, it is arguable that sanctions can work. On the other hand, it is also not true that Constructive Engagement with its emphasis on economic engagement will work better. All that it may ultimately accomplish is to sustain the authoritarian regime without weakening its grip on power, especially if the economic activity in the country is largely controlled by the regime and its cronies.

**Constructive engagement keeps communication lines open**

If any positive change is to be achieved, advocates of Constructive Engagement argue that a friendly dialogue must be maintained with the regime. Sanctions only provoke the regime unnecessarily and strengthen its resolve to cling on to power at all cost.

It is unclear however whether persuasion has in fact worked. There has been only superficial change in the treatment of human right in Burma and China. It appears that even ASEAN is seeing divisions in its ranks over whether Constructive Engagement has worked. Thailand's proposal of "flexible engagement" which called for a tougher stance to be taken with Burma, met with resistance from the other ASEAN members (including Burma) and was dropped.[24] Indonesia can be cited once again as an example where dialogue did not work. Nonetheless, complete isolation is also not to be preferred. Instead, keeping communication lines open while not engaging the regime actively may well make it easier to start a real dialogue when the appropriate time arrives.

**Economic development leads to political and legal reform**

It has been argued that trade liberalization weakens the power of government and that the institutional infrastructure of a market system is supportive of personal freedom and good government. Free markets, based on private property and consent, encourage individual responsibility, social mobility, and tolerance, which are all associated with human rights and democracy. As Michael Novak writes :

> "The capitalist preference for law and due process leads naturally enough to the ... basic institutions of democracy: the rule of law, limited government, separated powers, and the protection of the rights of individuals and minorities."[25]

Indonesia however is a case which defies the above theory. A free market for 30 years did nothing to change it from an authoritarian regime into a democracy with respect for human rights and the rule of law.

An argument can be made though that Constructive Engagement and the economic development that it brings are more likely to lead to political reform by strengthening the hand of the moderates among the regime. Frequently, it is the moderates and progressives that push for economic liberalization. They are also likely to be more receptive to bringing about political changes which would include a better respect for human rights. If they are successful in bringing development to the country and better the lives of the citizens as well as the leaders through the door of trade liberalization and a market economy, their influence in the ruling circle is likely to grow rather than diminish. They will then be in a better position to institute systemic political and social reform gradually in the country.

In this regard, I believe that Constructive Engagement is a better alternative to economic sanctions. No threat to the power of a regime can be more naked or direct than sanctions. A threat of sanctions is likely to breed a siege mentality among the leaders which will be fueled even more by the paranoia of the hardliners. There is also a danger that the hardliners will manipulate sanctions to cast the sanctioning country as an enemy of the people and rally the population around the regime. We can see this happening in Cuba and Iraq.

States should therefore identify and support or cultivate discretely moderate leaders in the authoritarian regime who are most likely to champion reform if given the opportunity.

**Constructive engagement strengthens the private sector**

One argument that can be made for Constructive Engagement is that it nurtures the private sector of the authoritarian state, bringing about greater economic freedom and weakening of state control over the economic life of the people. A strong private sector will encourage the fostering of the institutional legal and political framework necessary to protect property, contractual rights and trade. In turn, these will lead to a civil society with greater respect for civil rights. It is also argued that greater private enterprise will lead to the development of a middle class which is more politically aware and willing to participate in the political process.

How true this argument is in reality is difficult to quantify. In China's case, even as the state was liberalizing the economy, its control over political life remains strong, and some would argue, even stronger. For example, the flood of foreign investments and the increasing number of private enterprises have not prevented the CCP from placing restrictions on Internet usage in the country, which belies the prediction of the flood of information that was expected to engulf China.

**Culture**

One reason that has been cited for ASEAN's adoption of Constructive Engagement with respect to Burma is culture. As one Malaysian foreign ministry official reportedly put it: "We prefer to do things quietly, the ASEAN way, so as to give face to the other side."[26]

Cultural differences may influence the tack to take with a particular country. However, it can easily become a convenient excuse for carrying out one's own agenda, as is arguably the case with ASEAN's approach to Burma.

**Geographic proximity**

Another reason is geographic proximity. It is an unalterable fact of life for the ASEAN countries that Burma is part of the region. "We have to live with the problem" is a common refrain among ASEAN officials.[27] Geographic proximity means that problems in Burma can and do spill over into her neighbor's borders.

