

# Legal Issues on Burma

## JOURNAL

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## WHERE IS BURMA HEADING?

*Josef Silverstein\**

### **THE BURMA MILITARY LEADERSHIP IN PERSPECTIVE.**

After forty years of the Burma military in power, there are at least two things that remain unchanged: whether the members of the ruling group rose through the ranks and Officers Training School (OTS) or through appointment to and training at the Defense Services Academy (DSA), both produced officers who were considered hardliners and moderates. While Generals Ne Win and Than Shwe were seen as hardliners, those who served closely under them represented both groups. As the pendulum of power swung from hardline to moderate and back, the character of the government and its policies shifted without affecting the status of the General at the top. A second common characteristic is corruption. It has and continues to permeate the army forces at all levels and had nothing to do with the ethnicity of an officer nor his ideology. During Ne Win's undisputed leadership of the military and the nation he chose men who had served directly under him and advanced them into the ruling circle; continued loyalty to the General and not the individual's performance in his office were the measure of his tenure. Officers were removed from the ruling circle by allowing some to retire while others, who had offended the General in some way, by dismissal, arrest and imprisonment. Ne Win's way of making senior appointments and removing them from office continued under his successors, Generals Saw Maung and Than Shwe.

When Burma's Foreign Minister, Win Aung, was removed on September 18, 2004, it jarred the political kaleidoscope of military rulers. He was a protégé of Gen. Khin Nyunt, Secretary 1 of the ruling group, the State Peace and Development Council (SPDC). Win Aung appeared to be well thought of and respected by members of the diplomatic community with whom he came in contact and carried out his responsibilities professionally. His replacement, Maj. Gen. Nyan Win, is a man, known to be loyal to Gen. Than Shwe who was without diplomatic experience and language skills who was expected to learn "on the job". The arrest, dismissal from the offices he held and incarceration of Gen. Khin Nyunt was carried out swiftly and with no forewarning; the rapid removal of

leaders subordinate to him, was wide and deep. For a second time, these changes violently shook the kaleidoscope and the pieces have yet to arrange themselves in a new pattern and come fully to rest. Although no reasons were given for the change in Foreign Minister, the dismissal of Gen. Khin Nyunt was accompanied by charges of corruption against officers directly under his command and therefore his responsibility. All of the accused were arrested and imprisoned. The purge went beyond the ranks of senior officers and included the dismissal or reassignment of lower rank officers and ordinary soldiers. In the tradition of Gen. Ne Win, Gen. Than Shwe moved quickly to plug the holes in the ruling junta. He chose Lt. Gen. Soe Win to replace Gen. Khin Nyunt as Prime Minister. In 1997, he became a member of the ruling junta; in 2003, he was promoted twice, first to SPDC Sec. #2, than to Sec. 1. It demonstrates a close friendship between the Chairman of SPDC and Lt. Gen. Soe Win.

Since it was Lt. Gen. Soe Win who signed the dismissal of Foreign Minister Win Aung at a time Gen. Khin Nyunt was Prime Minister, it indicated that the Chairman had great trust in the Lt. Gen. and foreshadowed the changes which occurred the next month.

Personnel changes reflect both the settling of old scores with rival contestants for power and solving personnel problems the leader probably believes cannot be corrected in any other way; Retirement, dismissal and arrests are the rewards for those whom the leader believes have betrayed his trust. Without hard information about the ruler's relationship to the officers around him and their rise and fall, rumors and speculations by commentators and journalists who are believed to have some knowledge of what happens inside the ruling circle are seized upon and retailed throughout the system and the world at large. From the imperfect information at hand, do the personnel changes made thus far by Gen. Than Shwe suggest the beginning of a "new order" with changes in political goals, institutions, processes and other personnel changers soon to follow? And, if a "new order" is in progress, will it be more hardline or moderate? Rumored not to be well and desirous of retirement, who will replace Gen. Than Shwe and lead the nation? Finally, where is Burma headed?

### **THE RULER.**

Senior General Than Shwe, the head of SPDC and Commander in Chief of the Armed Forces is the undisputed ruler of Burma. His military leadership education began as a member of the ninth class of the OTS and was trained as a psychological warfare expert. He rose to the rank to major-general in 1985 and following the armed forces violent suppression of the 1988 popular demonstrations for political change, he became Vice Chairman of SLORC, Deputy Minister of Defense and Army Chief of Staff. In 1990, he was promoted to General and two years later, he replaced Gen. Saw Maung as head of SLORC. As Chairman of the ruling military junta, SLORC/SPDC, General Than Shwe approves

the selection of its members and its policies. He is reported to have signed the arrest order of General Khin Nyunt. He has led the nation since April 23, 1992, when he replaced General Saw Maung, and serves as the Chairman of the State Law and Order Restoration Council (SLORC)—renamed in 1997 as the State Peace and Development Council (SPDC)—and Defense Services Commander-in-Chief. So long as he remains head of SPDC, any discussion of Burma politics must begin with him.

At the beginning of his tenure as Chairman, he appeared to be moving the nation in a more moderate direction than that followed by his predecessor. He also seemed to have adopted a friendlier attitude toward Daw Aung San Suu Kyi than his predecessor, Gen. Saw Maung.

Before Gen. Than Shwe took over SLORC's leadership, she had been placed under house arrest and isolated from family and outside contacts; his government announced that she could see family members; shortly afterward, SLORC permitted her to have non-family visitors. Also, unlike the government of Gen. Saw Maung, General Than Shwe's acknowledged the existence of political prisoners and in words, not unlike those his government used twelve years later, following the fall of Gen. Khin Nyunt, SLORC was reported to have said, "...of the persons arrested and detained politically, those for whom there are no reasons to endanger the security of the State, will be released promptly". Also in 1992, on the long war against the Karens, SLORC offered a New Year's Resolution which declared that the army would defeat the Karens and capture their headquarters at Manerplaw before the arrival of Armed Forces Day (then celebrated on March 27). With the world watching, it saw the failure of the Burma army to achieve either of its proclaimed goals. When Gen. Than Shwe assumed power a few weeks later, he halted the war to capture the Karen headquarters and the government's spokesman declared a new goal and different goal which took the nation's attention away from internal war—the convening of a National Convention (NC) whose responsibility would be "...to lay down the basic principles for the drafting of a firm and stable constitution..." (Decl. 10/92). Both actions caught the nation by surprise and drew a variety of responses from skepticism and doubt to guarded statements of hope from foreign governments and political commentators alike. A Burma journal of that period, published in Thailand, dismissed both the National Convention and its task by asking, "How can a constitution written under a dictatorship be a reliable and democratic one?" (B.U.R.M.A Vol. 2 Number 5 May 1992, p. 7).

These early actions of SLORC under Gen. Than Shwe seemed to suggest a more humane and pragmatic approach to politics than those of his predecessor and the first steps toward peaceful political change. Today, twelve years later, with Than Shwe still in control and exercising more power than when he assumed office, the 1992/93 resolutions and actions, at best, have only been partially fulfilled; SLORC/SPDC's actions reveal a hardening of its policies toward the people and a steady effort to preserve and protect the military dictatorship which it disguises behind the rhetoric of working to create a democratic

system and transfer power back to the people.

The problem of political prisoners has been particularly vexing to the people and democratic parties of Burma who see their release as the first real step to democratic change. As noted above, in 1992 SLORC released a few political prisoners immediately and then from time to time, it gave freedom to others in order to rebut and deflect criticism from abroad and keep alive domestic hopes that the release of a few will be taken as signs that political change may soon be underway. Appeal for the release by family members, world figures, regional and world organizations were largely treated the same—SLORC/SPDC ignored them and never explains why the prisoners were held and when they would be freed. When political prisoners were released the government follows no pattern. Old age and infirmity only had a minimal effect upon the authorities; neither was the fact that prisoners have completed their terms of imprisonment a satisfactory reason. Only when Burma seems to be facing some kind of diplomatic crisis, have the rulers used the release of prisoners as a way to deflect criticism. Following the arrest of General Khin Nyunt, the Than Shwe-led SPDC announced that under him thousands of individuals had been arrested, imprisoned and held illegally. To right the wrong, it announced that it was taking action to correct the injustices; to date, SPDC have release 14,318. However, as soon as family and friends began to search among those freed, no more than 100 were identified as political prisoners while the rest were ordinary criminals at or near the end of their sentences. The most prominent political prisoner to recover his freedom was the secret student leader Ko Min Ko Naing (Paw Oo Tun) who led the 1988 peaceful demonstrations. At the sametime, Daw Aung San Suu Kyi, U Tin U, other leaders of the NLD and prominent public figures remain under house arrest, or in prison and out of touch with their supporters and friends. With no explanation why Ko Min Ko Naing was released and no apology of any sort for keeping him locked up for years after he had served his sentence, it is impossible to say what Gen. Than Shwe and the members of SPDC were trying to convey by the cruel hoax of seeking credit for its humanitarian act when the people knew that innocent people who deserved their freedom, remained in prison. The idea of writing a new democratic constitution has not been realized and with the soldier-rulers holding tightly and violating both its own laws as well as international law, a truly popular constitution will never be written.

When, in 1992, the SLORC announced the formation of a National Convention and the writing of a constitution it said nothing about creating an environment of freedom first—end martial law, free all political prisoners, restore freedom of movement, assembly and communication, end the police state of informers, midnight arrests, violence against peaceful citizens and remove the draconian laws and declarations which restrict, violate and dehumanize the people.

Until SLORC declared the convening of a National Convention to write the principles and possibly even the constitution, there was no legal basis for their action. Under the 1989 Election law, the people were given the right to form

parties, write their manifestos and draw up their programs, and, under tight restrictions to meet and campaign for seats in a National Assembly (Pyithu Hluttaw). The elected members were supposed to form themselves into a National Assembly. The law said nothing about a role for the military to intervene in and certainly not to direct the affairs of the national assembly. Most important the election law made no provision for the formation of a national convention of mainly nonelected delegates to formulate the principles upon which the people's representatives must write the constitution. Stealing the right of the people's elected representatives to write the constitution free of dictation was one of the worst political crimes the military rulers committed; it made them and not the people, the criminals.

In 1993, delegates to the National Convention were assembled, told which principles to include, not to discuss their work with each other without permission and not to discuss the proceedings with their constituents and parties. The participating delegates followed the guidelines of the military in charge and incorporated the six objectives declared by Gen. Than Shwe's government and 104 basic principle written in advance by the military theorists. In 1996, with nine of the new constitution's chapters written and six to go, Daw Aung San Suu Kyi withdrew the NLD delegates from further participation. She stated that the reason for her action was that the soldier-rulers did not allow the participants freedom of speech and censored everything they wrote and said both in and outside of the NC. Without participation of the political party that won the 1990 election, the people were not represented. The National Convention stopped meeting in 1996 and the writing the basic principles was not completed. In 2003, the NC was revived and given new importance when, Gen. Khin Nyunt, as Prime Minister announced that his government had developed a road map of seven steps to democracy and the first step along the way was the writing of a new constitution.

The question, who should write the constitution, was not spelled out in the Election Law. SLORC issued Declaration 1/90 on July 27, 1990, and the delegates to the NC affirm, by signing the document, which said in declarative language in Art. 20, that "the representatives elected by the people are responsible for drafting the constitution for the future democratic state." So long as the military rules by martial law and Decl. 1/90 remains valid, the elected members must be free to assemble and allowed to carry out their responsibility.

But the military has had a dozen years to convene the National Parliament and recognize the outcome of the election and has not. Therefore there seems to be little likelihood that SPDC will convene it now. If the NC writes the basic law, it will be another step away from restoring power to the people and a step closer to giving authoritarian rule a veneer of legitimacy.

Finally the war against the Karens, SLORC attacked the Karens in 1995, after Burma Intelligence engineered a split between Christian and Buddhist Karens. With the aid of the latter, the army captured and overran Manerplaw. But the

victory, thus far, has been hollow as fighting between the two continues. The Karens, fighting a defensive guerilla war against the army have, on six occasions since the 1992 declarations of Gen. Than Shwe's government, held talks with representatives of the government, but no real agreement has resulted. After five inconclusive meetings, Gen. Bo Mya of the KNU and Gen. Khin Nyunt met in Rangoon in January 2004 where they orally agreed to a ceasefire. During the meetings, the Burma military leaders showed a "softer side" by giving Gen. Bo Mya a surprise birthday party. Contradictory reports say that Gen. Than Shwe also met and talked to Gen. Bo Mya, but later, the Karen spokesman denied that a meeting between the two took place. In October, the Karens returned to meet again with the military leaders, but the arrest of Gen. Khin Nyunt and the changes in Burma government leaders caused the talks again to be postponed. By the end of November, Maj.Gen. Myint Shwe, Commander of the Rangoon Military Command, became the new Chief of Military Intelligence and inherited the role of continuing the negotiations with the Karens. It remains to be seen if they will pick up where they left off; if not, will all-out war be resumed?

The Karens were not the only ethnic minority group in revolt to negotiate with the Burma military leaders. In 1989, following the collapse of the Burma Communist Party, Gen. Khin Nyunt, as head of Military Intelligence went to the China-Burma border where he entered into discussions which led to truces with remnants of the BCP who had broken away and established political and military organizations of their own. The agreements allowed the former insurgents to govern their own people and areas, retain their weapons and develop their own economies. The pattern of the truces was followed by the government in discussions and truces with seventeen different groups. Thus far, the agreements have held and much of the warfare in the border areas has stopped. But with elements of the Karens and Chins, the Karenni and Shans refusing the terms, the wars against them continue with the people who are caught in the middle suffering the most. With the changes in the military leadership, the question how will the new military leaders around Gen. Than Shwe deal with the minorities now that so many are willing to end the wars permanently if they can maintain their autonomy, enjoy real authority in their own areas and preserve their cultures and identities. These are political questions, former General Khin Nyunt always said, that can only be decided after a constitution is in place and an elected government is in power. These are inducement to the ethnic minorities to embrace the roadmap to democracy and accept the leadership of the military. Will they take them?

### **GEN. KHIN NYUNT**

In political terms, until November 18, 2004, General Khin Nyunt was the second most important member of the ruling junta. He received his original military training in the OTS and was serving as a middle ranking infantry officer

until he was selected by General Ne Win to head the Military Intelligence. His opportunity arose following Ne Win's dismissal of several of its leaders and purging them from military service. Khin Nyunt's survival and success as the head of Military Intelligence grew out of his close and trusted relationship with General Ne Win. His Intelligence position gave him access to the personnel files of all his fellow officers and provided the information Gen. Ne Win used to keep informed about their loyalty and private behavior. An expert on Burma Intelligence recently wrote that the DDSI and Military Intelligence appeared to have "almost unrestricted authority to arrest without warrant, detain and investigate anyone suspected of political dissent, violent or non-violent." Khin Nyunt was close to Gen. Saw Maung and when the military junta seized power, he was named Secretary #1. He held that position until 2004 when he was named Prime Minister as Secretary #1, he spoke for the ruling group and became the best known amongst the leaders to outsiders as informed and authoritative. He continued in the office after Gen. Than Shwe became Chairman and held the position until he was named Prime Minister. In 1983, Gen. Ne Win selected him to replace the then head of Intelligence, after the latter had been dismissed because he allowed officers to address him as No.1 ½ which implied that he was the successor to Gen. Ne Win. He found his candidate in a Light Infantry unit, promoted him to Colonel and gave him the task of reorganizing the Intelligence. He continued in that position until 1988, when took on the added task of Secretary #1 in the ruling junta. Lt. General Soe Win, now is the new Prime Minister and General Thura Shwe Mann, is the new Defense Services Chief of Staff—they together with Lt.Gen. Soe Win are the officers who stand next in line to Gen. Maung Aye to fill the vacancy as the third most powerful leader in the country.

General Maung Aye, the Deputy Commander of Armed Forces, is the designated successor to General Than Shwe. A graduate of the first class of officers trained at the Defense Services Academy, he had both academic and military training and steadily rose to a Regional Commander from which he was promoted to membership in SPDC. In the last few years, most observers saw him and Gen. Khin Nyunt as rivals for succession to General Than Shwe with Maung Aye as a "hard-liner" and Khin Nyunt as the moderate.

People have forgotten that in the beginning of this regime, and Khin Nyunt was Secretary 1 of the SLORC, he presented and defended the hard line which was the position of the junta, whether explaining why SLORC did not transfer power after the election of 1990 or in declaring Daw Aung San Suu Kyi as a dupe of the Communists. In those days, international journalists gave him the name of "Darth Vader" of the ruling group. As the voice and personification of the military ruling group, he became better known to the outside world than Than Shwe, who was seen as more enigmatic and perplexing than his subordinate, whose command of English and contact with foreigners made it possible for the outside world to accept what he said and to believe they knew and understood the power structure in Burma. Until the first release of Daw Aung San Suu Kyi, he

and his subordinates were the main intermediaries between her and international representatives and the prime source of information about her. After she was released, the first time, his presentation of her changed and he began to be seen as the realist and pragmatist amongst the rulers who seemed to be looking for ways to heal the rifts between Daw Aung San Suu Kyi and General Than Shwe. Meanwhile, the outsider's view of Generals Than Shwe and Maung Aye was that of reactionaries, closed-minded men who disliked Daw Aung San Suu Kyi and were unwilling to see and talk to her about peaceful political change or to reach the people and persuade them that they, the rulers, too, wanted internal peace and eventually "disciplined" democracy, to reunite the nation and transfer power to the people once a new constitution was in place and the nation was on its way to becoming united behind a new constitution the rulers were determined to create.

Unlike his rivals for power, Khin Nyunt was the most experienced in dealing with foreigners and had represented Burma at numerous official and unofficial meetings. His Intelligence responsibilities as head of the National Intelligence Bureau, brought him information about foreigners as well as Burmese. He developed a network of spies and informers who produced almost unlimited information about every person in Burma—their contacts, movements information—formed the foundation for the success of Burma's police state where everyone feared that even family members and/or friends could be coerced to reveal anything they knew because they feared imprisonment, torture and other punishment if they tried to conceal their knowledge.

Nearly a quarter of a century ago, the MI went through a partial dismantling and a purge of personnel and quickly recover under a new leader and personnel. Today, things are different, computers and electronics of all sorts do more of the basic work than the human personnel. To use the equipment correctly and efficiently, there is a need for skilled and capable personnel at all levels. How well are the Burma armed forces prepared for such a situation that it faces today is not known; but given what is known about the level and modernity of education, it is unlikely that a surfeit of personnel is readily available. Who is to vet the personnel from top to bottom and how long will the replacements have to be on the job before they are fully trusted to do their assigned work.