Good neighborliness however does not mean that one has to stand by and watch as widespread human rights violations occur, especially since one's interests may be affected by the violations, such as in Thailand's case where refugees from Burma have spilled into the country.

**Sanctions not a credible threat**

Another reason why Constructive Engagement may be favored over sanctions is that isolation is not a credible threat to the repressive regime in Burma. It must be remembered that Burma had lived under self-imposed isolation for more than 30 years under General Ne Win. Isolation is therefore nothing new to the country. If sanctions were imposed, it is not hard to imagine that she would simply retreat into a shell and cut herself off from the rest of the world as she had done before.[28]

**Doctrine of non-interference**

An important reason why the ASEAN countries went the way of Constructive Engagement is the doctrine of "non-interference" which the regional grouping had subscribed to from its very beginning. As Indonesian Foreign Minister Ali Alatas said in 1996 :

> "Asean has one cardinal rule, and that is not to interfere in the internal affairs of other countries. [The countries of the region] prefer to work quietly on issues of internal matters, and Western countries must realize that this [i.e. ASEAN] is our organization, not theirs."[29]

ASEAN believes that how a government ruled its country and treated its citizens, even if there were effects on the other neighboring countries, were matters which were strictly "domestic" affairs. Also, none of the ASEAN members wanted their own affairs to be publicly scrutinized. By condemning Burma, it would have set an undesirable precedent for open criticism of one another's treatment of domestic matters.

Non-interference is certainly no excuse for standing by and watching people die and suffer under an oppressive regime. Non-action, like an actionable omission, is arguably as culpable as active participation in the abuses.

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**Fear of reprisal**

The ASEAN countries also claim that the junta will not give up power easily because it fears retribution by a vengeful civilian administration. One ASEAN official reportedly said: "The Western position sometimes is almost tantamount to telling Slorc to commit suicide. If you give them the choice that the Western countries are doing -commit suicide or be isolated -of course they'll be isolated."[30]

This is a problem that the international community has to deal with together with the people of the country ruled by the regime. Distasteful as it may seem, it may sometimes be better to find a way out for the repressive regime in order to persuade it to give up power rather than to force it to fight to the bitter end

at enormous cost to everyone.

**Constructive engagement legitimizes the illegitimate regime**

One of the main arguments against Constructive Engagement is that it grants an aura of legitimacy to an otherwise illegitimate government. This is certainly the case in Burma where free and fair democratic elections were held and a government elected through that process. The military junta that seized power does not have the mandate of the people of Burma to govern. By engaging with the junta, the countries that do so are recognizing that it possesses the legitimacy to represent the interests of the Burmese people when it has none and perpetuates the myth of its legitimacy.

Gaining friends in the international community also means that the authoritarian regime has others to speak up on its behalf and lend a voice to protect its interests on the world stage. In gaining membership to ASEAN, the military junta in Burma gained the backing of a powerful regional grouping, particularly in its skirmishes with the Western nations.

Sanctions may not solve the problem either. As already seen above, isolation may have little effect on a country like Burma. What is required is engagement with specific aims, such as humanitarian assistance, aid and limited economic activity that makes it clear that the regime is being dealt with because it holds the reins of power, not because it has the mandate to govern.

## Wither constructive engagement?

The above analysis shows that Constructive Engagement is a seriously flawed approach to take with totalitarian regimes. On the other hand, sanctions are also unlikely in most cases to be effective in bringing about positive changes in a country and better treatment of human rights. What is required is an approach that steers a middle path between the two. With this in mind, I would propose the following.

It is evident that isolation is counter-productive. It is necessary to maintain a limited dialogue with the regime. However, it must be made clear to the regime and the world that any dialogue with it is not to be interpreted as legitimizing it. It must be clear that contact is made with it not because it is the legitimate government of the country, but only because it is in power. The kind of indulgence shown to the Burmese regime by ASEAN must be firmly discouraged.

The country that seeks to engage the regime must also make it clear to the regime that it genuinely wishes to help the general population, and that human

rights reforms, democracy and the rule of law will be beneficial to the country. If the engaging country is a Western country, it must be especially careful as too often, well-intentioned Western governments end up lecturing the other country (which is likely to be a poorer, non-Western state) and provoking resentment, instead of trying to persuade and conduct a real dialogue where there is a frank and equal exchange of views.