These are but two of many questions which must be asked and answered by those who know. Until the Intelligence is fully up and running, the technical support that the Intelligence is expected to provide will not be there. Given the fact that Burma is more enmeshed with its neighbor states than ever before, it will be more cautious and hesitant than it has been in a long time.

Given this situation, Burma will be more reactionary and conservative in its decisions and actions. Its remaining leaders will be more cautious in making appointments and promotions and all will be fearful of everyone who might profit from Burma's temporary weakness. If there are moderate leaders still

remaining at the top, they no doubt fear transfer and dismissal and will be hesitant to put forth their full opinion when asked for fear that their answers may appear too moderate for a state under “siege”.

It is impossible to see where Burma is heading in the short run. In the long run, the hardline policies developed in the past will continue to guide the nation. This is not the time to look for new ideas and experimentation by the rulers of Burma.

### **Endnote**

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

# ECONOMIC PRESSURE: THE POLITICAL CURRENCY OF THE BURMESE JUNTA. REFORM THROUGH DISENGAGEMENT

*Jane Carter\**

## **Introduction**

Arresting the systematic and widespread human rights abuses perpetrated by the Burmese military government<sup>1</sup> against the disenfranchised and impoverished Burmese population presents as one of the more difficult challenges to the international community.

This essay explores the prospect of encouraging the ruling junta to observe fundamental human rights and promote democracy in Burma, through the strategic withdrawal of trade with, and financial investment in, Burma. Economic pressures applied in a complementarity of state and private action may be more effective in enforcing human rights than the 'constructive engagement'<sup>2</sup> approach that has been adopted by the international community. In the absence of direct intervention to restore a democratic regime, the Burmese junta is unlikely to initiate reform unless it determines that change is required for its own preservation. This essay will examine two means by which economic pressure may be applied to the junta to encourage such change.

The first 'mode' of influence that will be discussed is the growing body of jurisprudence in domestic law that extends liability to 'non-state' actors for alleged human rights violations. The essay will focus on litigation pursued by a group of Burmese citizens in the U.S. Courts against Unocal, a U.S. based company, in relation to a project it undertook in collaboration with the SPDC in Burma. This litigation has strengthened the possibility that corporations will be held legally responsible for their actions across the globe. While at the time of writing, this matter has not been finally determined by the Courts, a decision in favour of the plaintiffs in this case could potentially have far-reaching consequences for the ruling junta and trans-national corporations involved in Burma.<sup>3</sup>

In brief, a decision on the merits of this case could potentially lead to large-scale divestment in Burma.

The second aspect of this essay will consider the effectiveness of targeted multi-lateral economic sanctions imposed upon Burma as another significant 'mode' of influence. While there are already considerable trade and assistance restrictions in place against Burma, the current arrangements are ad-hoc, rather than a complementarity of targeted and centralised measures. Despite the common criticisms of sanctions as blunt instruments with unintended and disastrous consequences for the general population, a tailored set of 'smart sanctions' may be an enforcement strategy that merits further consideration. In this context, a uniform set of sanctions combined with a 'responsible engagement'<sup>4</sup> approach could provide significant pressure on the junta to embrace reform, or face the threat of returning to economic isolation.

In exploring these two distinct tools of change, my goal is to suggest that the threat of substantial barriers to global trade and investment through a combination of foreign corporate divestment and direct multi-lateral targeted sanctions may be a viable means of effecting change in Burma. The central premise to this argument is that foreign capital is inextricably linked to the survival of the junta. The SPDC is currently in a financially precarious position<sup>5</sup> and is eager to expand its trade relations and economic opportunities.<sup>6</sup> A concurrence of policies implemented by states and corporations alike, that jeopardise the junta's access to revenue may force the junta to finally respond to the international community's calls for an end to the violence.

As a human rights enforcement strategy, the confluence of corporate and state initiatives outlined above is not without its limitations. Foreign policy is multi-faceted and there are many other diplomatic and political tools available within the international community's suite of strategies that may serve to effect change. As a number of commentators argue, state and non-government efforts including consumer boycotts, all contribute to "a multi-tiered enforcement structure"<sup>7</sup> for global human rights, which combine to enhance the prospect for change. No single initiative will achieve a peaceful and genuinely democratic Burma. Most notably, this approach does not preclude the use of limited engagement to promote and elicit positive behaviour by the junta.

### ***THE FAILINGS OF DIPLOMACY?***

Since 1991 Burma has been the subject of annual resolutions by the United Nations General Assembly, condemning the junta's human rights practices and outlining the necessary reforms to move Burma from a dictatorship to a democracy<sup>8</sup>. Despite the extensive denunciations, the recalcitrant Burmese regime has been largely unresponsive to these diplomatic efforts. Burma remains one of the world's worst violators of human rights. Little or no progress towards democ-

racy has been made.<sup>9</sup> Other international bodies such as the Human Rights Commission and International Labour Organisation<sup>10</sup> have also attempted to exert pressure on the junta to reform. Regional bodies have also called for change, with no apparent effect<sup>11</sup>.

Over the same period, states have largely adopted a 'constructive engagement' approach with the SPDC<sup>12</sup>. Proponents of economic engagement as a foreign policy tool cannot persuasively argue that this approach has influenced the regime to become more open or democratic. Rather, the particular litigation that is discussed below highlights the risks inherent with unregulated and unrestricted economic engagement.

### **PART I - LIABILITY THROUGH COMPLICITY; MULTINATIONAL CORPORATIONS OPERATING INSIDE BURMA**

Due to the nature of the activities conducted by trans-national corporations<sup>13</sup> alone or in conjunction with corrupt governments, these bodies have the potential to impact on human rights.<sup>14</sup> Equally, it can be argued that the power these corporations wield can impact positively on the political stability and human rights situations within some countries. However, substantial foreign corporate investment in Burma over the last two decades has not achieved such positive outcomes. On the contrary, there have been instances where corporate investment has contributed to conflict and human rights abuses.

Despite the existing trade and investment barriers,<sup>15</sup> foreign investment in energy and mining enterprises in Burma has become a significant source of revenue for the current regime.<sup>16</sup> Such projects rarely produce tangible financial benefits to the general population and arguably further entrench the regime.<sup>17</sup> In this first part of the paper, I will examine the responsibilities and risks that may be associated with trans-national corporations operating in Burma.

#### *PURSUING CORPORATE ACCOUNTABILITY THROUGH THE COURTS*

The rise of globalisation has enabled corporations to do business seamlessly across the globe, in a largely unregulated market. In their efforts to address the consequences certain corporations' alleged complicity in human rights abuses, Non-Government Organisations (NGOs) and other bodies have successfully targeted these corporations with high profile consumer campaigns and boycotts. The breadth and intensity of scrutiny by NGOs and others is becoming a significant concern for such corporations and is impacting on multinationals' corporate activities.<sup>18</sup> As discussed below, this issue has also become a matter for the Courts.

The Unocal litigation is defining the parameters of corporate responsibility.<sup>19</sup> Traditionally, states were the exclusive subjects of human rights law however

recently there has been a shift in the focus of international law on to private actors such as multinational corporations.<sup>20</sup> A notable illustration of this extension is the new wave of claims initiated in domestic courts to obtain redress against multinational corporations, holding them accountable for human rights violations under norms of international law. In these cases against companies based in the United States, violations were directly committed by governments rather than the corporations<sup>21</sup> however plaintiffs pursue the corporate entity on the basis that it was complicit in the violation.

This essay will focus its discussion on a matter initiated under the *Alien Tort Claims Act* of 1798 (ATCA), however there are other forms of litigation also being pursued with the objective of enforcing corporate compliance with human rights. Principally, the other actions target parent companies of multinationals, to encourage companies to comply with their domestic standards of care in all their operations, regardless of where their operations are conducted across the globe.<sup>22</sup> There are also a number of non-litigious campaigns conducted by NGOs that form part of this approach to secure multinational accountability, with substantial success in relation to corporate conduct in Burma.<sup>23</sup> These campaigns include consumer boycotts, selective purchasing laws and shareholder activism aimed at limiting economic engagement with the regime.

#### *BACKGROUND TO DOE v UNOCAL*

In 1996 a group of Burmese citizens made an application to the United States District Court to sue Unocal, a US-based oil multinational company, for alleged human rights violations committed by the Burmese military in Burma.<sup>24</sup> The company was involved in a joint venture with the Burmese government to construct an oil pipeline called the Yadana pipeline. It was in the course of constructing the pipeline that the plaintiffs allege that the Burmese military, on behalf of the joint venture, subjected the local population to a program of violence and abuses including forced labour and forced re-location.<sup>25</sup> The plaintiffs argue that Unocal conspired with the Burmese military to commit these offences. The plaintiffs further allege that Unocal was both aware of these egregious violations and benefited from the actions of the military. Although the company did not directly carry out the purported violations, by virtue of its involvement in the project and its connection with the principal perpetrator, the plaintiffs argue the company should be held liable.

The application was made under the ATCA which provides District Courts with original jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” This statute has been interpreted to permit non-citizens of the United States to file suits in federal courts against any persons captured by the court’s jurisdiction, for a violation of customary international law or a treaty to which the United States is a party. ATCA has provided a vehicle for non-US citizens to sue in US courts

for violations of their human rights committed outside the US. More recently, this legislation has been used to pursue claims against multinational corporations for their complicity in the perpetration of alleged human rights abuses committed by states in offshore projects. There are a number of threshold requirements that must be established for an action to proceed against a corporation (or other non-state actor) for actions committed by a state, under ATCA. In brief, those requirements generally include the following:

- the claim is made by a non-citizen;
- the alleged tort is sufficiently serious to constitute a breach of the 'law of nations'<sup>26</sup>;
- there is an element of 'state action';<sup>27</sup> and
- the corporation was complicit in the abuse committed by the state.

Each of these obstacles and the way the Courts have dealt with them will be discussed in turn.

#### *Doe v Unocal 1997<sup>28</sup> - extending jurisdiction under ATCA to corporations*

In 1997, Paez J of the Central Californian District Court found that an action could lie against Unocal. In his ruling, Paez J found that the plaintiffs had established sufficient facts to sue under ATCA for a breach of the law of nations and that the requisite connection between the alleged violation, the principal perpetrator (the Burmese military) and the defendant corporation had also been sufficiently pled. This decision was a watershed and extended the types of actions that could be pursued under ATCA, to include jurisdiction over corporations as well as states and natural persons. It is worth noting that simultaneous to the federal ATCA litigation, Unocal is also being sued in a State-based action in the Superior Court of California, on the same facts.<sup>29</sup>

#### *Doe v Unocal 2000<sup>30</sup> - a narrow standard for liability*

The District Court of Central District California dismissed the case, granting Unocal's motion for summary judgement on the basis that there was an insufficient connection between Unocal and the alleged abuses to establish liability. In considering the requirement to establish state action under ATCA, Lew J applied an extremely narrow 'joint action' test for determining proximate cause between the acts of the corporation and the alleged abuses committed by the military. For the purposes of claims based on murder, rape and torture the case failed because the plaintiffs did not satisfy the court that the company controlled the Burmese military's decision to commit the acts. In terms of the claims of forced labour, the case failed because the plaintiffs could not show that Unocal "actively participated in or influenced"<sup>31</sup> the military's conduct. The Court ruled against the plaintiffs notwithstanding the finding that there was sufficient evidence to establish that Unocal knew or should have known that the abuses were

occurring and profited from the practice.<sup>32</sup>

*Doe v Unocal 2002*<sup>33</sup> – a broader approach to joint liability

On appeal, the U.S. Ninth Circuit Court of Appeals reversed Lew J's decision in part and affirmed it in part. On the following threshold questions the majority found that:

- the alleged torts were a violation of the law of nations;<sup>34</sup>
- state action was not a prerequisite to establish liability under ATCA for the alleged abuses. Forced labour was held to be among the “the handful of crimes to which the law of nations attributes individual liability such that state action is not required;”<sup>35</sup> and
- Unocal could be liable for the alleged forced labour if it could be established that the company aided and abetted the Burmese authorities as an accomplice, in perpetrating the abuses. The test derives from international criminal law and requires knowing “practical assistance or encouragement which has a substantial effect on the perpetration of the crime”.<sup>36</sup> The majority concluded that, on the facts, this standard had been met.<sup>37</sup> In adopting this approach, the court overruled the standard previously applied by Lew J of the District Court<sup>38</sup> requiring ‘active participation’. Unocal also had “actual or constructive (reasonable) knowledge”<sup>39</sup> that its conduct assisted the authorities to commit the abuses, satisfying the majority that there were genuine issues of fact that both actual and mental elements of the offence required for liability under ATCA could be met.

Reinhardt J delivered a separate judgement endorsing the conclusion of the majority, but adopting different reasoning. He determined that the majority's consideration of whether the alleged violations constituted ‘private actor’ abuses was superfluous because it was clear that the State had acted. He rejected the majority's application of international criminal law principles to establish that the defendant aided and abetted the Burmese authorities in the perpetration of the alleged abuses. Instead, Reinhardt J applied tort law principles<sup>40</sup> such as agency, joint venture and reckless disregard as the appropriate source of law to determine joint liability. In brief, Reinhardt J found that the company could be held liable as a joint venturer for the violations perpetrated by its co-venturer, the Burmese military as “Unocal freely elected to participate in a profit-making venture in conjunction with an oppressive military regime – a regime that had a lengthy record of instituting forced labour, including child forced labour.”<sup>41</sup> Furthermore, the plaintiffs had pled sufficient facts to establish the reckless disregard claim. This conclusion was based on the threshold claim that Unocal had entered into the project knowing that the Burmese military was a co-venturer. The reckless element of this conduct was based on the fact that the company “had knowledge that the military engaged in widespread human rights abuses, including forced labour.”<sup>42</sup>

The 2002 decision of the Court of Appeal is pending appeal by an *en banc* panel of the Ninth Circuit Court of Appeals.<sup>43</sup> The full panel is scheduled to hear submissions during December 2004. Any finding of partial or complete liability will have profound implications for corporations with interests in Burma, as discussed further below. If the Court applies the 2002 tests of the majority or Reinhardt J for joint liability, the legal net for corporations will be cast significantly wider than Lew J's scope for liability. The Appeal Court may even adopt Lew J's approach but refine its test for state responsibility to render Unocal culpable. In the event that the Appeal Court adopts Reinhardt J's line of reasoning, this broad construction of joint liability could lead to wholesale divestment from the country because all corporations in partnership with the brutal regime would arguably be at risk of liability for the junta's abuses.

### *MEASURING COMPLICITY*

As illustrated by the Unocal matter, the Courts have taken divergent views on what test should be applied in determining a level of complicity to satisfy the requirement under ATCA. The legal tests for liability under ATCA are not settled law. This area of jurisprudence is in its infancy.

Mindful that the matter is pending an appeal, Unocal has the potential to establish a powerful precedent with respect to corporate responsibility. It is possible that the parameters for corporate accountability may be broadened to potentially include a spectrum of behaviours from direct involvement in human rights abuses<sup>44</sup> to merely doing business with repressive regimes that perpetrate abuses. In considering the legal concept of 'corporate complicity' the Courts have drawn heavily on international and domestic criminal law principles. A helpful analysis of the approach distinguishes between three categories of complicity being direct, indirect and silent complicity.<sup>45</sup>

Direct complicity involves a corporation that knowingly assists a state in violating the human rights of its citizens. Consistent with the principles of complicity in criminal law, the corporation need not be the principal perpetrator and liability is not contingent upon a finding of guilt against the principal. Transnational corporations are aware that with the influx of applications under ATCA, they can no longer be directly involved in such abuses with impunity.

Indirect or beneficial corporate complicity applies where the corporation may not be directly involved in the execution of the human rights abuses however the business benefits from these abuses. The Unocal matter has been characterised as a clear example of indirect complicity.<sup>46</sup> Although Unocal did not directly commit the purported abuses, it is argued that the company is culpable because of its involvement in the project and the assistance it offered to the principal perpetrator. This form of liability raises the bar for corporations active in states with appalling human rights records. As in Burma, it is clear that transnationals that enter into partnerships with the junta can exercise little or no control of its

actions. Notwithstanding, such corporations may face the threat of legal liability for violations committed by the authorities, by virtue of their commercial relationship with the state. Corporations may be construed by the courts as “de facto state actors in breaches of international law”<sup>47</sup> if there is sufficient connection between their assistance and the abuses committed by the state. The necessary assistance may act such as hiring the military and providing it with revenue, instructions and equipment to fulfil its tasks. So long as it can be established that the corporation was also aware that the assistance could lead to the perpetration of those abuses, a finding of liability may arise. In this context, the only course of action that a corporation could adopt to avoid liability may be to withdraw from the operation. This form of complicity is discussed in more detail below.

Silent complicity invokes the principle that transnational corporations have an obligation to speak out against abuses, and corporations should be liable for failing to exercise this responsibility. It is less likely that the Courts will find a company liable for its inaction; nevertheless the implications of ‘unethical conduct’ have become more pertinent. Companies that continue to operate in countries with repressive regimes are being targeted by consumers, shareholders and NGOs and, as suggested in Reinhardt J’s decision, some members of the judiciary.

*Indirect complicity; implicating multinationals in the regime’s abuses*

The second category of indirect or beneficial complicity contemplates a set of facts that are common in repressive regimes such as Burma. The courts’ development of liability in this area is at the centre of corporate concerns with respect to their operations in nations with poor human rights records. The judgements to date in the Unocal matter can provide insight into some of the practical issues companies will need to consider with respect to any potential investments in countries such as Burma.

The plaintiffs submit that Unocal’s liability derives from its relationship with its partner, the Burmese military regime for its part in the commission of egregious human rights violations in conducting its operations. This relationship has been described as a form of “militarized commerce”<sup>48</sup> where companies operating in repressive countries rely on state military forces (or its agents) to provide security for their projects. Such interdependence with the state exposes corporations to an increasing risk of legal liability for their complicity with their partner’s human rights violations. The plaintiffs in Unocal do not claim that the company inflicted or assisted in the actual infliction of the abuses.