Trade and other economic activity should not be stopped completely as it hurts the people more than the regime. On the other hand, the kind of scramble that developed in the case of China and Burma should not be condoned as well. What is required is a concerted effort by the major trading partners of the rouge state to be selective about the kinds of trade and investments that they encourage. One way of doing this is to encourage the regime to free up the economy to more private enterprise so that a true market economy develops. At the same time, the foreign companies could be encouraged to do more business with the private sector so that it can be nurtured and the state's economic controls weakened. Either general guidelines or a code of conduct could also be established for companies wishing to do business in the rouge state which encourages fair wages, good working conditions and contribution to the community, e.g. by helping to build schools and hospitals. Local talent should also be nurtured so that a middle class can develop. Participation in certain sectors, such as telecommunications, energy and transportation, is also likely to be more beneficial to the country than being involved in building defense installations.

Historical allies or neighbors of the rouge state can also help by acting as a form of mediator between the regime and those opposing it so that a peaceful transition to democracy and rule of law can take place. The ASEAN countries played such a role in Cambodia and there is no reason to believe why the same cannot be done in Burma.

Humanitarian assistance and development aid should not be stopped, although the granting of aid and its utilization should be more strictly scrutinized to ensure that the regime does not pocket the money.

As things stand, it is clear that Constructive Engagement in its present form is unlikely to bring about changes in the near future. Neither are sanctions likely to be successful. If the above suggestions are adopted, I believe that respect for human rights and democracy will be more likely to emerge in the rouge states of the world.

## Endnotes

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# Shadow over Daw Aung San Suu Kyi's inheritance case

*B. K Sen and Khin Maung Win**

The lawsuit against Daw Aung San Suu Kyi filed by her brother Aung San Oo is for half ownership of the house where she now lives. As with most property disputes, and particularly in the very difficult situation Daw Aung San Suu Kyi is presently in, a private settlement would clearly have been preferred and would have been a more appropriate course of action for Aung San Oo to take. There would have been many options available, including negotiating a money equivalent of the half share or establishing a trust in which both interests could be held. However, he decided to file a suit against his sister without even affording her prior notice of his intentions. This approach reeks of a sinister attempt to publicly humiliate the acclaimed leader of the National League for Democracy (NLD), which overwhelmingly won the one and only democratic general election conducted by the military junta.

## Legal background to the suit

According to Burmese Buddhist customary law, on the death of the parents, all surviving children inherit the parents' property equally, irrespective of sex or seniority. Burmese Buddhist customary law is not a codified law. It is the sum total of the body of law made, constituting legal principles and judicial decisions. The procedure for civil actions is governed by the Burma Civil Procedure Code, and the rules of evidence by the Burma Evidence Act. The suit has to be filed in the Rangoon Divisional Court as the property is situated in Rangoon.

The mother of Daw Aung San Suu Kyi and Aung San Oo, Daw Khin Kyi, who became a widow when her husband General Aung San was assassinated on July 19, 1947, died in December 1988. Aung San Oo's legal move comes a month before the 12th anniversary of his mother's death. When co-heirs to an estate cannot settle their claims amicably, any one of the heirs can file a civil action for partition in court. The twelve year period of limitation begin running only when the dispute between the co-heirs starts, rather than at the last living parent's death. As the issue of sharing or partition of the property had apparently never been discussed between Aung San Oo and Aung San Suu Kyi until this civil suit was filed, there is no dispute between the two co-heirs yet, and so the twelve-year limitation period has not yet commenced.

Several probabilities arise from this case. Firstly, could it be that the property has been gifted by the mother or has been bequeathed under a will to Daw Aung San Suu Kyi? Under Burmese Buddhist customary law, a will is not valid. Similarly, any wish that property be sold and the proceeds distributed to charity is not legally enforceable.

A preliminary decree may be passed declaring the respective entitlements of the parties. A final decree must subsequently be passed. Thereafter the plaintiff has to execute the decree. In this case it would be possession of a half share of the property, and, if it cannot be divided into two equal parts, then division can be made by metres and boundaries. The defendant, Daw Aung San Suu Kyi in this case, can offer to buy the other half share, paying the market price as determined by the court, and thereafter become the full owner.