The corporation’s knowledge that its role may encourage the military to engage forced labour, combined with the fact that it profited from those abuses, combined to provide sufficient connection to base a cause of action.<sup>49</sup> These legal tests fit neatly into an emerging concept of the corporate ‘sphere of influence.’<sup>50</sup>

This notion has become the subject of commentary around the issue of corporate accountability and discusses the scope within which companies have the power (and the moral or legal obligation) to observe international norms and effect change in the offending behaviour of its operatives or partners. Unocal's involvement in the Yadana project has been described as having a "catalytic effect" in bringing local communities into confrontation with military forces. During its construction, the military presence in the region increased from five to fourteen battalions between 1990 and 1996. Almost all the gas from the project is exported to neighbouring countries and the revenue earned does not flow beyond the regime and oil companies. Virtually no Burmese citizen will benefit from this project "instead they will suffer the consequences of a degraded environment and expanded political oppression."<sup>51</sup>

Given the emergence of this form of corporate liability, any multinational active in Burma would be prudent to assess its relationship with the authorities with a view to identifying the risk that they could be found complicit in human rights violations perpetrated by the junta. Similarly, potential investors are likely to be discouraged from entering into projects that require some form of partnership with the junta. The Unocal matter has progressed further than any other suit against a corporation under ATCA. A final decision against the company would almost certainly translate into wholesale withdrawal of foreign investment from Burma. However, this action has undoubtedly already impacted on Unocal and other similar organisations because "the bottom line for companies is that share prices respond even to the threat of liability."<sup>52</sup> Accordingly, this threat can motivate companies to change their behaviour. Ward explains that liability can be "a leveller" and, while these actions against corporations may not result in legal accountability, the evidence admitted into Court can be equally damning for the defendant's standing. The pursuit of accountability is not solely dependant upon a finding of culpability. It follows that as a result of this action, corporations may already be revising their conduct in countries such as Burma.

There are arguments to suggest that a wholesale withdrawal of investment would have profound negative effects on the people of Burma. Conversely, it can also be argued that the corporations that improperly benefit from violations of the local population, such as through the use of forced labour, are not contributing to the prosperity and peace of the Burmese people. The presence of such organisations may perpetuate the violations of human rights conducted by the authorities. As the facts of the Yadana pipeline project have revealed, foreign investment per se does not necessarily translate into benefits for the people of Burma.

#### *ABSOLVING THE ROLE OF STATES BY POSITING CORPORATIONS AS VEHICLES FOR CHANGE?*

"...Neither the World Bank, nor the human rights Non Government Organisations could convince the military regime in Nigeria to mend its ways in

the past and cannot force change in Myanmar or Sudan today. So they saddle oil companies with the task".<sup>53</sup>

*"Transnational companies have been the first to benefit from globalisation. They must take their share of responsibility for coping with its effects."*<sup>54</sup>

It is important to note that the plaintiffs in this matter have not argued that the test for liability ('practical encouragement') should extend to apply to *all* corporations that do business in a repressive country. Neither the plaintiffs nor the author of this essay endorse a blanket prohibition on investment in countries with totalitarian regimes, which does not discriminate between degrees or types of complicity, as discussed above.<sup>55</sup> The mere act of investment in such countries should not provide a prima facie case against corporations, for crimes committed against the citizens by a repressive regime. It is the role of governments to identify and address human rights violations perpetrated by objectionable regimes. States should not be absolved of this responsibility by corporations.

The approach adopted by the plaintiffs supports the basic principle that corporations should be held legally responsible for the consequences of their actions, including those activities that they participate in either as principal actors or accomplices. A corporation's duty is to obey the law.

Criticisms against the Unocal litigation suggest that using companies indirectly as a vehicle for change in Burma may not be an appropriate strategy.<sup>56</sup> It could be argued this approach places corporations in the role of political reformers. Conversely, it has been suggested that "when domestic tribunals assert jurisdiction over multinational companies, they are counter-balancing the impact of globalization with a measure of international law. Courts are asserting that multinationals should not and cannot escape the precepts of the international legal system, which benefits corporations worldwide. Globalisation is occurring within the legal system...".<sup>57</sup> This jurisprudence can be characterised as a re-distribution of accountability to reflect the re-distribution of power from states to multinationals. Other commentators have described this process of foreign direct liability as the "flipside of foreign direct investment" or globalisation.<sup>58</sup>

Litigation against private actors is just one avenue that could effect change by establishing a precedent that, at its minimum, will influence corporate behaviour in rogue nations such as Burma. A finding of liability against the corporations may result in a wholesale divestment by foreign companies in Burma. This 'mod of influence' may have more far-reaching effects on the Burmese junta if it is underpinned by a range of targeted multilateral sanctions against the regime. This synergy would combine state action with corporate action to exert significant pressure on the SPDC to reform.

### ***DOE v UNOCAL - POSTSCRIPT***

On 15 December 2004, the parties to both the state and federal Unocal actions announced an 'in principle' settlement to the litigation.<sup>59</sup> Proceedings sched-

uled before the U.S. District Court of Appeals have been adjourned. The federal suit was considered to be a significant test case for actions against corporations under ATCA because, unlike most similar actions, it had overcome most of the procedural and technical hurdles to proceed to full-scale trial.<sup>60</sup>

Conjecture relating to the settlement has already commenced. It is suggested that Unocal was motivated principally by the desire to avoid a trial, where damaging evidence would be admitted into Court attracting further public scrutiny. Furthermore, the prospect of a finding against the company could result in an award of a substantial sum<sup>61</sup> as well as further damage to its corporate image. It has also been suggested that the recent Supreme Court decision in *Sosa v Alvarez Machain*<sup>62</sup>, while not on point, confirmed the validity of ATCA as an avenue for victims of abuses to sue for damages. This decision may have signalled the judiciary's acceptance of such actions.

If the action had been successful, the precedent established may have had a floodgate effect, encouraging similar communities affected by projects conducted by trans-national corporations to make applications under ATCA. It is arguable that a settlement will have similar consequences, as NGOs and public interest lawyers will be encouraged to file more claims against corporations. Accordingly, this outcome is likely to discourage foreign investment from countries with poor human rights records such as Burma. It may also exert pressure on corporations and the junta to comply with human rights norms in the future.

The settlement remains tentative and the parties are required to report to the Circuit Court if the negotiations are not finalised by 1 February 2005.

## **PART II - 'SMART' SANCTIONS; LAYING THE GROUNDWORK FOR CHANGE**

*"There were many moments in our struggle against apartheid when it appeared as if...injustice would have the last word. But during those hours when hope was fragile, we were strengthened by the support of our brothers and sisters around the world. Sanctions were imposed, governments and citizens worked hard against the regime, and my people are now free. Burma is the next South Africa. Its people are engaged in an epic struggle for freedom...As in South Africa, the people and legitimate leaders of Burma have called for sanctions. In South Africa when we called for international action we were often scorned, disregarded, or disappointed. To dismantle apartheid took not only commitment faith and hard work, but also intense international pressure and sanctions. In Burma, the regime has ravaged the country, and the people, to fund its illegal rule. Governments and international institutions must move past symbolic gestures and cut the lifelines to Burma's military regime through well-implemented sanctions..."*<sup>63</sup>

In this second part of the paper, I will examine the use of centralised and tailored economic sanctions as an important tool available to the international

community to promote respect for and enforce compliance with human rights in Burma.<sup>64</sup> Restrictions on economic assistance and trade can be used for a broad range of purposes beyond the narrow punitive objective traditionally associated with sanctions. Rather than simply punishing rogue states for their conduct, sanctions also contribute to the international community's understanding of universal human rights and the rules that apply to breaches of those rights.<sup>65</sup> Furthermore, sanctions should not be assessed with an expectation that they achieve immediate or expeditious results. These measures may not instantly effect a regime change however they may achieve less tangible results such as an incremental undermining of the target state. They may also serve to encourage the pro-democracy movement within Burma and lead to partial liberalisation efforts by the junta.<sup>66</sup> In this context, the sanctions imposed upon Burma have raised the international community's awareness of the junta's repressive regime and strengthened global resolve to promote improved human rights conditions and an open democracy in Burma. However, on balance, while the existing sanctions may have raised international attention and pressure on the regime, they have failed substantively to enforce international human rights norms.<sup>67</sup>

#### *BACKGROUND: A SNAPSHOT OF EXISTING SANCTIONS*

There are a myriad of aid and trade restrictions currently in place against Burma, imposed by individual states, regional associations, U.N. bodies, private corporations and others. The United States has been a key proponent in imposing unilateral economic sanctions against Burma and encouraging other States to oppose the ruling regime.<sup>68</sup> Since 1988 it has suspended various aid programs, withdrawn Burma's preferred trading status, reduced diplomatic contacts, imposed embargos on arms sales and lobbied other states to refrain from selling weapons to the junta. Domestic legislation has also formed part of the package of measures employed by the United States. In 1990 federal legislation was enacted to empower the President to impose any economic sanctions upon Burma deemed appropriate in the absence of any progress towards a democracy. The same Statute requires the President to develop a multilateral response to improve the human rights situation in Burma. Under this legislation a number of mandatory sanctions have been imposed, including a general prohibition on foreign aid<sup>69</sup> and a ban on any new investment in Burma by U.S. citizens post-1997.<sup>70</sup> It has been estimated that the ban on investment alone has had a significant impact on the Burmese junta's financial resources, resulting in a reduction in foreign investment from \$US 2.8 billion in 1996 to \$US19.1 million in 2001/2002.<sup>71</sup>

Other States and regional associations have adopted similar yet less stringent measures to the United States. The European Union (EU) has suspended military cooperation, imposed bans on prescribed exports, maintained an arms embargo and limited its assistance to humanitarian aid. Recently the EU banned all European companies from investing in Burmese firms controlled or associ-

ated with the junta. Consideration is also being given to suspending further loans to the junta from the World Bank and IMF.<sup>72</sup> Similarly, a ban on entry visas for senior members of the junta has been introduced, as has a freeze on assets in Europe held by members of the junta. Burma's trade status has also been diminished by the European Commission.<sup>73</sup> The EU also supported the United States' opposition to Burma's membership in ASEAN in 1996. Since then, the EU has excluded or attempted to exclude Burma from the annual meetings between ASEAN and EU states (ASEM).<sup>74</sup>

These measures have been disjointed and a number of states that have imposed such restrictions also pursue engagement and some trade with the junta.<sup>75</sup> Another 'stumbling block' in efforts to negatively impact the junta is the willingness of ASEAN nations to trade with and support the regime. Arguably the most important trade and investment partner the Burmese regime has is China. China aggressively pursues the Burmese market and has been identified as the "single most significant impediment to the success of the transnational sanctions efforts"<sup>76</sup> because of its interests in Burma. It is likely that this partnership may undermine the individual efforts of some of the largest trading nations across the globe.

#### *A CALIBRATED MULTI-LATERAL APPROACH?*

It follows that one of the weaknesses of the current unilateral regime of sanctions imposed upon Burma is its fragmentation. These isolated efforts have provided scope for the Burmese regime to find alternative markets or suppliers for the sanctioned goods<sup>77</sup> which has undermined the impact on the junta. Notwithstanding the potential for countries such as China to compromise a concerted global effort, a coordinated scheme of uniform and tailored restrictions may be more effective than the current approach.

The U.N. Charter expressly provides for multi-lateral economic sanctions for the purposes of preserving the peace and stability of the international system.<sup>78</sup> A centralised approach to promote human rights goals is therefore consistent with the objectives and obligations imposed on states under the Charter.<sup>79</sup> The Security Council also has broad powers to impose legally binding sanctions.<sup>80</sup> A set of tailored measures would preferably be coordinated through the U.N. Security Council, given its status as an international body and its power to enforce such sanctions. However, the prospect of achieving Security Council endorsement for this approach is remote. In this context, a loose form of multi-lateral strategies, or an alternative international grouping of states may provide the means of achieving a broad-based and consistent approach.<sup>81</sup> In considering alternatives to the current Security Council as the source for the approach, Forcese suggests that an alternative body, being the Group of Eight (G8), could emerge as "an institution whose sanctioning role will become more important."<sup>82</sup> Under their collective, the economies of the G8 wield significant power over global markets and could have a significant impact on the Burmese junta.<sup>83</sup> Notwith-

standing its potential to coordinate such sanctions, such groups are restricted from imposing sanctions on non-members, which hampers their effectiveness. This is particularly the case with measures such as arms embargos, because the junta is known to obtain significant military hardware from neighbouring states such as China. Therefore, it is clear that the U.N.'s membership and status as the principal international organisation would be the most effective location for such measures.

The concept of 'smart sanctions' arose from concerns regarding the sanctions imposed on Iraq throughout the 1990s.<sup>84</sup> The principles underpinning this concept are that sanctions should target the decision-makers responsible for the violations while guarding against further hardships for the local population. Where possible, sanctions should also serve to empower opposition groups. These principles should be adopted in any targeted, concerted effort. The restrictions currently imposed by the United States are largely consistent with these principles and, save for some revisions, could serve as a template to develop a universal set of sanctions.

The proposed approach should focus on placing coercive pressure on the junta by obstructing access to their offshore assets and foreign markets to sell their resources. Given the recalcitrant nature of the regime, the measures should not be moderate as the junta has proven largely unresponsive to the foreign policies applied by the international community to date. Accordingly, the sanctions must be proportionate to the egregious violations perpetrated by the state. The approach could include a complete arms embargo, and selective trade bans on imports of goods and services from SPDC-owned enterprises. This may include sanctions on strategically important markets under state control such as natural resources, including timber and gems, a source of significant revenue for the junta. The package of sanctions would also include a ban on international transfers and transactions with the junta. A freeze on the assets owned by the junta should also be included. To ensure consistency with the principles of 'smart sanctions' the current blanket U.S. ban on foreign investment (post 1997) should be revised to prohibit any investment that either reinforces the regime financially or lends it political legitimacy. These measures would reduce capital flow to the repressive regime and have little or no impact on the Burmese populations. However, it is critical that strategically important states that trade with the junta are incorporated into the multi-lateral effort to ensure the maximum impact of the restrictions. This decisive element of the approach is discussed further below.

### *Responsible engagement*

The imposition of a coordinated set of restrictions on trade with Burma is underpinned and informed by a 'responsible engagement' approach. This approach involves limited trade and diplomatic relations that cannot translate into practical support for the repressive regime or the perpetration of human rights abuses.

In assessing whether a particular form of investment or trade agreement could be so characterised, the test is whether the net impact of that arrangement is positive for human rights or whether it exacerbates human suffering.

Accordingly, economic participation in Burma may be characterised as 'responsible engagement' if it does not "augment the staying power"<sup>85</sup> of the Burmese regime. However, a foreign investment project that required the foreign corporation to enter into a joint-venture with the Burmese authorities, involving the engagement of the Burmese military to provide security for the project, could be characterised as investment that directly bolsters the financial and political security of the junta. This form of investment may fail the test in which case, economic disengagement would be considered the appropriate course of action. Unocal's investment and subsequent role in the Yadana pipeline project clearly falls within the realm of such irresponsible engagement. The corporation's involvement caused further human rights violations and strengthened the repressive junta's capacity (by providing a major source of revenue and creating infrastructure that is used by the military government against the local people). Notwithstanding the option individual plaintiffs may have of pursuing liability through the Courts, a state-based approach prohibiting such forms of investment would complement such litigation and send a clear signal to corporations that such conduct will not be tolerated by the international community or domestic courts.

#### *The prospects of effecting change*

There are two threshold issues in terms of gauging the success of a suite of 'smart sanctions' imposed upon Burma. The first is the challenge of securing multilateral support for the approach outlined, and the second is then obtaining the desired result from the measures. Both will be dealt with in turn.

As discussed above, there may be some impediments to obtaining a Security Council resolution imposing any economic sanctions against Burma. However, the prospect of obtaining broad based support for multilateral sanctions remains positive. The degree of international public support for government actions against Burma is strong and, as evidenced in the U.S, domestic regulation of corporations has been largely complied with.<sup>86</sup> In the absence of U.N. support, a loose network of nation states could adopt consistent domestic legislation, to achieve the same effect as such a resolution. Alternatively, further consideration could also be given to existing regional and international groupings of nation states, as possible models for the multi-lateral approach outlined.

The challenge of generating sufficient influence over the revenue stream available to the junta turns on the level of support for the approach by individual states. Despite China's burgeoning interest in Burma, the junta's revenue stream has been substantially dependant on foreign investment from Western corporations and trade with Western nations. Accordingly, even in the absence of a

Security Council resolution, a broad coalition of predominantly Western nations may prove to be very effective. Approved foreign direct investment to Burma since 1989 was worth US\$ 6.6 billion. This form of investment is concentrated in the areas of natural resource extraction projects and tourist infrastructure and this revenue stream for the junta has resulted in an expansion of the military from 180 000 personnel to 450 000, while the country's health, education and public services are on the brink of collapse.<sup>87</sup>

An additional issue raised by such a multilateral approach is the tension between trade-restraining measures and international trade law, most notably the General Agreement on Tariffs and Trade (GATT).<sup>88</sup> This area of law remains largely untested however, there appears to be a strong *prima facie* case that certain human rights trade sanctions contravene the GATT. The international trade regulatory regime generally obliges market access and trade. Certain measures currently employed against Burma, such as the various selective purchasing laws,<sup>89</sup> raises trade law issues. In fact, the WTO dispute mechanism has previously been invoked under the Government Procurement Agreement by the EU and Japan in relation to a U.S selecting purchasing statute. The matter was undecided<sup>90</sup> and therefore the legality of such laws remains unclear. While some states have creatively avoided liability under the GATT and continued to link trade with human rights conditions,<sup>91</sup> it is clear that in the absence of Security Council resolutions, legal uncertainty remains with respect to a number of important 'smart' sanctions.<sup>92</sup> Resolving some of these tensions will be another challenge for any multi-lateral approach.

The success of the measures will be assessed by the capacity to coerce the junta to cooperate with the international community and comply with international human rights laws. This approach is designed to encourage the regime to calculate that the benefits of compliance outweigh the costs of their defiance of U.N. resolutions and other multilateral calls for change. The effect of the measures should therefore compromise the ability of the junta to continue its programs which, in turn, will undermine the economy.

Unlike other case studies such as South Africa, it is not foreseeable that local businesses will rise in power as a result of these measures, largely because the Burmese economy is not sufficiently developed. However, it is anticipated that the sanctions approach will be strengthened by the existence of a strong and coordinated opposition movement within Burma. The National League of Democracy (NLD) was elected to government in a landslide victory in the 1990 democratic elections. The junta has disregarded those results and detained key figures and activists involved in the NLD, the most prominent being the leader Aung San Suu Kyi who has been under house arrest for most of the past nine years. Despite the junta's attempts at repression, the NLD is a remarkably effective and strong opposition force.