On refusal by her brother, a problem may arise as he may plead that he wants possession of one half of the property for his residence. The court must not entertain this plea because, as a foreign citizen and non-resident, he has no right of residence, far less possession, of the property in question. He could also plead that, given that he has no right to acquire ownership of the property, he may elect to make a gift to the State of his unrealised interest in the property. Whichever plea he may make, his sibling cannot legally be evicted from the property.

A pertinent issue raised by these proceedings is whether non-resident foreigners can sustain a claim to inheritance which is inclusive of possession when the claim offends the statutory law- the Transfer of Immovable Property (Restriction) Act as amended in 1987. Whether the Act attracts cases of inheritance is a moot point. However, there are several restrictions upon foreigners owning immoveable property under the statute, generally relating to the sale, mortgage or lease of such property. The amended Act stipulates that when a foreigner is in absentia, his or her property devolves to the state. On that view, the half share of the property of Aung San Oo, who is not a citizen, devolves to

the government, now SPDC. On conclusion of the suit, the junta will most probably take the position that, in deference to the wishes of Daw Khin Kyi, the owner of the property should vacate the property and give its proceeds away to charity.

## The relevant facts

The fact of whether Aung San Oo was a foreigner on the date when Daw Khin Kyi died in December 1988 will have much impact on the case. If he was a foreigner before his mother's death, the half share of the property he inherits under Burmese Buddhist customary law upon his mother's death could not have devolved to him because the Transfer of Immovable Property (Restriction) Act as amended in 1987 debars devolution of immovable property to a foreigner. His property devolves to the State. The other half will vest in Daw Aung San Suu Kyi who has never been a foreign citizen. In such a situation SPDC will have to file a suit for partition of the half share against Daw Aung San Suu Kyi. SPDC may get the half share by possession of half the property or by sale of the property. However, Daw Aung San Suu Kyi has a right of pre-emption to be offered the half share and retain ownership of the entire property. In this scenario, there will be no role Aung San Oo can play in filing a lawsuit against his sister, as he is doing now.

The fact of whether Aung San Oo was a foreigner on the date when Daw Khin Kyi died in December 1988 will have much impact on the case....
...If Aung San Oo took foreign citizenship sometime after Daw Khin Kyi's death, he was entitled to half of the property their mother left, under Burmese Buddhist customary law. However, his ownership became non-actionable under the amended Transfer of Immovable Property (Restriction) Act.

If Aung San Oo took foreign citizenship sometime after Daw Khin Kyi's death, he was entitled to half of the property their mother left, under Burmese Buddhist customary law. However, his ownership became non-actionable under the amended Transfer of Immovable Property (Restriction) Act. The Act bars any foreigner from acquiring, transferring and selling immovable property. However, the time has not yet come for SPDC to claim Aung San Oo's property because it has already devolved to him, as he was a citizen at the relevant time. Aung San Oo's property will devolve to the SPDC only when he dies. These are the legal processes to come under the second scenario, which is the path the case was heading down.

However, the SPDC cannot wait until Aung San Oo's death, as they are eager to immediately interfere in Daw Aung San Suu Kyi's compound, which is also the NLD's head office. The SPDC must find a way allowing them to legally claim half ownership of the domain. The SPDC's calculation is that if there is a court verdict that Aung San Oo owns half of the property, that property will devolve to the State, not to Aung San Oo by virtue of the amended Transfer of Immovable Property (Restriction) Act. SPDC picked up a provision in the Transfer of Immovable Property (Restriction) Act to pave the way for Aung San Oo's legal move against his sister for half ownership of the property. That provision is

Section 4 of the Act, which provides:

> Notwithstanding the provisions of the Section 3[1], the President of the Union [the SPDC Chairman at present as there is no President] may exempt from the operation of this Act the transfer of any immovable property or of a lease of immoveable property for a term exceeding one year.

It is understood that SPDC gave an exemption to Aung San Oo in July 2000 under this section.