*PROMOTING CHANGE OR DEEPING THE DIVIDE? COUNTERING CRITICISMS AGAINST SANCTIONS.*

Economic sanctions have been condemned as ineffective measures that rarely accomplish changes to the target's policies,<sup>93</sup> and have been described as "unjustifiably blunt, indiscriminate and brutal in that they harm innocent citizens rather than the perpetrators"<sup>94</sup> and counter-productive because they may entrench the perpetrators. However there is a significant body of work that supports multilateral sanctions as an effective foreign policy tool to demonstrate resolve and send clear messages of condemnation.<sup>95</sup> In the context of foreign investment in Burma, it can also be argued that projects such as oil and gas exploration and development deliver little benefit to the local populace, while providing critical foreign currency to the repressive government. Such investment does not translate into infrastructure or sustainable employment for the Burmese people. Accordingly, a program of withdrawing and banning such investment would generally not negatively effect the innocent population.<sup>96</sup>

Restrictions on economic engagement are also criticised on the basis that they impede economic development which necessarily leads to democratic government. Total economic isolation would arguably increase the plight of the oppressed population. However, there is no causal link between democracy, respect for human rights and economic development.<sup>97</sup> Free trade advocates and others also argue that such restrictions breach the international trade regulatory regime, as discussed above. This area of law has largely been untested. However, the legalities of imposing sanctions will clearly be a challenge for states and the international community in the coming years.

**CONCLUSION**

It is important to note that neither creative litigation nor responsible engagement and sanctions are the sole mechanisms that will bring about reforms in Burma. In fact, in isolation, these measures are unlikely to have a sufficiently significant impact on the ruling junta to bring about respect for human rights and the restoration of democracy. However, these strategies may combine to have significant implications for the junta's revenue stream, which in turn may provide the international community with the requisite leverage to insist on compliance with human rights norms.

In order to maintain its repressive rule and continue its program of militarisation, the junta relies heavily on a steady stream of capital. Accordingly, foreign capital through trade and investment is the most powerful political currency for the junta. An approach that recognises this strategic vulnerability may go some way towards restoring human rights and democracy in Burma.

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**M Winston**, 2003 'Corporate Responsibility for Preventing Human Rights Abuses in Conflict Areas' in J Frynas and S Pegg 2003 *Transnational Corporations and Human Rights* 1<sup>st</sup> Ed, Palgrave Macmillan, New York

### Endnotes

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1. The Burmese military dictatorship is called the State Peace and Development Council (SPDC). The junta was formerly known as the State Law and Order Council (SLORC) until 1997.
2. 'Constructive engagement' is a policy that justifies economic and diplomatic relations with repressive states such as Burma on the basis that trade with and investment in such countries will promote political reform and strengthen compliance with human rights norms. This approach does not preclude the use of other foreign policy tools such as economic sanctions. Over the past twenty years, states have adopted this 'mixed' approach in their relations with the SPDC. However the imposition of sanctions has principally been applied by the West. C Forcese 'Globalizing Decency: Responsible Engagement in an Era of Economic Integration' (2002) 5 *Yale Human Rights and Development Law Journal* 57.
3. On 15 December it was announced that the parties to the Unocal litigation have arrived at an 'in principle' settlement. Please refer to postscript at the conclusion of Part I of this essay for a brief overview of this recent development.
4. The concept of responsible engagement is discussed in Part II of this essay.
5. Burma was identified by the World Bank in 1945 as one of the economies most likely to grow in the region, largely due to its wealth in natural resources. From the 1960s to the late 1980s, the junta destroyed the local economy by practising economic isolation from the international community. By the 1970s the 'closed state-run economy' was run down and economic growth was halted. Department of Foreign Affairs 2003, *Globalisation Keeping the Gains*, Commonwealth of Australia, p87. In 1987, the United Nations designated Burma as a 'Least Developed Country' this status was arguably earned due to the economic policies instituted by the junta.
6. There are a number of large projects involving foreign investment currently in train. For example, the proposed Shwe Natural Gas Pipeline project is currently being planned by a consortium of South Korean and Indian corporations to build a large-scale gas field on the Western coast of Burma.
7. S Cleveland, 'Norm Internalization and U.S Economic Sanctions' (2001) *Yale Journal of Interna-*

- tional Law* Winter 26 p3.
8. In its 2000 report on the situation of human rights in Burma, the General Assembly deplored “the continuing violations of human rights in Burma, including extrajudicial, summary or arbitrary executions, enforced disappearances, rape, torture, inhuman treatment, mass arrests, forced labour, including the use of children, forced relocation and denial of freedom of assembly, association, expression and movement” UN GA Res 54/186. The U.N. has given the junta until 2006 to begin substantive dialogue with the National League of Democracy (NLD) and the release of its leader, Aung San Suu Kyi. The NLD is the main Opposition Party to the SPDC and won a landslide victory in the 1990 democratically held elections. Its leader has been detained by the junta under house arrest sporadically since 1990.
  9. In 2002, the SPDC responded to the U.N. criticisms by introducing a National Constitutional Convention, titled the ‘road map to democracy.’ The junta has consistently argued in the international arena that the ‘roadmap’ illustrates the junta’s commitment to restore democracy within Burma. However, this forum has been overwhelmingly denigrated by human rights activists, members of the NLD and the United States as a sham. The Convention has not allowed NLD participants and, in November 2004, the architect of the ‘road map’ the Prime Minister General Khin Nyunat was deposed by the junta and is currently detained under house arrest. This recent development signals even less hope for the prospect of reform.
  10. For example, the Human Rights Commission appointed a special rapporteur to Burma in 1992 and this office’s mandate continues to the present day. Furthermore, the International Labour Organisation (ILO) after repeated expressions of concern and resolutions of condemnation, took the unprecedented step of invoking measures against Burma under Article 33 of its Constitution for breaching its international labour obligations. The practical effect of these measures has been expulsion as a member of the ILO: ILO Resolution on the Widespread Use of Forced Labour in Myanmar, 97<sup>th</sup> Session, November 2000. The World Bank has also previously suspended international assistance to Burma.
  11. More recently, pressure has been exerted on the junta by regional bodies such as the European Union (the EU). Through its negotiations with ASEAN, the EU has attempted to influence the foreign policies of ASEAN members in relation to their engagement with Burma. Again, this has yet to result in any change and ASEAN members generally remain firm in their refusal to comment on the internal politics of Burma. Despite the EU’s efforts, Burma will assume the role of Chair of ASEAN in 2006.
  12. While the US imposed broad sweeping sanctions against Burma which came into force in the 1990s, these were not adopted by other nations including the European Union. The imposition of sanctions by the West is discussed in further detail below.
  13. The terms ‘trans-national corporation’ and multinational corporation are used interchangeably in this essay. For a comprehensive definition of a trans-national corporation see S Joseph, 2004 ‘Corporations and Transnational Human Rights Litigation’ 1<sup>st</sup> Ed, Hart Publishing, Oxford p 1.
  14. C Scott 2001 ‘Multinational Enterprises and Emergent Jurisprudence on Violations on Economic, Social and Cultural Rights’ A Eide et al (eds) *Economic, Social and Cultural Rights* 2<sup>nd</sup> Edition Kluwer Law International p 564.
  15. An overview of existing sanctions imposed upon Burma is provided in Part II of this paper.
  16. C Forcese (2001) ‘ATCA’s Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act’ *Yale Journal of International Law* 26 p 4 . It has been estimated that Yadana will provide the SPDC with in excess of \$US 400 million per year. This is the single largest source of liquid funds for the junta. The SPDC has also imposed a number of substantial fees on other oil companies who have sought to conduct explorations.
  17. The currency from the Yadana pipeline project that is the subject of the Unocal litigation has been a significant source of finance for the junta’s program of militarization. The junta spends an estimated 40% of its national budget on the military. In the year the Yadana contract between the joint venturers was entered into, an unprecedented \$390 million was spent on its military. The currency from the Yadana pipeline project has been a significant source of finance for the junta’s program of militarization. As Burma is not under threat from any of its bordering neighbours, the military hardware is used for the sole purpose of repressing Burmese citizens: ‘Total Denial: A Report on the Yadana Pipeline Project in Burma’ 1996, Earthrights International and South-east Asian Information Network.

18. J Frynas and S Pegg (2003) *'Transnational Corporations and Human Rights'* 1<sup>st</sup> Ed, Palgrave Macmillan, New York, p 1.
19. A Clapham A and S Jerbi, 2001 'Categories of Corporate Complicity in Human Rights Abuses' *Hastings International and Comparative Law Review* 24 p 339.
20. J Paul 'Holding Multinational Corporations Responsible Under International Law' *Hastings International and Comparative Law Review* 24 p 290. In his article, the author suggests that corporations have "displaced the state's exclusivity" in the sphere of international law and regulation. Paul describes the number of actions taken by private individuals against multinationals under international law in domestic courts as "private citizens becoming the agents for internalizing international law on private actors, including multinational corporations" *ibid* p 289. He characterises this development as individuals taking the law into their own hands because of the failure of states to respond. Paul goes on to argue that when domestic courts "assert jurisdiction over multinational companies, they are counter-balancing the impact of globalisation with a measure of international law." *ibid*. p 290.
21. Forcese 2001 'ATCA's Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act' *Yale Journal of International Law* 26 p 2.
22. These types of actions are discussed in more detail by H Ward (2001) 'Securing Transnational Corporate Accountability Through National Courts Implications and Policy Options' *Hastings International and Comparative Law Review* 24 p 456.
23. For example, international advocacy networks were instrumental in the withdrawal of oil companies such as BP, Chevron and Texaco from Burma. Similarly, non-oil companies like Best Western, Levi Strauss, Federated Department Stores, European brewers Carlsberg and Heineken, and PepsiCo also pulled out of their operations in Burma after sustained campaigns. However, it should be noted that all these companies' operations in Burma represented a relatively small proportion of their overall operations and therefore the extent of these withdrawals should not be overestimated. The UK firm Premier Oil chose to remain in Burma even after the UK Government requested they withdraw in 2000. For a detailed discussion of investment and divestment in Burma, refer to S Pegg 'An Emerging Market for the New Millenium' in J Frynas and S Pegg (2003) *'Transnational Corporations and Human Rights'* Palgrave Macmillan, New York, p 23.
24. The joint-venture was directly with the state-controlled oil company, the Myanmar Oil and Gas Enterprise (Myanmar Oil) to construct the gas pipeline. Myanmar Oil had been hired to provide security and labour for the onshore construction and operation of an oil pipeline. The plaintiffs' original action was also against Total (a French energy company that had jointly invested with Unocal in the project). The Court however decided on jurisdictional grounds that the claim could not succeed against Total in *Doe v Unocal* 1998 27 F Supp 2d 1174 (CD Cal 1998).
25. The plaintiff's case also included claims that the Burmese authorities also subjected the local villagers to murder, rape and torture.
26. This requirement is discussed below, at note 33.
27. The requirement for state action applies in matters against private actors under ATCA. Generally, private actors can only be liable under ATCA where they acted in concert with state officials. However, there are a number of exceptions to the rule that a breach of the law of nations requires an element of state action. The type of human rights violations that do not require any conduct by a state are defined as 'private actor' violations. In those instances, corporations may be liable for violations of international law absent any state action.

28. *Doe v Unocal Corp*, 963 F Supp 880 (CD Cal 1997).
29. This matter also alleges liability for a number of torts including wrongful death, battery and false imprisonment. It is beyond the scope of this essay to examine the developments in this suit.
30. *Doe v Unocal* 2000 110 F Supp 2d 1294 (CD Cal 2000).
31. *Doe v Unocal* 2000 1306.
32. *Doe v Unocal* 2000 1310. This included evidence of memorandums to the company concluding the “egregious human rights violations have occurred and are occurring now...[including] forced relocation...along the pipeline route, forced labour to work on infrastructure projects supporting the pipeline... and imprisonment and or execution by the army of those opposing such actions. Unocal, by seeming to have accepted SLORC’s version of events, appears at best naive and worst a willing partner in the situation.”
33. *Doe v Unocal* 2002 US App LEXIS 19263 (9<sup>th</sup> Cir 2002).
34. The court held that the torts set out in the claim constituted violations of the law of nations, the necessary jurisdictional hurdle to satisfy the requirements of ATCA. The Court recognised that forced labour, torture, murder and slavery are “jus cogens” violations meaning norms of international law that are binding on nations even if they do not agree with them, thereby they are also violations of the law of nations: *Doe v Unocal* 2002 14208.
35. *Doe v Unocal* 2002 14210, 14212. Similarly, the allegations of murder and rape also came under this category because they were committed in furtherance of the forced labour program. *Doe v Unocal* 2002 14223, 14224.
36. *Doe v Unocal* 2002 14212, 14217, 14219, 14220.
37. On the facts, Unocal encouraged and assisted the military to subject the plaintiffs to forced labour by hiring, paying and instructing the military to provide security and build infrastructure. Unocal provided further practical assistance by providing the Burmese authorities with the necessary instructions, technology and resources for them to carry out their tasks. This assistance was provided despite the corporation’s knowledge that forced labour was being used in connection with the project. The majority concluded that such assistance was held to have had a ‘substantial effect’ on the perpetration of forced labour, *Doe v Unocal* 2002 1421, 1422.
38. *Doe v Unocal* 2002 14213 n22. Notwithstanding the finding that the District Court applied an erroneous standard of ‘active participation’, the majority noted that there was sufficient evidence to meet this standard. The majority relied on evidence of Unocal’s directives to the Burmese military to infer there was at least constructive knowledge of the brutal methods employed by their partners, the Burmese military.
39. *Doe v Unocal* 2002 14218.
40. Reinhardt J stated it is clear that international law applies under ATCA to determine whether a violation has occurred. However, federal common law should be applied to resolve the ancillary issues that may arise under such applications such as whether a third party may be held liable in tort for a government’s violations of the law of nations: *Doe v Unocal* 2002 14248. In obiter, the majority noted that Unocal may be liable under tort law principles such as joint venture, negligence and recklessness. However it determined that it did not need to address these theories because it considered that the company could be held liable for aiding and abetting in violation of international law: *Doe v Unocal* 2002 14212 n 20.
41. *Doe v Unocal* 2002 14259.
42. *Doe v Unocal* 2002 14266.
43. *Doe v Unocal* 2003 WL 359787 (9<sup>th</sup> Cir 14 Feb 2003).
44. For example, a corporation that promotes the forced relocation of people could constitute direct complicity in the violation.
45. A Clapham A and S Jerbi, 2001 ‘Categories of Corporate Complicity in Human Rights Abuses’ *Hastings International and Comparative Law Review* 24 p 340, 342.
46. ‘Defining the Scope of Business Responsibility for Human Rights Abroad’ Danish Centre for Human Rights and the Industrialization Fund [www.humanrights.dk/humanrightsbusiness](http://www.humanrights.dk/humanrightsbusiness) discussed in A Clapham A and S Jerbi, 2001 ‘Categories of Corporate Complicity in Human Rights Abuses’ *Hastings International and Comparative Law Review* 24 p 356.
47. C Forcese (2001) ‘ATCA’s Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act’ *Yale Journal of International Law* 26 p 7.

48. C Forcese (2001) 'ATCA's Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act' *Yale Journal of International Law* 26 p 2.
49. H Ward (2001) 'Securing Transnational Corporate Accountability Through National Courts Implications and Policy Options' *Hastings International and Comparative Law Review* 24 p 455.
50. International Council on Human Rights 'Beyond Voluntarism' 2002 p 135.
51. S Pegg 'An Emerging Market for the New Millenium' in J Frynas and S Pegg (2003) '*Transnational Corporations and Human Rights*' Palgrave Macmillan, New York, p 11, 13.
52. H Ward (2001) 'Securing Transnational Corporate Accountability Through National Courts Implications and Policy Options' *Hastings International and Comparative Law Review* 24 p 464.
53. M Winston 'Corporate Responsibility for Preventing Human Rights Abuses in Conflict Areas' in J Frynas and S Pegg (2003) '*Transnational Corporations and Human Rights*' 1<sup>st</sup> Ed, Palgrave Macmillan, New York, p 91.
54. UN Secretary general Kofi Annan 'Help the world help itself' *Wall Street Journal* November 29 1999, cited in C Forcese (2001) 'ATCA's Achilles Heel: Corporate Complicity, International Law and the Alien Tort Claims Act' *Yale Journal of International Law* 26 p 2.
55. Conversely, some commentators suggest that Burma may be one of a small number of pariah states that are exempt from this approach. For instance, in his analysis this issue S Pegg suggests that "with the exception of a few cases (perhaps including Angola, Burma and Sudan today, Nigeria under its most recent military dictatorships and apartheid under South Africa), the argument that any investment in a particular country is necessarily bad is unlikely to convince most corporate executives, government policy-makers or consumers at large." An Emerging Market for the New Millenium' in J Frynas and S Pegg (2003) '*Transnational Corporations and Human Rights*' Palgrave Macmillan, New York.
56. Clearly, multinational corporations are not appropriate agents to bring about the reform of corrupt authoritarian governments, greater protection of human rights or the resolution of internal conflicts. For a more extensive discussion on this issue, please refer to M Winston 'Corporate Responsibility for Preventing Human Rights Abuses in Conflict Areas' in J Frynas and S Pegg (2003) '*Transnational Corporations and Human Rights*' 1<sup>st</sup> Ed, Palgrave Macmillan, New York, p 90.
57. J Paul (2001) 'Holding Multinational Corporations Responsible Under International Law' *Hastings International and Comparative Law Review* 24 p 290.
58. H Ward (2001) 'Securing Transnational Corporate Accountability Through National Courts Implications and Policy Options' *Hastings International and Comparative Law Review* 24 p 464.
59. Media release "Settlement in Principle reached in Unocal Case" [www.earthrights.org](http://www.earthrights.org);
60. At present no substantive actions against corporations under ATCA have been decided on their merits.
61. Unocal's legal costs were reportedly estimated to be \$US 25 million to date, *Guardian Unlimited*, 15 December 2004. Campbell D 'Energy giant agrees settlement with Burmese villagers.'
62. 124 S. Ct 2739 (2004).
63. Archbishop Desmond Tutu, (2003), launch of the Burma Sanctions Coalition [www.burmacampaign.org.uk](http://www.burmacampaign.org.uk).
64. There are a number of notable examples where sanctions have contributed to significant reform such as the dismantling of the apartheid regime in South Africa. For a detailed discussion on the merits of sanctions, please refer to S Cleveland, 2001 'Norm Internalization and U.S Economic Sanctions' *Yale Journal of International Law* Winter 26 p 3. In relation to Burma, it has been suggested that the US Congress' consideration of sanctions in 1995 partially prompted the government's release of Aung San Suu Kyi from house arrest. It is also suggested the regimes' ratification of a number of Conventions, such as the Convention on the Rights of the Child in 1997 and its efforts to become more open to NGOs such as allowing the Red Cross access to prisons in 1999 have also been in response to the threat of more sanctions.
65. S Cleveland, 2001 'Norm Internalization and U.S Economic Sanctions' *Yale Journal of International Law* Winter 26 p 4.
66. Parker R, 2000 'The problem with Scorecards: How (and how not) to Measure the Cost-Effectiveness of Economic Sanctions' 21 Michigan International Law 235.
67. Despite all the measures imposed by predominantly Western nations, the U.S State Department's annual report to Congress states that the SPDC "has made no progress in moving towards greater democratization, nor has it made any progress toward fundamental improvement in the quality of life of the people of Burma": U.S State Department Country reports on Human Rights Prac-

- tices 2000, cited in E Moritsugu, (2002) 'The Winding Course of the Massachusetts Burma Law: Sub-Federal Sanctions in a Historical Context' 34 *George Washington International Law Review* 435.
68. For a comprehensive discussion of the United States' and other individual state's unilateral measures against Burma, refer to S Cleveland, 2001 'Norm Internalization and U.S Economic Sanctions' *Yale Journal of International Law* Winter. Further U.S. restrictions include a ban on U.S. entry visas to Burmese officials and concerted opposition to financial assistance programs sponsored by the World Bank. Over the same period, the various administrations have elected not to renew lapsed trade agreements and have insisted its contribution to various U.N. projects are not expended on the Burmese military. Domestic procurement legislation, known as 'selective purchasing laws' have also prohibited authorities from doing business with Burma. Other common law countries such as Canada, Australia and the United Kingdom have all imposed various diplomatic, assistance and trade restrictions against Burma.
  69. The prohibition does not include humanitarian and anti-drug trafficking assistance.
  70. Until November 2004, the United States was the only country that prohibited new investment in Burma. The EU has recently announced its decision to impose a similar ban.
  71. European Union website [www.europa.eu.int/comm/external\\_relations/myanmar](http://www.europa.eu.int/comm/external_relations/myanmar).
  72. D Gow, 8 October 2004, 'Burmese ban for European firms' *The Guardian*.
  73. The EU has also withdrawn preferential trading terms that Burma enjoyed as a developing country under the General System of Preferences and has publicly stated that tourism to Burma is inappropriate.
  74. The EU has excluded Burma from participating in a range of ASEM meetings and negotiations since 1997.
  75. Imports from Burma to the U.K alone have reportedly trebled since 1997 and were estimated to be £62.2 million in 2003: D Gow, 2004 'Burmese ban for European firms' *The Guardian*. However, the imposition of sanctions does not preclude a strategy of constructive engagement. As discussed below, I do not argue in this essay for a complete ban on engagement and trade with the Burmese regime. While there is merit in the argument that any engagement can potentially fuel further abuses, an approach of 'responsible engagement' and the imposition of 'smart sanctions' can be utilised to influence the targeted regime while not contributing to the repressive program imposed upon Burma's citizens.
  76. S Cleveland, 2001 'Norm Internalization and U.S Economic Sanctions' *Yale Journal of International Law* Winter 26 p 9.
  77. L Martin, 1962 'Coercive Cooperation Explaining Multilateral Economic Sanctions' Princeton University Press, New Jersey p 3.
  78. U.N Charter, Article 46.
  79. Despite the fact that sanctions are contemplated as a legitimate tool available to the international community to influence repressive regimes, the use of economic sanctions has been criticised as being inconsistent with the principles and law of the international trade regime, governed by the World Trade Organisation. The compliance issues sanctions raise for the trade regime is discussed briefly below.
  80. The Security Council has the power to impose sanctions under Chapter VII of the Charter. While the Security Council would be the ideal vehicle for 'smart sanctions' against Burma, given its political and legal constraints such as the veto power held by the five permanent members, it is not suggested the sanctions must be imposed by this body. It is likely China, as a permanent member would oppose any proposal to impose economic sanctions against Burma. The Security Council has demonstrated a general reluctance to exercise its power to impose sanctions over the past ten years. This reluctance has generally been informed by the detrimental impacts sanctions imposed during the 1990s had on vulnerable populations. In 1995 the five permanent members stated that "further collective actions in the Security Council within the context of any future sanctions regime should be directed to minimize unintended adverse side-effects of sanctions on the most vulnerable segments of targeted countries."
  81. C Forcese, 2002 'Globalizing Decency: Responsible Engagement in an Era of Economic Integration' 2002 5 *Yale Human Rights and Development Law Journal* 1 p 23.
  82. Ibid.
  83. The G8 members are Canada, France, Germany, Italy, Japan, the United Kingdom, the United States and Russia. For further information regarding the G8 please refer to [www.g7.utoronto.ca/g8](http://www.g7.utoronto.ca/g8).
  84. C Forcese, 2002 'Globalizing Decency: Responsible Engagement in an Era of Economic Inte-

- gration' 2002 5 *Yale Human Rights and Development Law Journal* 1 p 23.
85. C Forcese 2002 'Globalising Decency: Responsible Engagement in an Era of Economic Integration' 5 *Yale Human Rights and Development Law Journal* 1 p 3.
  86. S Pegg 2001 'An emerging market for the new millennium' in *Trans-national Corporations and Human Rights* 1<sup>st</sup> Ed, Palgrave Macmillan, New York p 19. There is support for the argument that 'home country' regulation of multinational companies can be effective. Compliance with extra-territorial sanctions in the US is generally high. Importantly, some research suggests that multinationals prioritise their relationship with the US authorities over lost opportunities for investment overseas and therefore they comply strongly with sanctions in order to avoid threatening their relationship with the government.
  87. Burma Sanctions Coalition website: [www.freeburma.org.au](http://www.freeburma.org.au)
  88. C Forcese 2002 'Globalising Decency: Responsible Engagement in an Era of Economic Integration' 5 *Yale Human Rights and Development Law Journal* 1 p 20. Trade constraints against Burma (a WTO member) may breach Article XI of the GATT. However Articles XX and XXI of the GATT provide exemptions to the general principle that trade should not be fettered by prohibitions or restrictions. Those exemptions are limited and apply where: a) a state is taking action in pursuance of its obligations under the U.N Charter, to maintain peace and security; or b) a state is acting to protect its security interests. In the absence of Security Council resolutions, any restrictions on trade with Burma could breach the GATT.
  89. As discussed above, these laws prohibit government procurement from companies operating in Burma. Such laws operate as economic sanctions.
  90. The complaint related to a Massachusetts statute that was recently held to be unconstitutional in a decision of the Supreme Court in *Crosby v National Foreign Trade Council* 530 U.S (2000). Given this ruling, the WTO dispute was discontinued.
  91. The U.S and EU have utilised their respective General System of Preferences programs to tie human rights compliance with trade. Both systems allow incentive trade benefits to countries wishing to trade with their markets and the withdrawal of those benefits, contingent upon prescribed conditions such as compliance with labour standards. Given the non-binding nature, this approach is unlikely to contravene the GATT.
  92. While some 'smart sanctions' such as investment bans may not be at risk of breaching the GATT, procurement regimes and the promotion of voluntary codes of conduct are vulnerable. For a more detailed discussion of these issues, please refer to C Forcese 2002 'Globalising Decency: Responsible Engagement in an Era of Economic Integration' 5 *Yale Human Rights and Development Law Journal* 1.
  93. L Martin, 1962 'Coercive Cooperation Explaining Multilateral Economic Sanctions' Princeton University Press, New Jersey p 5.
  94. M Monshipouri and C Welch (2001) 'The Search for International Human Rights and Justice: Coming to Terms with the New Global Realities' 23 *Human Rights Quarterly* p 377.
  95. Please refer to S Cleveland, 2001 'Norm Internalization and U.S Economic Sanctions' *Yale Journal of International Law* Winter 26 for illustrations of successful policies that imposed sanctions. instances sanctions have proven to be effective in achieving their objectives.
  96. A former U.S official stated that the Burmese junta is "so single-minded that whatever money they might obtain from foreign sources they pour straight into the army while the rest of the country is collapsing." Canadian Friends of Burma, *Dirty Clothes – Dirty System* 51 (1996) cited in C Forcese 2002 'Globalising Decency: Responsible Engagement in an Era of Economic Integration' 5 *Yale Human Rights and Development Law Journal* 1 p 9.
  97. C Forcese 2002 'Globalising Decency: Responsible Engagement in an Era of Economic Integration' 5 *Yale Human Rights and Development Law Journal* 1 p 5. Forcese argues that the relationship between economic prosperity and growth and political liberalisation is complex.

## A FACET OF BURMA'S CRIMINAL JUSTICE — BAIL, NOT JAIL

*B.K.Sen* \*

### **Introduction**

Bail is a humane dimension of custodial justice in contrast to jail which is the harsher side of judicial confinement. Bail is the rule and judged from the philosophy of personal liberty is basic to Human Rights. So long as the presumption is of innocence in civilized criminal law, the right to bail has a better claim over judicial imprisonment. Only in those cases where justice will be defeated by the accused being enlarged can there be a denial of under trial freedom from incarceration. Indeed, the absence of this humanism in judicial practice has led to large-scale imprisonment of under trials. This is a gross injustice.

Even when bail is granted it should not be on onerous or absurd conditions of heavy surety ship and the like. On the whole, the criminal justice system, to be civilized, must be in conformity with values of humanism and compassion. The vision of a just judicial system summons a generous, though well guarded, bail guarantee. After all, a person who is bailed is obliged to appear in court since absence will entail forfeiture of bail money and the right to personal liberty during trial. Every person charged but not found guilty, must stand trial as a free man. The fact that the legal system discriminates against the poor is so various as to need no further proof or explanation. In the area of criminal law, the practical working of the system vitally affects the very life and liberty of the deprived sections.

Even where the demands were nothing more than an implementation of existing laws pertaining to minimum wages, contract labor, or forced labor, reclamation or migrating to earn living, the people struggling were arrested and kept in jail for long periods. Infact, the most non-violent of struggles for the simplest of demands that the government, have been met by repression and use of legal

machinery to arrest and harass the persons involved in the agitation. In almost all these fabricated "Political" criminal cases, implicated are convicted, when, the case comes up for trial. The primary purpose of the exercise is the putting into jail of the persons active in the agitation, so as to crush the struggle and thereby aid and abet the exploiting vested interests, the military regime in the case of Burma. A sizable section had been in jail for a period longer than they had been convicted. Despite the judgment in the case, even today a large number of persons continue to be in jail awaiting trial due to their non-release on bail. The pro-rich property-oriented attitudes of the courts all over the country and the mechanical linking of release on bail with the production of money sureties is the principle. The major problem faced by movements for social change with respect to the legal system is the implication in criminal cases. Routinely it is difficult to get competent legal help in the hundreds of magistrates and sessions courts throughout the country where the cases go on. In polarized situations of sharpened political conflict, it becomes even more difficult to get lawyers. There is no Legal Aid system enabling lawyers to be engaged.

Given the pathetic condition of legal service available, it may well be worst as many can hardly draft and argue bail petitions. Most lawyers in lower courts have no libraries and seem totally unaware of the case law on the subject. The provisions for attachment of property of an absconder in the Criminal Procedure Code are being extensively misused by the police. Under the law, it is only the court which has the power, after strictly following the procedure laid out, of declaring a person as a proclaimed offender and attaching his property.

As all of us know a number of years pass between the arrest of a person and trial in court. Anyone accused of a crime and arrested is innocent till tried and found guilty by a court. The police have no power to judge a person guilty. The function of the police is to investigate a crime and present the evidence to the court. It is the court which decides the guilt or innocence of a person based on the evidence. However, the jails in our country are filled with people who have been arrested and are waiting for their trial. These people waiting for trial are called "under trials". Under trials are in prison not because they are guilty of an offence but due to the inefficiency and delay in courts. The period between arrest and the beginning of the trial of the case is spent in waiting for the trial by these "under trials". It is inhuman sight to see them ferried to and pro from court to Jail on dates of hearing. A person is arrested on suspicion of being involved in a crime. Acts which are crimes have been mainly defined in the Penal Code. A person arrested as an accused can be released from custody on bail. For purposes of release on bail, the Criminal Procedure Code, 4(1) (A) has divided the offences into two categories:

- (1) Bailable and,
- (2) Non-Bailable.

### **Chapter XXXIX - Criminal Procedure of the Code exclusively deals with bail**

**496.** When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police-station or by an investigating officer not below the rank of head constable or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceedings before such Court to give bail, such person shall be released on bail : Provided that such officer or Court, if he or it think fit, may, instead of thinking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided:

Provided further, that nothing in this section shall be deemed to affect the provisions of section 107, sub-section (4), or section 117, sub-section (3).

**497.** (1) When any person accused of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police-station, or appears or is brought before the Court, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or with transportation for life.

Provided that the Court may direct that any person under the age of sixteen years or any women or any sick or infirm person accused of such offence be released on bail.

(2) If it appear to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed a non-bailable offences, but that there are sufficient ground, for further inquiry into his guilt, the accused shall, pending such inquiry, be released on bail, or, at the discretion of such officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.

(3) An officer or a Court releasing any person on bail under sub-section (1) or sub-section (2) shall record on writing his or its reasons for so doing.

(4) If, at any time after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to here judgment delivered.

(5) The High Court or Court of Session and, in the case of a person released by itself, any other Court may cause any person who has been released under this section to be arrested and may commit him to custody.

**498.** (1) The High Court or Court of Session may in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail, or

that the required by a police officer or Magistrate be reduced.

(2) The amount of every bond executed under this Chapter shall having due regard to the circumstance of the case, not be excessive.

1. Sub-section (1) of section 497 and section 498 were substituted by, Act XXXVIII, 1948. For temporary amendments to these, see Act VII, 1954, at page 423, post.

Provide that no person shall be admitted to bail under this section unless the Attorney-General of the District Magistrate, as the case may be, has had an opportunity of being heard.

**499.** (1) Before any person is released on bail or released on his own bail, a bond for such sum of money as the police-officer or Court, as the case may be, thinks sufficient shall be executed by such person, and, when he is released on bail, by one or more sufficient conditions that such person shall attend at the time and place mentioned in the bond, and continue so to attend until otherwise directed by the police-officer or Court, as the case may be.

(2) If the case so require, the bond shall also bind the person released on bail to appear when called upon at the High Court, Court of Session Court to answer the charge.

**500.** (1) As soon as the bond has been executed, the person for whose appearance it has been executed shall be released ; and , when he is in jail, the Court admitting him to bail shall issue an order of release to the officer in charge of the jail, and such officer on receipt of the order shall release him.

(2) Nothing in this section, section 496 or section 497 shall be deemed to require the release of any person liable to be detained for some matter other than in respect of which the bond was executed.

**501.** If, through mistake, fraud or otherwise, insufficient sureties have been accepted, or if they afterward become insufficient, the Court may issue a warrant of arrest directing that the person released on bail be brought before it and may order him to find sufficient sureties, and, on his failing so to do, may commit him to jail.

**502.** (1) All or any sureties for the attendance and appearance of a person released on bail may time apply to a Magistrate to discharge the bond, either wholly or so far as release to the applicants.

(2) On such application being made, the Magistrate shall issue his warrant of arrest directing that the person so released be brought before him.

(3) On the appearance of such person pursuant to the warrant or on his voluntary surrender, the Magistrate shall direct the bond to be discharged either wholly or so far as release to the applicants, and shall call upon such person to find other sufficient sureties, and, if he fails to do so, may commit him to custody.

1. Inserted by Act XIII, 1959

## **Bailable / non – Bailable Offences**

**Bailable Offences** defined in section 4. (1)(a) of Criminal Procedure Code.

A person accused of committing bailable offences and arrested has a “right to be released on bail”.

General bailable offences are comparatively lesser offences. For example, offences like causing simple hurt, being a member of an unlawful assembly or criminal intimidation are bailable offences. Besides the, offences can be bailable or non-bailable, as specified under other laws like Wildlife Protection Act, 1972 and the Forest Act, 1927. An offence not specifically made non-bailable is bailable. The offences in the Penal Code which are bailable are indicated in the First Schedule of the Criminal Procedure Code, which is annexed as Annexure 1.

A person arrested for committing bailable offences has a right to be released on bail.

## **Non-Bailable Offences**

A person accused of non-bailable offences and arrested can also get bail and be released from custody. Non-bailable offences do not mean that the accused cannot get bail and has to remain in jail. It only means that persons accused of non-bailable offences cannot get bail as a matter of right.

Non-bailable offenses are generally more serious offences. For example, offences like murder, rape, dacoity, High Treason are non-bailable offences. The offences under the Penal Code which are non-bailable are also indicated in the First Schedule of the Criminal Procedure Code, which is annexed as Annexure 1. Persons accused of bailable or non-bailable offences are presumed to be innocent till proved guilty in a trial. Before their conviction by a court, they cannot be kept in jail as a punishment.

## **Cognizable / Non-Cognizable Offences**

Another distinction which is relevant for purpose of release on bail is the division into cognizable and non-cognizable offences. Section 4 (f) & (n) of the Code of Criminal Procedure, divides offences into two categories: (a) Cognizable Offences and (b) Non-cognizable Offences.

**1. A “Cognizable Offences”** is one for which a police officer can arrest a person without a warrant from a magistrate. For example, offences like murder, rape, High Treason, dacoit are all cognizable offences.

**2. A “Non-Cognizable Offences”** is one for which a police officer cannot arrest a person without a warrant from magistrate. For example, offences like

cheating, causing hurt, and bigamy are non-cognizable offences.

Schedule 1 of the Code of Criminal Procedure specifies which offences under the Penal Code are cognizable and which are non-cognizable. Alongside the list of bailable and non-bailable offences, the cognizable or non-cognizable nature of the offence has also been indicated in Annexure I. For offences 5(2) created under laws other than the Penal Code mostly special laws, the guideline is as follows:

- (a) Offences for which the punishment is three years or more of imprisonment are "cognizable offences".
- (b) Offences for which the punishment is less than three years are to be treated as "non-cognizable".