## The question of the legality of the exemption

Another issue to focus on is the question of the legality of the exemption, which is the main legal ground upon which Aung San Oo has filed the lawsuit. The exemption does not stand the test of law in at least three points. Firstly, the test of purpose: an exemption may be given only where the use of the immovable property would be in the public interest. Secondly, the timing of the exemption: the giving of the exemption in July 2000, about four months ahead of filing the suit, indicates clearly that the exemption was not produced in advance. Under the law, an exemption could be given only when it had become clear that Aung San Oo owned half of the property and was ready to transfer it for charitable purpose. Thirdly, the mala fide nature of the exemption: the exemption was granted to enable a foreigner to file a lawsuit against a citizen. As a matter of law, an exemption can be given only for the transfer of property or a lease of a term greater than one year, not for filing a lawsuit to claim ownership of the property, as has been done in this case.

Considering the above three points, it has become apparent that the exemption lacks legal grounds. Therefore it is void and the lawsuit is dismissible.

**Endnotes**

* Authors are executive Committee Members of the Burma Lawyers' Council

1. Section 3: "Notwithstanding anything contained in any other law for the time being in force, no person shall transfer any immovable property by way of sale, gift, mortgage, or otherwise, or grant a lease for a term exceeding one year of any immovable property, in favour of a foreigner or any person on his behalf , and no foreigner shall acquire any immovable property by way of purchase, gift, mortgage, or otherwise or accept any lease of immovable property for a term exceeding one year:

   Provided that this section shall not apply to any transfer or lease of immovable property to a foreign government for the use of its diplomatic mission accredited to the President of the Union of Burma if the Minister for Foreign Affairs certifies that such transfer or lease should be exempted from the provisions of tis Act:

   Provided further that any transaction, whereby estate consisting of immovable property held jointly either by co-owners or co-heirs is divided and each one or more of such co-owners or co-heirs is or are allotted his or their shares to be held thereafter in severalty or where immovable property devolves on the death of the holder to his heir or heirs shall not be deemed to be a transfer of immovable property for the purpose of this Act.

# Constructive Engagement with Burma Sees Red Light

A compelling case has emerged which is of concern and needs attention in the region. The case refers to a joint venture in the Union of Myanmar (Burma) between a Singapore-based company, Yaung Chi Oo Trading, and the Ministry of Industry No. 1 of the State Peace and Development Council (SPDC). In 1993, the Union of Myanmar opened up its doors to foreign investment. The bankrupt Mandalay Brewery bubbled back to life. Mandalay Beer became a recognised brand name. A network of 40 pubs operated nationwide and it became the largest domestic taxpayer, generating revenue for the dilapidated state coffers. On November 11, 1998 the joint venture came to an abrupt halt when armed soldiers seized the brewery on the orders of the SPDC. The bank accounts of the partner were frozen and it was threatened with arrest for alleged misappropriation of funds soon after its final payment of $5.3 million.

The salient facts of the case are that the Ministry of Industry- No. 1 (MI-1) and Singapore based Yang Chi Oo entered into a joint venture in respect of the Mandalay Brewery for five years. According to clause 17 of the Myanmar Law 10 (Union of Myanmyar Foreign Investment Law), a contract shall be executed when a joint venture is entered into. An arbitration clause in the contract stated that all disputes between the parties must be referred to arbitration.

Before the end of the five-year term a dispute arose. The Ministry was required to refer the dispute to arbitration. On the contrary, however, the SPDC seized the factory and all the assets. This was highly arbitrary and was a clear case of taking the law into one's own hand. The SPDC subverted the legal process laid down by its own law. No subsequent filing of legal proceedings could legalize the previous illegality. Subsequently MI-1 commenced liquidation proceedings

against Yaung Chi Oo in court under Section 162 of the Burma Companies Act. Yaung Chi Oo, pointing to the law on the subject, took objection. The court, true to its ilk under SPDC, did not entertain the objection. On the contrary, it appointed SPDC's favorite, the tycoon Steven Law, as liquidator so that it could influence the liquidation proceedings and secure a favorable outcome. In such proceedings, the normal course is to appoint the Official Liquidator or, if the parties agree a qualified independent Chartered Accountant may be appointed.

This step shows the SPDC's contempt for law. A legitimate question that may arise is why the SPDC did not go to arbitration. This process was surreptitiously circumvented because in the event of arbitration proceedings, the other partner would have more say and leeway. The appointment of an independent Receiver might be sought. The time-honored legal process has been hijacked by the SPDC to promote its own interests.