### **Court by which Offences is Triable**

Chapter II of the Code of Criminal Procedure lays down the following hierarchy of courts: (i) Sessions Court; (ii) Divisional courts; (iii) Township Courts. The least serious offences can be tried by any judicial magistrate, the more serious ones by Judicial Magistrate First Class. The most serious offences like murder and dacoity can be tried only by a Session Court. Schedule 1 of the CrPC alongwith the list of bailable and non-bailable offences, also specifies the court in which a particular offences is triable.

### **Grounds of Arrest**

A person who is arrested has a right to be informed of the grounds of his arrest, i.e. the reasons for arrest. Although there is no Constitution, the Criminal Procedure Code guarantees the fundamental right to be informed of the grounds of arrest. Section 50 (1) CrPC makes it the duty of the police officers arresting a person to communicate the particulars of the offence for which he is being arrested.

CrPC makes it the duty of a police officer to inform a person arrested for a bailable offences of his right to be released in bail and that he can arrange sureties for such release on bail. A description of the offences supplied to the accused person as grounds of arrest would indicate whether a person is accused of a bailable or a non-bailable offence. A person cannot be detained in custody without being informed of the grounds of arrest.

### **Right to a Lawyer**

Section 340 (1) CrPC also declares the right of a person accused of an offence or against whom proceeding have been initiated to be defended by a lawyer of his choice. Court Manual provides that the court should provide a lawyer at state expense in a trial of murder case. Also refer to SPDC law:- if the accused

is too poor to engage a lawyer.

### **Release by Police**

A person arrested or detained and accused of a bailable offence has to be necessarily released by the officer-in-charge of a police station, if the person is prepared to give bail. The police officer does not have the power/discretion to refuse bail.

The only discretion which the police officer has is to release the accused person (i) on his personal bond or (ii) on personal bond with monetary sureties. In fact, the officer-in-charge of a police station must in case of bailable offences inform the arrested person that he is entitled to be released on bail.

CrPC casts a duty on the police officer arresting a person for a bailable offence to inform him of his right to be released on bail. A person cannot be denied bail on the ground that the officer-in-charge is absent, then the police officer next in rank who is present, has to exercise the power and release the accused person on bail.

If the accused person is not able to furnish bail and is not released by the police, then he has to be produced before a Magistrate within 24 hours of his arrest, excluding journey time from place of arrest to the court.

Production before a Magistrate within 24 hours of arrest is a fundamental right of the accused person. CrPC also prohibits a police officer from detaining anyone beyond 24 hours without producing him before a Magistrate. CrPC provides that an arrested person can request the magistrate for a medical examination in case he has been beaten up or tortured by the police.

The application for release on bail should be moved simultaneously when the accused is produced before the magistrate. Otherwise the accused person would routinely be sent to police or judicial custody.

Police Custody is custody in the hands of the police to help them in their investigation. The accused is kept in the lock up at the police station.

Judicial Custody is custody of the court. In this case the accused is sent to jail. The Jail Superintendent and staff of the jail are separate and not connected with the police investigating the case.

### **Release by Magistrate**

If the accused is ready to furnish bail before the Magistrate, then he has to be necessarily released. Generally, an accused is first produced in the court of a Magistrate. The Magistrate has no discretion to refuse bail. Like the police officer, the only discretion the Magistrate has is to either release the accused per-

son on his personal bond or ask him to furnish bond with sureties.

Infact, the Magistrate before whom a person accused of aailable offence is produced has a duty to point out that the accused has a right to be released on bail. As soon as an application for bail, either personally or through an advocate is filled before a Magistrate, he has to pass either:

After an accused is produced before a Magistrate, a police officer does not have the right to release a person on bail. It is only the Magistrate who has the right to release the accused on bail. A bail application can be filed before the court, if a person has been arrested and is kept in a police lock up. If the accused person is ready to furnish bail then the Court has to release him.

A Magistrate / Court can exercise power to release a person on bail as soon as he is arrested without having to wait for the police to first produce the person before it. A person can surrender by physically appearing in court and be released on bail. Even a person against whom an arrest warrant has been issued can surrender before the court by appearance and has to be released on bail in case ofailable offences.

### **Non-Monetary Factor in Release**

The present bail system in practice works unfairly against the poor as the rich manage to get the money sureties demanded by courts for release on bail. An accused person should be released on bail on the basic, for the following factors which are not related to the money possessed by a person:

- Number of years a person has been staying in a community.
- Employment.
- Family relations and ties.
- General reputation and character.
- Whether responsible members of the community are ready to vouch for his reliable.
- Whether involved in criminal cases earlier.
- Record of conduct when earlier released on bail.
- Offence charged with and the likely sentence, if convicted.
- Membership of organizations.
- Other factors showing ties to the community.

Unfortunately, the courts all over the country continue to follow the old practice of mechanically equating release on bail with monetary sureties. However, the above mentioned non-monetary factors need to be emphasized in each bail application in the court with the hope that over time some change in the attitude of the Judges may be effected.

## **Personal Bond**

Under Section CrPC, an accused person can be released on his own personal bond without surety. The accused does not have to deposit the money pledged in his bond at the time of release on bail. The money is to be given only if the accused defaults in appearing in court. The format of the bond is given as Form No. 45 in the Second of the CrPC:

## **Sureties**

The courts generally do not release an accused person on his own personal bond and insist on sureties. That is, persons who give an undertaking to the court that the accused would appear on the next date of hearing and thereafter when required and pledge to give money in case the accused is absent. The amount of money to be pledged is decided by the court. The persons who stand as sureties should have papers as to their identity and residence like ration card or passport. These sureties have to satisfy the court that they are solvent, i.e. they are in an economic position to be able to produce the amount of money pledged in case the accused does not appear in court. The person standing as sureties do not have to deposit any money at the time of bail. The sureties should have ownership papers of property whose value equals the amount of money fixed in the sureties bond. The format of the bond for sureties is given as Form No. 45 in the Second Schedule of the CrPC and is as under:

## **Surety Amount**

Generally, the courts mechanically fix high surety amounts without taking into consideration the circumstances of the accused person resulting in denial of release on bail. A large number of persons accused of bailable offences continue to be in jail as they are not able to produce sureties for the amount fixed by the court.

All courts are bound by law to fix an amount which is reasonable and which reach of the economic status of the accused person produced before them. Fixing a high amount as surety results in denial of bail to an innocent person who has a right to be released on bail. A surety cannot be rejected on the ground that the person is from a different district or state. Fixing of high surety amounts by magistrates and courts should be contested and fixing of a sum which is reasonable taking into consideration the situation of the accused person should be strongly advocated.

Infact this section clearly lays down that the amount of the bond shall be fixed with regard to the circumstances of the case and should not be excessive. The High Court and the Sessions Court have been given the power to reduce the amount fixed by a Magistrate or police officer. Fixing a high amount for the

surety bond defeats the very provisions for release on bail.

### **Money instead of Bond**

A court or police officer can permit the depositing of a sum of money instead of executing a bond with or without sureties.

### **Change from Cash to Surety**

An accused offered the option of depositing cash or producing a surety and who deposits case, can later ask for refund of the cash on the ground that he is now willing to produce a surety.

A court or officer-in-charge of a police station, expect for demanding sureties, cannot impose any other conditions for release on bail in bailable offences.

Thus directions to:

- Report to the police after release on bail; or
- Not give public speeches; or
- Not participate in public demonstrations; or
- Not go out of the city.

are conditions which cannot be imposed for release on bail in bailable offences.

### **No Delay in Bail**

A person accused of a bailable offence, who applies for bail cannot be denied bail on the ground of giving notice to the public prosecutors. An accused in a bailable offence is to be immediately released by officer-in-charge of a police station. After regular court hours there is a duty magistrate in court so that is no delay in urgent matters like bail.

### **Cancellation of Bail**

A Magistrate can cancel the bail in a bailable offence on the ground that the accused person has not appeared in the court at the time specified in the bail bond. This is the only ground on which a Magistrate can refuse to release a person on bail in a bailable offence. Once a person has not appeared and his bail is cancelled, then he cannot apply for fresh bail just through his advocate. The accused person has to surrender and then apply for fresh bail. The High Court or Session Court can cancel the bail of a person accused of bailable offences for reasons like tampering with evidence or threatening witness.

### **Rights to Legal Aid**

The Magistrate before whom an accused is produced has the duty to direct the

state to provide a lawyer to obtain bail for an accused who is not able to hire a lawyer due to his socioeconomic status. Providing a lawyer from the time of arrest is part of the fundamental rights of equality, life, liberty and protection against arbitrary detention.

An accused person, who cannot afford to hire a private lawyer, can demand from the court, the assistance of a lawyer from the stage of arrest and throughout the proceedings of trial, conviction and appeal. Section 304 CrPC provides that the court should provide a lawyer at state expense for a trial in Sessions Court in case the accused is too poor to engage a lawyer.

### **Release on Bail in Non-bailable Offences by Magistrates and SHOs**

Serious offences like murder and dacoity are called “non-bailable” offences. The term ‘non-bailable offences’ does not mean that a person accused of these offences cannot be released, on bail. As in the case of bailable offences a person accused of non-bailable offences is innocent till proved guilty in a court. He or she is not to be kept in jail as a punishment. There is no justification for keeping an innocent person accused of an offence in custody before being proved guilty are factors such as the likelihood of threatening witnesses, tampering with evidence and running away.

As a general rule a person accused of a non-bailable offences is to be released on bail. However, unlike bailable offences, a person accused of non-bailable offences does not have a right to be released on bail. The courts have the power to either release a person on bail or deny bail and direct that the accused person be kept in police or judicial custody. But in Political Case this principle is never followed in variably bail is refused.

However, police custody cannot be granted after the first fifteen days from the date of arrest. The court cannot order police or judicial custody unless the accused person is produced before it. At the time of production before the court, the accused person can complain to the judge and ask for a medical examination under Section CrPC in case he/she has been beaten or tortured by the police.

The power of the court to give or deny bail is to be exercised as per the provisions of law. The various factors which govern the decision to grant or deny bail have evolved over the years through judgments delivered by courts. Thus, a person accused of a non-bailable offences can also be released from custody on bail.

The power of the courts to release a person on bail in non-bailable offences as laid of the Criminal Procedure Code. Some restrictions have been put on the power of a police station-in-charge and or Magistrate to release on bail in non-bailable offences punishable with death or life imprisonment. The Sessions and

High Courts have been given wide powers to release on bail in all non-bailable offences with no restrictions imposed by the provisions.

CrPC governs the release on bail in non-bailable offences by officers-in-charge of police stations and courts other than sessions or high court. CrPC governs the release on bail in non-bailable offences by high courts and sessions courts.

### **Release on Bail in Non-bailable Offences by Magistrate or Officer-in-Charge of a Police Station**

The officer in charge of a police station, SHO can release a person arrested for a non-bailable offence till the stage that he is not produced before a court. After, a person is produced before a court; the police officer does not have power to release a person on bail. An arrested person, after production before a court, can be release on bail only by the court.

However, case laws have put restriction to release a person on bail in non-bailable offences by the following two clauses: if there are reasonable grounds for believing that a person has been guilty of an offence punishable with death or life imprisonment, then he or she will be denied bail.

That a person accused of a cognizable offence shall not be released on bail, if he has been previously convicted:

For an offence punishable with death, life imprisonment or imprisonment of seven years or more; or the court can give bail to persons covered by restrictions, if they fall within the category of:

- persons below 16 years of age; or
- women; or
- sick or infirm persons.

Bail should not be refused only on the grounds that an accused is required for identification by witnesses.

The fact that the police want the accused to participate in a Test Identification Parade to give an opportunity to witnesses to identify the person guilty of the crime should not lead to refusal of bail. The Court, while releasing on bail can give directions in this regard to the accused person, who in turn has to give an undertaking to obey the directions given by the court.

### **Reasonable Grounds for Believing a Person Guilty of Offence Punishable with Death, Life Imprisonment or Seven Years Imprisonment**

The stage of pronouncing a person guilty or innocent comes much later, after a trial in which the guilty of an accused is to be proved beyond reasonable doubt. At the stage of giving bail to an accused who is an under-trial, the court has to see whether there are materials to reasonably believe that the person is guilty of the offence.

This reasonable belief is only for the purposes of deciding the question of bail. A person denied bail on this ground, may well be declared innocent after the evidence is examined in a trial. The following guidelines indicate the criteria for the formation of a reasonable belief of guilty for purpose of bail.

(a) Merely because the police states that a person is accused of an offence punishable with death or life imprisonment or seven years imprisonment does not mean that the court should reach the conclusion that there are reasonable grounds for believing that a person has been guilty of such an offence.

(b) The court is not to deny bail, merely on the basis of police report without applying its mind to the merits and circumstances of the case.

Under CrCP, the Investigating Officer (IO) of the police has to submit to the court a copy of the case diary alongwith the remand report. The court has to examine the material produced before it by the police on behalf of the give rise to a reasonable belief that the accused person has committed an offence punishable with death or life imprisonment or seven years or more of imprisonment. At the initial stage, the prosecution has only to produce prima facie material, i.e. which on the face of it supports the charge and satisfies the court that there is a genuine case against the accused. The angle of consideration and approach of the court is quite different from that to be adopted at the stage of the trial when a person can only be convicted if the guilt is proved beyond reasonable doubt.

Corresponding, at the stage of investigation, while opposing the bail to prove the guilt beyond reasonable doubt. It only has to collect materials in support of said that there are reasonable grounds for believing that the accused has committed the offence alleged. Ultimately, it is the discretion of the individual judge to decide whether a material produced by the prosecution is sufficient for a reasonable belief that the accused has committed the alleged offence. This is the regard to bail of an arrested person is almost totally in the hands of the judge hearing the bail application.

The defence which an accused may have in answer to the crime with which he is charged is not a relevant material to be considered at the time of granting of bail by a court. The question of defence story or version arises only after the prosecution has established the charges beyond reasonable doubt in a trial. At the time of bail, the prosecution does not prove the crime. It only produces materials which on the face of it support the charge against the accused.

### **Bail or Remand**

Remand is the sending of the arrested person to either judicial custody or police custody.

An accused person is sent into police custody and kept in the police lock-up to

help the police in the investigation of the crime. In the alternative, an accused person can be sent into judicial custody, i.e. the custody of the court and kept in jail. The issue of relating a person on bail or remanding him to police or judicial custody arises critically at the following stages in the courts of criminal proceedings:

(i) Production before Magistrate within 24 hours;

When investigation into the offence alleged is not over within 24 hours of the arrested of a person and the accused is sent to the magistrate for remand during police investigation.

The Magistrate at this stage has to decide whether to release the accused person on bail or send him into police custody or judicial custody. Copies of the entries in the case diary have to be sent by the investigating police officer to the court. The court has to examine the evidence already collected and the prospects of getting further evidence regarding the offence alleged in deciding whether an accused is to be remanded to custody under Section 167(2) CrPC or released on bail.

If, after the period of the first remand is over, the prosecution asks for remand for a second time, then the police has to produce more direct evidence to link the accused with the alleged crime. The prosecution has to produce stronger proof connecting the accused with the crime to justify successive request for remand. Police custody cannot be granted for more than a period of fifteen days.

Police custody cannot be granted after the lapse of the first fifteen days from the date of arrest. That is, if an accused person has been in hospital or in judicial custody for 15 days from the date of arrest, then thereafter the accused cannot be sent into police custody.

(ii) CrPC, if after taking cognizance of a case or commencement of trial, the court adjourns the matter for some reason, then it has the power to remand the accused to custody. However, at this stage, the accused person can only be remanded to judicial custody by the court. Even if further investigation is needed, the accused person cannot be remanded to police custody.

At each stage, from arrest of an accused person, to production before a Magistrate during investigation and subsequent taking cognizance of the case, the Court is to exercise the power to release a person on bail after taking into consideration various relevant factors laid down by law.

### **Principle and Factors Governing Release on Bail**

The decision to release a person on bail is entirely in the decision of the court.

However, as the decision concerns the individual liberty of a person, the courts have to take particular care in deciding the issue. The courts should not routinely remand and accused person to police or judicial custody. "Bail not Jail is the Rule". The courts have to take into account the following principles and factors while deciding the question on bail:

(a) Releasing a person on bail should be the general rule and refused of bail should be an exception.

A person accused of a crime is innocent till proved guilty in a trial before a court. The individual liberty of an accused person should ordinarily not be restricted. He has not been sentenced to imprisonment in jail by any court. Therefore, unless there are special grounds to believe that the person will misuse his liberty by tampering with evidence or threatening witness, the accused should not be refused bail.

(b) Bail should not be refused to person accused of a crime with the object of keeping him in jail or police custody as a punishment.

Unfortunately, this simple principle is often violated. Many judges, special where persons are accused of serious crimes like murder, routinely reject the first bail application, keep the person in custody for sometime and then later hear a second bail application on merits. It seems to stem from the reasoning that persons accused of a crime must be kept in jail for sometime and only then their bail application should be considered.

(c) The nature and seriousness of the crime for which the accused is in jail

This is one of the major factors to be taken into consideration. Section 436 of the CrPC itself gives a right to the accused to get bail in 'bailable offences' which are lesser offences compared to non-bailable offences. Similarly, CrPC makes it more difficult to get bail for offences which are punishable with death or life imprisonment compared to those for which the punishment is less.

To illustrate:

It is easier to get bail for theft, as it is a lesser offence, than for armed dacoity which is a more serious offence. It is easier to get bail for slapping a person and causing 'simple hurt', than for hitting a person and causing 'grievous hurt' by breaking his arm. Thus, the more serious a crime of which a person is accused, the more difficult it is for him or her to get bail.

The nature evidence against the accused relates to:

- a. The police has to submit copies of the entries in the case diary, remand report and other materials like statements of witnesses to the court.
- b. The Court has to examine the material produced by the prosecution and

determine whether there are reasonable grounds for believing that the accused has committed the offence with which he is charged.

- c. Even in cases where the materials produced may give rise to a reasonable belief that the accused has committed the offence charged with, bail is not to be denied solely on this ground. This is one of the factors to be considered by the courts. Obviously, it is easier to get bail if the material produced by the police/prosecution does not give reasonable ground to believe that the accused has committed the offence.
- d. Magistrates are ordinarily not to give bail if the materials of the prosecution give rise to a reasonable belief that the accused has committed an offence punishable with death or life imprisonment.

This restriction on ground bail by magistrate is not applicable to offences for which the punishment is less than life imprisonment or death.

Apprehension of witnesses being influenced or threatened by the accused.