The issues that arise are:

1. Whether in view of the contract the liquidation proceedings are maintainable,
2. Whether the application of the Burma Companies Act discloses a cause of action, and
3. 3. Whether the provisions of Section 162 of the Burma Companies Act have been complied with.

As the Court is biased the following steps must be immediately taken to prevent further mischief: A stay application must be filed before the court of Liquidations to stay further proceedings, pending an intended appeal under section 173 of the Burma Companies Act. The appeal must be filed in a higher court under section 162(6) of the Act against the order in Liquidation, along with an application for an interim stay of the lower court's order, pending admission of the appeal. These are defensive steps. An application pursuant to the clause of the joint venture contract regarding arbitration, read with section 8 of the Burma Arbitration Act, should be filed in the High Court for the appointment of an arbitrator by the court. In the same Act there is provision for the court to stay all other proceedings. Once this stay can be obtained other things can be sorted out. The questions of forcible seizure, renewal for the second term, innovation of the contract, breach of terms and allied matters can be thrashed out in the arbitration proceedings, failing which the only forum left will be the Liquidation court.

Analysts say that the incident is the outcome of a power struggle between the two factions in the military junta, led by General Khin Nyunt, the intelligence head, who is for economic openness and favored the Singapore-based partner, and Maung Aye, the Army Commander, who is opposed to too much openness too fast. Be that as it may; the basic reason is the murky Investment Law 10/88

The suicidal policy of the SPDC, in politics as well as in trade, will meet with its nemesis. The highlight of the Yaung Chi Oo case is that, as in all fields of peoples' lives, SPDC flouts the Rule of Law. Economic and commercial laws, which govern foreign trade, are no exception. They are two sides of the same coin - the coin being the SPDC. The message is clear for future investors.

of Myanmar, to which the investors have been lured. And of course the arbitrary legal system, which is supposed to safeguard the said law. The joint venture in which the foreign investors are trapped is a contract between the foreign partner and one of the Ministries, executed under the Union of Myanmar Foreign Investment Law. Although it guarantees under clause 22 that there shall be no nationalization during the tenure of the contract, clause 14 of the Law gives overriding power to the Myanmar Investment Commission to decide matters and terminate the contract before the expiry of the contract period. Under the Law, the Commission is composed of the 11 Ministers concerned with trade and economy and it decides disputes between trading partners in which the ministries have direct interests and where the trading partners are not at all represented. In the instant case, MI-1, the violator of law will sit as a judge as a member of the Commission. Why the investors agreed to such a clause cannot be understood except as insofar as it represents their craze to earn quick money. The true nature of the unjust clause has come out in the open in the Mandalay Brewery case.

It is reported the Myanmar Investment Commission engaged an independent chartered accountant to compile a report, and the report found that the takeover was conducted "without legal sanction". The Singapore partner has invoked a clause in ASEAN's Agreement of Promotion and Protection of Investment 1987, which confers jurisdiction to arbitrate if a domestic forum refuses. This Act covers all the members of the ASEAN group countries. ASEAN will have to show its ability to protect foreign investment in the region through its dispute settlement mechanism. It will also be a test of Burma's commitment to ASEAN, as it directly violates the commitment to protect foreign investment given by Burma on joining ASEAN in 1997. The SPDC's flagrant abuse of both its own and international laws protecting foreign investment will make the protagonists of constructive engagement think twice. The fall-out of the Singapore case will grind investment in the region to a halt.

Ironically there need be no sanction. The suicidal policy of the SPDC, in politics as well as in trade, will meet with its nemesis. The highlight of the Yaung Chi Oo case is that, as in all fields of peoples' lives, SPDC flouts the Rule of Law. Economic and commercial laws, which govern foreign trade, are no exception. They are two sides of the same coin - the coin being the SPDC. The message is clear for future investors.

# Burma's Election and Constitutional History: A Snapshot

*This is an outline of a speech given by the Honourable Janelle Saffin MLC, BLC Executive Member, at a seminar on Burma and its path towards independence and democracy, hosted by the New Zealand Asia Institute on the 18th-19th August 2000. For the complete text of the speech and other Burma commentary please see in the upcoming New Zealand Asia Institute's publication of the seminar's proceedings. The Institute is housed at Auckland University Auckland New Zealand. The Institute Director is Professor Chris Tremewan who is also Pro Vice Chancellor of Auckland University. Ms Xin Chen is the Executive Officer.*

> "Burma's constitutions do not reside in the hearts and the minds of the people and until they do there can be no constitutional settlement."
>
> "Burma is a country at war, but at war with its own people."

The summary seeks to capture the essence of the presentation that was to introduce the listener to Burma's troubled and confused path in seeking to gain independence and to consolidate democracy, which implicitly illuminates the absence of the rule of law.

The nation's constitutional and election history highlights the difficulties that have been encountered in securing peace with the people, particularly as the armed forces (Tatmadaw) have long ruled Burma. There is no culture of consent between the governed and the government and this is a constant of political life. Until this is remedied, the country embroiled in its own civil war for 52 years will stay at war in one form or another.

The 1990 election is but symptomatic of the affliction that besets Burma. Because of the armed forces complete mistrust of the people and a supreme belief in the military's primary role as the true saviours of the people, in 1990 those elected were and continue to be denied the right of incumbency. The party that won a landslide majority, and thus the right to form government, were denied that right

The military junta without the support of the people have clung through armed might to power. They make the laws at a whim and break them with impunity when the outcome is not to their liking. This is the continuing legacy of what was imposed upon the people following the 1990 election.

Daw Aung San Suu Kyi has said, "Please use your liberty to help promote ours."

The speech in part is a response to her call.

This is a snapshot of Burma's constitutional and election-electoral history, from 1922 until the present. It is a rebuttal of the Tatmadaw, also called the State Peace and Development Council (SPDC), government's claim that the 1990 multi-party general elections were not general elections. It makes clear that the 1990 election was supported by Burmese election law promulgated by the then named State Law and Order Restoration Council (SLORC) in 1989.

It demonstrates that, for the thirty-eight years (plus sixteen months as a caretaker military government from 1958), the Tatmadaw have ruled Burma since its formal independence effected at 4.20 a.m. on the 4th January 1948, they have proved incapable of effecting a lasting settlement and peace with Burma's large ethnic population. Significantly there is no rule of law and there has not been for a very long time. They have also failed to develop an institutional framework that can accommodate Burma's diverse political interests.

During the past 79 years Burma has had four constitutions. The first two of 1922 and 1935 (constitutional to some degree) were circumscribed by their colonial roots, and the 1947 (their independence) and 1974 (one-party state) constitutions all suffered from a lack of acceptance by the people.

Burma's constitutions do not reside in the hearts and the minds of the people and until they do there can be no constitutional settlement.

Burma currently has neither constitution nor constitutional government, and is ruled by a military junta that enacted a military coup d' etat on the 18th September 1988 in which they suspended the 1974 constitution *inter alia* by issuing Order 1/88 on the 19th September 1988. The SPDC is currently orchestrating a

'national convention' that has drawn up an administrative document referred to as 'constitutional principles' that would, if adopted, consolidate the Tatmadaw's role in politics and exclude the popular will of the people.

It, too, is doomed to failure.

In 1996 the then SLORC passed Order 5/96 that prohibited (and still prohibits) anyone from involving themselves in constitutional matters, even discussion. A breach of that Order carries a penalty of twenty years maximum gaol sentence. At the same time, the military junta continues to exhort the people in their national newspapers to be involved as a matter of civic duty. The contradiction is stunning.

The speech provides a revealing account of the processes set in place for the formation of the various constitutions. It highlights that, in particular, the 1974 referendum to approve or reject the constitution drawn up by the Burma Socialist Program Party (BSPP) (again the creature of the Tatmadaw under the stewardship of General Ne Win), had separate "yes" and "no" ballot boxes at the polling booths. The psychological warfare and control the junta had had of the population by this stage resulted in a very predictable if extraordinary high "yes" vote.

There was no such thing as a secret ballot.

The first elections were held in 1922, and subsequently in 1926, 1929, 1932 and 1935. All were free and fair given the limitations imposed by their colonial framework. Those polls were, however, boycotted by the active and strong political organisation, the General Council of Burmese Association. This Council had been initially established as the famous Young Men's Buddhist Association (YMBA).