- a. A person is kept in jails an under trial, i.e. before his conviction by a court, only to ensure a fair trial.
- b. If an accused person threatens or offers money to witnesses to change their testimony in court, then it affects the fairness and impartiality of a trial.
- c. If the chance of an accused threatening witnesses against him to change their testimony are high, then the accused is not to be released on bail.
- d. Complaints by witnesses of threats and intimidation are of course a sure sign of trying to influence them and the accused is not to be released in such circumstance.
- e. The position in society of the accused compared to the position of the victim and the witnesses is an important factor in assessing the chances of an accused threatening the victim and the witness.

To illustrate:

- (i). If the accused is a police officer who has been arrested for beating a vegetable-vendor to death, *then* the chances of the accused threatening the victim's family or neighbours who may be witnesses is quiet high considering the status and socio-economic status of the persons involved.
- (ii). Conversely, if the accused is a worker in a factor charged with slapping the general manager, *then* the chances of the accused offering money or threatening the victim and witnesses to change their evidence are very low.

Apprehension that the accused person will run away if released on bail.

- a. Fear that the accused person will run away (abscond) if released on bail and will not be available to undergo trial is one of the strongest reason to deny bail and keep the person in custody.
- b. The accused person himself gives an undertaking in the shape of a "personal bond" to appear in court when required.

- c. Generally the courts insist on monetary sureties, which are to be arranged by the accused, to act as a check against the accused person running away after release the concerned person in court.
  - (i) 'Sureties' are persons who undertake to produce the accused when required by the court and pledge to give a sum of money to the court in case they are unable to produce the concerned person in court.
  - (ii) The sureties have to show that they are in a position to produce the sum of money pledge.
- d. Insistence on monetary sureties as the only means to ensure that the accused does not run away is discriminatory against the poor as it favours the rich.
- e. The fact of a person being rooted in his community has been held by the Supreme Court to be one of the strongest factors for a person not to run away from the usual place of his residence. Existence of family, associations or other social organizations are all factors which indicate the roots of a person in a community.

There is no reason to delay bail to a person with roots in the community. He or she should be released on bail on his/her personal bond without insistence on sureties.

#### **Duration of the trial**

If the trial is going to be long and delayed then it is a good ground in favour of release on bail.

*For example:*

- a. If the accused person has already been in jail for a while and the trial is likely to being after sometime, then it is a strong factor in favour of releasing the person on bail.
- b. If the accused is in jail and the trial is likely to take considerable time to conclude, then the person should not be denied bail and kept in custody.

However, if the delay in the trial is caused due to the accused himself asking for repeated adjournments giving various reasons, then he is not entitled to be released on the ground of delay.

#### **Opportunity to prepare defence**

- a. The required of justice is a fair trial. A fair trial is one in which the accused has a proper opportunity to defend himself.
- b. A trial in which an accused has not been able to properly defend himself is bad in law.
- c. Therefore, if the circumstances show that the accused person will not be able to take the steps necessary for his defence, if he is kept in custody, then it is a strong factor in favour of release on bail.
- d. Steps necessary for defence range from getting competent legal counsel to identifying and locating documents and persons whose testimony helps the defence case.

e. Financial status, social condition, number of family members, level of education of the accused are some of the factors which are relevant in assessing whether an accused person is getting a proper opportunity to defend himself while confined in jail.

For example:

In a poor illiterate family, if the sole earning member or the only male member is in jail, then he, as an accused may not be getting a proper opportunity to defend himself. The non-earning members or the women members may not in a position to get out of the house, arrange for money, engage a lawyer and take other steps necessary for defence.

### **Financial Status**

- a. The fact of the accused person being the only earning member of a family is a strong factor for his release on bail.
- b. If the sole earning member of a family is put in jail and denied bail, then the whole family is left with no livelihood.
- c. An accused person cannot carry on his usual work in jail and even though he is innocent till pronounced guilty by a court, his whole family suffers the punishment of their survival being threatened. This is obviously unfair and unjust.

**Note:** Ordinarily, the courts with their bias in favour of the propertied class, infact, more easily release on bail accused persons who come from well-off families rather than a daily wage worker. However, the above mentioned reasons for releasing the sole earning member of a poor family on bail are strong and valid reason in law.

Illness or old age of the accused is a strong factor in favour of granting bail. Again, pregnancy of the accused or the fact of having a small child/baby is a factor which should tilt the balance in favour of release on bail.

### **Bail and Search**

Bail cannot be denied on the ground that the police wants to search the house of the accused.

### **Danger of the alleged offence being repeated**

If, from the various circumstances of the case, the chance of the accused person committing or continuing the same offence appear to be high, then he is not to be released on bail. Circumstance include the character or nature of the accused, his behaviour in relation to the individual facts of the case, earlier history of jumping bail and so on.

### **“Legal Interests”**

In general the courts follow a more cautious policy and deny bail where they feel larger interests of the country are involved, as in case pertaining to Official

Secrete Act or military affairs involving spying or overthrowing the government.

The Court in evaluating the various factors like chances of the accused running away, the nature of evidence, the danger of witnesses being threatened takes into account the police diary which is a record kept by the police of its investigation. This police is not given to or shown to the accused or his lawyer.

### **Appeal in case of rejection**

In case the bail application is rejected by the Magistrate the accused person has a right to appeal against it to the Sessions Court.

### **Bail at later stage**

It is provided that:

At any stage of the investigation, inquiry or trial, if it appears to the court or the police officer, on the basis of materials before them that:

There are no reasonable ground of believing that the accused person has committed a non-bailable offence, but there are materials to indicate that further inquiry into the guilt of the accused is needed, then, the court or police officer can release the accused person on bail or personal bond without sureties.

Therefore, a court may refuse bail at an initial stage, yet, later after some degree of police investigation and on the basis of materials produced against the accused reach the conclusion that there are no reasonable grounds for believing that the person has committed a non-bailable offence and release him on bail or personal bond.

### **Conditions while releasing on bail.**

From Human Rights part of view conditions can be imposed by court on a person and release him on bail, if he is accused of any of the cognizable offences:

For Example;

- Offences punishable with seven years or more of punishment;
- Offences against the State like waging war against the government and sedition given under Chapter VI of the Indian Penal Code (PC) ;
- Offences affecting the human body like murder, grievous hurt, kidnapping, rape given under Chapter XVI of the PC;
- Offences against property like theft, robbery, dacoity, cheating given under Chapter XVII of the PC;
- Abetment or conspiracy to commit any of the above offences.

### **Object of imposing conditions**

The Court can impose reasonable conditions necessary to achieve the following objectives:

- (a) To ensure attendance of the accused in court;
- (b) To prevent the commission of offences similar to the one for which he or she has been arrested; and
- (c) To ensure the ends of justice.

The phrase "to meet the ends of justice" gives very wide discretion to the court. Therefore, the Court can impose any conditions which it considers necessary in the interests of justice. There is no provision that bail shall not be given in cognizable offences.

In imposing conditions for bail, the Court has to strike a balance between minimum interference with the personal liberty of the accused and the right of the police to investigate.

### **Conditions which may be imposed**

The conditions may be imposed by courts while releasing a person on bail are:

- (a) That the person released shall report to a particular police at specified intervals of time. Depending on the circumstances of the case, the court can ask a person to report every month or every week or every daily.
- (b) That the person released shall appear before the police, if called for interrogation.
- (c) That the person released shall not enter particular places.
- (d) That the person released shall confine his movement within a particular area in the interests of proper investigation.
- (e) That the person released shall not leave the country if he has one.
- (f) That the person released shall surrender his passport.

However, conditions imposed on the accused person released on bail must not be unreasonable or too harsh or amount to a virtual denial of bail by putting severe restriction on the liberty of the individual. The following illustrations indicate conditions considered as unreasonable:

Demanding sureties for every high amounts of money as a condition for bail. It amounts to denial of bail and cannot be imposed. The court while releasing a person on bail, cannot direct the accused to show the place from where the police can recover articles/evidence which can be used against him.

Unreasonable restrictions on the movement of the person released on bail not permitting him to attend to work and his daily duties are not to be imposed. The period for which bail is granted should not be left vague.

Bail should be granted for a definite period or till a certain stage in the case. For example, bail may be granted till the investigation is completed or the case is committed to the Magistrate.

**Reasons for bail in offences punishable with death or life imprisonment**

If a police officer or the court grants bail under CrPC to a person accused of offences punishable with death or life imprisonment, then reasons for giving bail must be recorded. The reasons for giving bail must show that the police officer or court has applied its mind to the facts of the case, taken the relevant factors into consideration and then reached a decision.

**Cancellation of Bail**

This CrPC gives power to any court which has released a person on bail to, if necessary, direct the re-arrest of the person and send him into custody.

The factors to be considered for cancellation of bail are different those relevant at the time of deciding a bail application. The consideration responsible for rejection of a bail application are not the same as those which weigh for cancellation of bail which has been already granted. Bail is to be granted after considering the various factors mentioned earlier under CrPC. The cancellation of bail is due to developments which make it clear that a fair trial would not be possible if the accused is roaming around freely.

The provision does not specify the grounds on which bail can be cancelled. However, generally bail is cancelled where the accused has abused his liberty or there is a reasonable apprehension that he will interfere with a fair trial.

**Grounds for cancellation**

Bail can be cancelled if the person released on bail:-

- (a) Commits the cancelled same offence for which he is being tried; or
- (b) Threatens or bribes prosecution witnesses; or
- (c) Removes traces or evidences of the crimes; or
- (d) Tampers with evidence in other ways; or
- (e) Commits acts of violence in revenge against the police or the complaint or other persons; or
- (f) Goes underground; or
- (g) Runs away from the sureties; or
- (h) Runs away from the country; or
- (i) Creates obstacles in the investigation; or
- (j) Fails to appear before the court on the date fixed; or
- (k) The surety for the attendance of the accused person applies to be discharged, i.e. the presence of the obligation and applies to the court to release him as a surety; or
- (l) Where fresh evidence indicates that the accused may have committed an offence punishable with death or life imprisonment.

**No grounds for cancellation**

The following instances have been held to be insufficient to cancel the bail granted to an accused person:

- (a) Mere vague allegations are not enough to cancel the bail.
- (b) Bail cannot be cancelled because the prosecution witness have turned hostile. Some behaviour or act of the accused has to be established to show that he has threatened, bribed or influenced the witness.
- (c) Bail cannot be cancelled only because the accused is required for recovery of evidence articles by the police.
- (d) Bail cannot be cancelled because subsequent to the release on bail, the police has filed a challan/ charge-sheet.
- (e) Bail cannot be cancelled on the ground that some other accused have absconded.
- (f) Bail cannot be cancelled as an indirect punishment of the accused.
- (g) Serious nature of offence is a factor while considering the release of a person on bail. Once a person is released, bail cannot be cancelled on the ground of serious nature of offence.

In India Criminal Procedure Code where an accused is in custody and the trial is not completed within 60 days of the first date of evidence then he has to be released on bail. The Magistrate does have power under the section refuse bail. However, he has to record reasons for refusal.

This section is applicable to offences triable by Magistrate and not more serious crimes like murder, dacoity which can be tried only by a Sessions Court. But in Burma we do not have this provision.

### **Release on Bail in Bailable and Non-bailable Offences by Sessions Courts or High Court**

As seen in the previous chapter, Magistrate and Offences-in-charge of a police station have powers to release a person accused of non-bailable offences under CrPC. However, restriction have been put on their power to release on bail for offences which are non-bailable specially those punishment with death or life imprisonment. In a number of places, an application for release on bail is routinely moved before a Magistrate and it's mechanically rejected. After that the bail application is moved before the Session Court, which considers the reasons given in the application for release on bail, applies its mind and gives a decision on merits.

The Session Court and the High Court have been given wide powers to release a person in custody who is accused of non-bailable offences. The restrictions on magistrates and officers in-charge of police stations with regard to release on bail for offences punishable with death or life imprisonment do not apply to the power of the Session Court and High Court. The Session and High Court have also been given the power to impose conditions while releasing a person on bail in case of the more serious offences.

CrPC gives powers to Magistrates and Officer-in-charge of police stations to

release on bail a person accused of a bailable offences. In addition, the Sessions Court and High Court have been given special powers to release on bail accused of bailable or non-bailable offences under Section 439 CrPC.

### **Power to Release on Bail**

Lays down that a High Court or Sessions Court may release on bail a person who is accused of an offence and is in custody. A person has to be in custody before bail can be granted under this provision. He has to be physically present and submit to the jurisdiction of the court.

A person in 'in custody' in the following situations:

- (a) Where the police arrest him and he is held by the investigating agency or any other authority such as the Forest Department in cases of offences under the Wildlife Act.
- (b) Where the police after arrest, produces him before a Magistrate and obtains a remand to judicial or other custody.
- (c) Where the accused surrenders before the court and submits to its direction. A person under the control of the court is under "judicial custody".

### **Conditions imposed while Releasing on Bail**

For conditions which can be imposed while releasing on bail for certain specified offences, the object of imposing conditions, conditions frequently imposed and condition considered too unreasonable – Refer to Chapter III titled "Release on Bail in Non-bailable Offences by Magistrate and SHOs".

### **Appeal in case of rejection**

In case the bail application is rejected by the Sessions Courts then the accused can appeal against the rejection to the High Court.

### **Power to set aside or modify conditions**

This section gives power to the Session and High Court to set aside or modify any condition imposed by a Magistrate while releasing a person on bail.

### **Notice to Public Prosecutor**

CrPC lays down that in case of offences punishable with life imprisonment and those triable by session court, notice has to be given to the public prosecutor before granting bail. A copy of the bail application has to be given to the public prosecutor and his arguments with respect to grant of bail have to be heard by the court taking a decision.

However, if it is not practicable to given notice to the public prosecutor, then the court has been given power to release a person on bail without giving notice. In this event, the court has to record the reasons for not giving notice.

**Salient Features:**

1. The Sessions and High Courts have been given wide powers to release on bail a person accused of any offences.
2. Bail can be granted by them in case of bailable as well as non-bailable offences.
3. A person accused of serious offences punishable with death or life imprisonment can also be released by this court.
4. The High Court and Sessions Court can grant bail despite the refusal to release on bail by the trial court.
5. The limitation on Magistrate to not release an accused person on bail, if there are reasonable grounds for believing that he is guilty of an offence punishable with death or life imprisonment, do not apply to the power to release on bail given to the Sessions and High Court.
6. The powers of the High Court and Sessions Court to release on bail are wide, however, the principle and factors like presumption of innocence, seriousness of crime charged with, nature of evidence, likelihood of tampering with evidence, chances of absconding, financial status, rootedness in community, opportunity to prepare defence and duration of trial govern the decision to grant or refuse bail.

**Note:** A detailed text with regard to the principles and factors governing bail has been given under Chapter III, titled "Release on Bail in Non-bailable offences by Magistrate and SHOs"

7. Bail application can be given to either the Sessions Court or the High Court. Ordinarily, it is better to first approach the Sessions Court, rather than go directly to the High Court.
8. Even after the rejection of a bail application, a fresh bail application can be filed giving additional new materials and further developments.
9. The dismissal of a bail application does not end the issue of release on bail.
10. Successive bail applications can be given on fresh grounds.

**Cancellation of bail and re-arrest**

This section gives power to the Sessions Court and the High Court to cancel the bail of a person and direct his re-arrest. The power to order the arrest of a person released on bail extends to any of the following situations:

**1. a.** Where in a bailable case, bail has been granted by the police or a subordinate court.

**b.** The Magistrate under CrPC can cancel bail granted in a bailable offence, only if the accused does not appear in court at the time specified in the bail bond. He has no power to cancel bail for other reasons.

The High Court and Sessions Court have power to cancel bail granted by a Magistrate or police in bailable offences for reasons like threatening witnesses or tampering with evidence.

**2. a.** Where in a non-bailable case, bail has been granted by a subordinate court or the police.

- b. In case of non-bailable offences, any court which has released a person on bail, has power to cancel it under CrPC, if it considers it necessary.
3. Where bail has been granted in a bailable or non-bailable offence by CrPC.
  4. Where anticipatory bail has been granted in respect of a non-bailable offences by the Sessions Court or High Court under CrPC.
  5. Bail can be cancelled by Session Court or High Court on the application of a private even in a police case.

Bail can be cancelled under this section on the ground that:

1. Order granting bail was without jurisdiction; or
2. Order by the Magistrate granting bail was made without applying his mind; or
3. Order by the Magistrate granting bail was made on irrelevant considerations.

### **Grounds for Cancellation**

CrPC does not provide grounds on which bail can be cancelled. The factors to be considered for cancellation of bail are different from those relevant at the time of deciding a bail application. The considerations responsible for rejection of a bail application are not the same as those which weigh for cancellation of bail which has been already granted. The cancellation of bail is due to developments which make it clear that a fair trial would not be possible if the accused is roaming around freely.

The various provisions which give power to the court to release a person arrested by the police for any offences on bail have been explained in the earlier chapters. The principles and factors which govern the issue of release on bail have also been discussed. The court has to apply the principles and factors laid down to a principles and factors and decide the question of release on bail of an accused.

Bail cannot be refused once the conditions are fulfilled. The court does not have any discretion in the matter and cannot deny bail. The steps leading to release and the relevant provisions are as follows:

- (a) The police under Section 61 CrPC cannot detain a person beyond 24 hours, without an order from a Magistrate under Section 167 CrPC.
- (b) If investigation cannot be completed within 24 hours, then the police has to produce the arrested person before a Magistrate.

### **Under India Criminal Procedure Code.**

Compulsory Release on Bail if Investigation not complete in 60 or 90 days

The Magistrate can send the arrested person to either police custody or judicial custody in the first fifteen days from the date of production before him.

It lays down that after the expiry of the first fifteen days, a Magistrate can send an accused person to judicial custody as long as the total period is:

1. Not more than 90 days for offences punishable with death, life imprisonment or a minimum of ten years; and
2. Not more than 60 days in case of all other offences.

After the expiry of 90 days and 60 days respectively for the two categories of offences, the accused person has a right to be released on bail. If the accused is ready to furnish bail, the Magistrate does not have the discretion to refuse to release him.

### **Detention only after Production**

To safeguard the rights of the accused and to offer them some protection against beatings and torture by the police, detention can be ordered only after production of the accused. Production of the accused before the Magistrate is to ensure that the Magistrate himself can observe the condition of the accused. The accused can also complain to the Magistrate about beatings, torture and other illegal acts of the police. The Magistrate is duty bound to take cognizance, send the accused for medical examination and take further steps to prosecute the guilty policemen.

Unfortunately, Magistrates sometimes authorise further detention without the accused being produced before them. Or Magistrates treat the whole procedure totally mechanically and do not even look up to observe the condition of the accused and authorise detention as per the wishes of the police.