After 1935 and Burma's separation from India, effected in 1937, there were no elections until 1947. During this period the Japanese Imperial Army occupied Burma for a period of three years. The 1947 elections were in preparation for independence and to have a constituent assembly design a constitution.

That constitution was adopted by the Constituent Assembly on the 24th September 1947 and, whilst it can be said it is a democratic constitution with regular 'rule of law' and 'separation of powers' safeguards, it too is criticised as wanting in form regarding its lack of inclusiveness, its colonial bias, and for the lack of public participation in the process.

It did, however, contain the surprising secession clause (after ten years) for three states. The untimely assassination in July of that year Burma's national hero, General Aung San (by that time U Aung San), removed the one person who had

The nation's constitutional and election history highlights the difficulties that have been encountered in securing peace with the people, particularly as the armed forces (Tatmadaw) have long ruled Burma. There is no culture of consent between the governed and the government and this is a constant of political life. Until this is remedied, the country embroiled in its own civil war for 52 years will stay at war in one form or another.

the trust of the many people of Burma.

It is widely said that if he had lived he would have put right what was missing from the constitutional form and process.

There were elections in 1951/52 that took seven months to complete due to the civil war that had erupted in 1949 and is still raging today, despite seventeen cease-fire agreements between various leading ethnic armies and organisations and the Tatmadaw. Elections followed in 1956 and 1960, and then by military coup, the Tatmadaw seized control on the 2nd March 1962.

On the 28th March 1964, all political parties were banned along with all other non-government organisations and it was not until the 26th October 1988 with the *Introduction of the Political Parties Registration Act* that parties were again able to form, and well over two hundred did.

Elections for the People's Assembly were held in 1974, 1978, 1984 and 1986 with only BSPP candidates allowed to stand, and the only choice being sometimes two candidates offered in the one constituency. The most recent election was held on the 27th May 1990. In this watershed election, the National League for Democracy (NLD) won 392 of the 485 constituencies contested (seven were deemed too unstable), thus the right to form government. The SLORC refused to cede power.

The SLORC claimed retrospectively that the elections were not multi-party general elections, that they were merely to elect a group to work out a constitution.

However, the respective *Political Parties Registration Law*, and the *People's Assembly Multi-Party General Election Law* (known as the election law), the establishment of the Multi Party Election Commission and public comments and assurances given in SLORC media conferences, despite some dissembling and ambiguity at times in terms of the SLORC's comments, put beyond doubt that that the legal purpose of the 1990 elections was to elect MPs to the People's Assembly.

… At the very worst, we are faced with a country which is at war with its own people, at the very best, it is a country which is holding its people hostage…

The powers and responsibilities of the Election Commission were defined in an order issued by the SLORC on the 21st September 1988 as doing "whatever is necessary for the successful holding of fair and free democratic multi-party general elections."

That the SLORC-supported party, the National Unity Party (NUP), won only 10 of the 485 constituencies shocked the Tatmadaw and this shock result remains the reason for them not ceding power. In fact the result was a shock only to the Tatmadaw who were and still are so out of touch with popular sentiment).

Burma's people have rarely been able to exercise their political will or have their voices heard by those that rule the country and the 1990 election was no different. The people spoke with actions, including the Tatmadaw members who voted for civilian government; yet again the Tatmadaw who claims to truly represent their interests ignored them.

The Burmese Tatmadaw Government representative to the United Nations 45th general Assembly claimed that "his country upheld the principles embodied in the Charter of the UN and the Universal Declaration of Human Rights (UDHR) and abided by them scrupulously." Article 21 of the UDHR says

> … The will of the people shall be the basis of the authority of government, this will be expressed in periodic and genuine elections…

The Tatmadaw have not accepted the will of the people as so clearly and so decisively expressed in the 1990 election. They have chosen to violate the UDHR that they claim to scrupulously abide by. They have continued to repeat that lie in various other forums wherever the opportunity arises.

Burma is a country at war, but at war with its own people.

Justice Rajsoomer Lallah, the previous UN Special Rapporteur on Human Rights Violations in Burma, best described the situation that prevails today in Burma as

> … At the very worst, we are faced with a country which is at war with its own people, at the very best, it is a country which is holding its people hostage…