Criminal Procedure Code can be used effectively by the accused persons themselves as well as their lawyers to see to it that all instances of police beating and torture are brought to the notice of the Magistrate, a medical examination done and action taken against the policemen responsible.

### **Magistrates power to send to police or judicial custody**

The following points about the Magistrate's power to send to police or judicial custody, though not strictly related to release on bail, are important while dealing with criminal case:

1. A Magistrate cannot send an accused person into custody unless the person is produced before him in court.
2. A Magistrate can send an accused into police custody only during the initial fifteen days from the date of production before him.
3. During the initial 15 days a Magistrate can send an accused person from judicial to police custody and from police custody to judicial custody.
4. After the first fifteen days from the date of production are over the Magistrate can send an accused person only to judicial custody.

(a) However, if some separate occurrence which is an offense is disclosed by the accused while in judicial custody, then he/she can be sent into police custody to help investigation of this separate case.

(b) The re-arrest and seeking of police custody, after the first fifteen days from the date of production in an offence, can only be with regard to a different case regarding some other distinct and separate occurrence.

5. In the same case, a person cannot be sent into police custody after the first fifteen days from the date of production on the ground that a more serious offence is disclosed with regard to the same occurrence.

6. The police cannot go on adding fresh section and offences with regard to an occurrence or incident and continue to get police custody of the accused person.

### **Bonds for Release, Discharge of surety and Forfeiture of Bond**

As discussed in earlier chapters, a person arrested and charged with a bailable offence has a right to be released on bail under CrPC. Persons charged with non-bailable offences may get bail from a police officer or court under CrPC. Under Sections 167(2) (a) CrPC if the investigation is not complete within the time specified then a person charged with any offence has to be released on bail. However, in all these cases, even after a bail order has been made by the judge, certain forms called bonds have to be filled before a person is released from custody. In each case, a personal bond has to be filled by the accused promising to be present whenever called by the court. Generally, the bail order also insists on undertaking by sureties. In that event, the sureties have to fill a bond. Along with the contents of these bonds the procedure in case a person standing surety wants to discontinue and the consequences of the accused running away are described in this chapter.

#### **Bond of accused and sureties**

Law requires that whether an accused person is released on personal bond or on bail bond with sureties, the bond must specify a sum of money which is sufficient to ensure the attendance of the accused at the time and place specified in the bond.

#### **Important Points**

1. If an accused is released on his personal bond alone, then that bond should specify a sum of money thought sufficient to ensure his presence in court.
2. If the accused is released on his personal bond along with sureties, then both the personal bond and the bond of the sureties should specified a sum of money sufficient to ensure the presence of the accused in court.
3. The bond should mention the time and place where the accused has to be present.
4. The bond should also have an undertaking that the accused person will

- continue to attend until otherwise directed by the court or police officer.
5. The sum of money mentioned in the bonds is to be given to the court as a penalty, if the accused person fails to appear at the time and place specified in the bond.
  6. The format of these bonds has been given as in Schedule II of the CrPC.
  7. In case of release on personal bond with sureties, there have to be separate declarations by the accused person and the sureties.
  8. Each of the accused has to execute a separate bond.
  9. Each of the sureties also has to execute a separate bond.
  10. The surety is liable independent of the liability of the accused. Thus, even if money has been recovered from the accused as per his personal bond, the specified amount can be recovered from the surety as per the surety bond.

### **Conditions in Bond**

Law requires that the bond should contain any condition imposed for the release of the arrested person on bail. Law lays down that if required the bond can also bind the accused person to appear before the high court or Court of Session or any other court.

### **Fitness of sureties**

This section lays down that for deciding the fitness or sufficiency of the sureties, the court can either: Accept an affidavit of the surety as to his solvency, i.e. having enough money to pay the amount specified in the bond, value of property mentioned and other such fact; or

The court can hold an enquiry itself or direct a subordinate magistrate to determine the sufficiency and fitness of the sureties. A person standing surety cannot be rejected on the ground that does not reside within the local limit of the Magistrate before whom the bond is executed.

### **Release immediately on Execution**

As soon as the bond is executed, the accused person shall be released. If the accused is in jail, then the court shall issue an order of release to the officer-in-charge of the jail who shall release him. Even where an enquiry is directed by the court with regard to fitness of a surety, the bond becomes operative from the date of execution. It should be accepted and the accused released on bail subject to the final acceptance of the surety after the report of the enquiry. Even after execution of the bond, a person can be kept in detention for some matter other than the one for which the bond has been executed. In case insufficient sureties have been accepted and the accused person released on bail, to issue an arrest warrant and order the accused to find sufficient sureties.

### **Discharge of Sureties**

Discharge of surety means that the person who has undertaken to ensure the person of the accused in court wants to be released from the obligation and applies to the court to relieve him as a surety. A person who has accused a bond

as a surety for the attendance of a person released on bail and then wants to discontinue can be discharged as per the procedure laid down.

A person who is a surety for a person released on bail and then wants to discontinue has to apply to the Magistrate to be discharge as a surety. The Magistrate on receiving an application for discharge from a surety is to issue an arrest warrant directing that the concerned accused be brought before him.

After the accused has been arrested and brought or if he voluntarily surrenders, the Magistrate can discharge the earlier surety and direct the accused to find other sufficient sureties. If he accused does not produce other sureties, then he can be sent to jail.

### **Cash instead of bond**

The Court can also permit a person to deposit money in cash instead of executing a bond with or without sureties.

1. The accused person can offer to deposit cash instead of producing sureties.
2. The court in its discretion can permit an accused person to deposit cash instead of producing sureties.
3. The accused does not have a right to deposit money in cash instead of producing sureties.
4. The court cannot demand that the accused person deposit money in cash. The court can permit it, if offered by the accused.

### **Forfeiture of bond**

In case of a bond for appearance of a person or for production of property in court, if it is proved that the bond has been forfeited.

*Then*, The court has to record the grounds of proof and ask the person who executed the bond to either pay the penalty or give valid reason as to why he should not be made to pay the penalty.

### **What is forfeiture.**

- a. A surety bond is a contract or undertaking by the surety to produce the accused released on bail in court.
- b. If the accused released on bail does not appear in court at the time and place specified in the bond, it amounts to a breach of the contract or undertaking.
- c. For breach of the contract or undertaking a penalty is to be imposed on the person who had given the surety bond.
- d. This is called forfeiture of bond.

### **Conclusion of Violation of Bond:**

- a. The court has to reach the conclusion that the undertaking in the bond to produce the accused in court has been violated.

**b.** The court must also record the grounds on the basis of which the conclusion has been reached.

#### **After Conclusion of Violation of Bond**

- a.** After reaching the conclusion that the bond has been violated, the court has to issue notice to the person who has executed the bond to give reason as to why he should not be made to pay the penalty.
- b.** The person who executed the bond has to be given an opportunity to explain and give reasons why penalty should not be imposed on him.
- c.** The matter ends if the person is able to show sufficient reasons for non-imposition of penalty.

If neither sufficient cause for not imposing penalty is shown nor the penalty is paid, then the court can recover it as a fine. If the penalty cannot be recovered, then the court can send the person to civil jail for six months.

#### **Reduction of penalty amount**

Power to the court to reduce the penalty amount.

#### **Death of person who executed bond**

If the person who has executed the bond dies before the penalty can be recovered, then the amount cannot be recovered from his property/estate.

#### **Release after forfeiture**

- a.** If the undertaking given for the presence of the accused in court is violated and the bond is forfeited, then the bond of the accused as well as the surety bond stand cancelled.
- b.** After the cancellation, the accused person is not to be released on his own personal bond unless he has been able to show valid reason for not complying with the bond.
- c.** However, the accused person can still be released on executing a fresh personal bond and a bond by one or more sureties.

## **CONCLUSIONS**

Some of the salutary provisions protecting the rights of a person accused of having committed an offence have been nullified by rampant corruption affecting the Judiciary. Invariably not a single case in which bail has been given, it is obtained without money having been spent. There is a nexus between the lawyer, bench clerk and magistrates and the poor man only suffer. This facet of criminal justice, fairness, can only function when there is transparency & accountability and judiciary is independent. The Head of the State Senior Gen Than Shwe has also remarked about the rampant corruption prevalent in the

military intelligence and other sectors of the government. In political cases contempt for Rule of Law in other cases rampant corruption were the causes for these events. This is an admission that the Law Enforcement agency is in league with the Judiciary. They have put hundreds in prison political or otherwise. The Judiciary is in the dock. The military cannot come out of this vicious circle. Only restoration of constitutional rule can prevent a disaster.

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\* The author is an Executive Committee Member of the Burma Lawyers' Council.

## BURMESE WORKERS IN A STATE OF FORCED LABOUR WITHIN AND WITHOUT BURMA

*Jason Douglas Hoge\**

“What does labor want? We want more schoolhouses and less jails, more books and less arsenals, more learning and less vice, more constant work and less crime, more leisure and less greed, more justice and less revenge. In fact more of the opportunities to cultivate our better natures, to make manhood more noble, womanhood more beautiful and childhood more happy and bright.”

—\***Samuel Gompers**\*—

“The American labor movement has consistently demonstrated its devotion to the public interest. It is, and has been, good for all America. Those who would destroy or further limit the rights of organized labor—those who cripple collective bargaining or prevent organization of the unorganized—do a disservice to the cause of democracy.”

—\***John F. Kennedy**\*—

Entwined with the very foundational principals of democracy are the rights to unionize and to collective bargaining. This truism is made clear by the fact that all nations which have earned the right to call themselves democratic and free nations have enshrined the right to freedom of association and assembly within their constitutions and these rights are guaranteed by their laws. The freedom of association was so fundamental to the founding fathers of the United States that the principal was enumerated within the Bill of Rights and set forth by the very first amendment of the US Constitution: “[T]he right of the people to peaceably assemble”.<sup>1</sup> Unions have played a predominant role in achieving the promises of democratic societies, such as equality, justice, and freedom. During the early 19<sup>th</sup> Century when industrialization was emerging the unions protected impoverished labours from exploitation and actually strengthened the evolution of capitalism by preventing the implosion of the system predicted by such thinkers as Karl Marx.<sup>2</sup> Equality was delivered through the struggles of agricultural unions such as Ceasar Estrada Chavez’s United Farm Workers in obtaining fair work treatment for Latino migrant workers in the United States. The ensuring of the

freedoms of association and assembly are crucial to the establishment of an authentic democracy and in return the right to unionize and collective bargaining guarantee that all classes of the society have access to the promises of democracy. Unions play an essential role in civil society in that they provide a mechanism by which people can come together to exercise the rights and freedoms promised by their nations and protect themselves against the often limitless resources employed by industry to deprive them of these rights and freedoms.

Article 2 of Convention No. 87 of the International Labor Organization states, "Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organization concerned, to join organizations of their own choosing without previous authorization".<sup>3</sup> The Union of Burma ratified Convention No. 87 in 1955 and **The Trade Unions Act**<sup>4</sup> in Volume 5 of the Burma Code recognizes the right to unionize, albeit with the prior consent of the government. Section 3 of the **Trade Dispute Act**<sup>5</sup> established Boards of Conciliation and Courts of Arbitration where workers could exercise their rights to collective bargaining and effectively protect themselves against exploitation. Furthermore, under the Burma Code Volume 5 workers interests were protected in accordance with **The Workmen's Compensation Act**<sup>6</sup> and **The Payment of Wages Act**<sup>7</sup>. Prior to the reign of the military regimes Burmese workers' freedoms to unionize and collectively bargain were protected under Burmese Law. However, under the oppressive rule of the successive junta's all independent trades unions have been extinguished, public sector wages are unilaterally set by the regime and the private sector is coerced by the regime to set wages below the public sector.

The Core Convention No. 98 of the ILO<sup>8</sup> protects the free exercise of the rights to organize and collectively bargain. Under the **Trade Dispute Act** mechanisms were established at both the national and local level for the resolution of trade disputes and these forums enabled the workers to collectively bargain in order to further their interests. However, under the successive military regimes these forums and mechanisms which were intended to protect the rights of Burmese workers have been left to lie dormant and forgotten. In repudiation of its obligations in accordance with the Core Conventions No. 87 and 98 the SPDC enacted the **Law on the Formation of Associations of 1988**<sup>9</sup> which states, "2(a) an organization means an association, society, union, party, committee, federation, group of associations, front, club and similar organization that is formed with a group of people for an objective or a programme either with or without a particular name....3(a) Organizations shall apply for permission to form to the Ministry of Home and Religious Affairs according to the prescribed procedure". Thus, this law openly flouts Burma's obligations under C. No. 87 to not require prior authorization for the formation of a union. Furthermore, the right to collectively bargain is effectively circumscribed by this law which prevents even the forming of the most informal of associations and therefore neither spontaneous or deliberated banding together of workers for purpose of collective bar-

gaining is permitted. This SPDC law goes on to state, "5. The following organizations shall not be formed, and if already formed shall not function and shall not continue to exist: (b) Organizations that attempt, instigate, incite, abet or commit acts that may in any way disrupt law and order, peace and tranquility, or safe and secure communications". The peaceful movements of Mahatma Gandhi and Martin Luther King attempted, instigated, incited, abetted and committed acts that disrupted law and order, peace and tranquility, etc. The only way peaceful movements initiated by the grass-roots masses are successful is by their ability to threaten the status quo and to shake up the society such as to initiate change and to forbid any act which would achieve this is to relegate the society to stagnation. The exercising of collective bargaining and strikes are threats to the stability of the industrial order and thus coerce the industry to make efforts to meet the demands of the workers. Thus, by its very nature the act of collective bargaining is threatening, coercive, and disruptive and to be otherwise would result in failure and exploitation by the industrial powers.

The Burmese people are victims twice over in regards to being denied their freedom of association and assembly in relation to the right to unionize and collective bargaining. Under the crushing oppression of the State Peace and Development Council (herein after the SPDC) independent labor unions are non-existent and instead civil servants, blue- and white collar workers are coerced into the Union Solidarity Development Association, a mere front for the junta and tool for indoctrination.<sup>10</sup> The regime in Burma has promulgated numerous laws that restrict the freedom of association and the formations of independent unions. Such laws as the **1950 Emergency Provision Act**, which is the most commonly used provision by the regime to oppress the Burmese people and the **Unlawful Associations Act** are utilized to prevent the formation of independent trade unions. The Unlawful Associations Act allows for up to three years of detention for anyone involved in or assisting an unlawful association:

"Unlawful Association" means an association-

- a. which encourages or aids persons to commit acts of violence or intimidation or of which members habitually commit such acts, or
- b. which has been declared to be unlawful by the President of the Union under powers hereby conferred.

Thus this provision is written broadly and vaguely enough to engulf almost all forms of civil society organizations including trade unions and Section (b) allows for arbitrary discretion in the outlawing of associations. It should be noted that any successful strike or protest initiated by workers or a union is a form of intimidation in that it is show of solidarity and strength in an attempt to bolster the union's or workers' position at the bargaining table. All attempts to exercise the rights to unionize and collective bargaining have been met with suppression by the military junta. Organizations such as the Federation of Trade Unions of Burma established in 1991 have been forced underground and its members subject to execution and imprisonment. Trade union leader, Naing Than, has been

servicing a life sentence since 1988 for his role in the forming of Strike Committees during the Four Eights Uprisings. On August 4, 2002 U Saw Mya Than, a member of the FTUB, was murdered by SPDC soldiers and in November of 2003 nine democracy activists were sentenced to death; among the charges were contacting the ILO to report instances of forced labour in Burma. Under these conditions of repression it is unimaginable that the exercising of the rights to unionize and collective bargaining could exist in present day Burma.

The military regime opposes the formation of independent unions because of their political implications; unions have throughout history campaigned the cause of the ordinary citizens and allowed for the mobilization of various grass-roots causes. Thus the junta in Rangoon fears labor unions as possible adversaries to the regime's obsession with total domination over the Burmese society. Therefore, the Burmese junta's opposition to labor unions is founded in political reasons.

As was aforementioned Burmese people are victims twice over in regards to deprivation of their freedom of association and assembly and in turn their rights to unionize and collective bargaining. Above it has been delineated how the Burmese people are deprived of their rights within Burma; in addition those Burmese who seek a better life for themselves and their families through work in neighboring Thailand are again victimized. Approximately two and half million migrant workers from Burma have entered Thailand seeking relief from the crushing poverty due to the mis-governance and corruption of the SPDC. On the one hand it may be true that in Thailand the migrant workers are able to secure employment which is scarce in Burma and are able to earn wages that they are unable to receive inside Burma. However, on the other hand the migrant workers are the victims of a myriad of unfair and inhumane labor practices which violate Thai Labor Law, International Standards, and common levels of human decency. The minimum wage for Tak Province under Thai Labor Law is 135 Baht per day<sup>11</sup>; however Burmese migrant workers on average make 50 to 70 Baht per day and some workers have wages as low as 30 Baht per day. The hourly rate for overtime in Tak Province in accordance with Thai Labor is 25 Baht per hour and pursuant to the 1998 Labour Protection Act (LPA) Section 24 "An employer shall not require an employee to work overtime on working days unless the employee's prior consent is obtained at each occasion". However Burmese workers are regularly forced to mandatory overtime without their consent, sometimes a shift can begin at 8am and end at midnight, the average hourly overtime pay for a Burmese migrant worker is 7 Baht per hour. This forced overtime which is often unpaid bares no difference from the SPDC's practice of forced labour inside of Burma. Thus the Burmese workers exist in a state of forced labour within both Burma and in Thailand. Furthermore in violation of the 1998 LPA Burmese workers are forced to work 7 days per week and not given paid sick days.

Section 30 of the Thai Constitution states, "All persons are equal before the law

and shall enjoy equal protection under the law"<sup>12</sup>, however the abuse of the rights of Burmese is widely known by Thai officials and regularly tolerated as normal business procedure. In an interview with the Thai Labour Campaign staff on December 29th 2003<sup>13</sup> the President of the Federation of Thai Industries, Tak Chapter stated that Burmese workers are not entitled to minimum wage for the following reasons:

- Burmese workers are of poor quality compared to Thais and other workers.
- Migrant workers are often paid under minimum wage throughout world, particularly in such places as the United States, Hong Kong, and Taiwan.
- Employers in Tak have a right to make deductions for food, shelter, etc. so workers do not receive minimum wage.
- Employers prefer the target/piece rate system to a daily wage.

It is worth noting that at no time does the President of the FTI base his argument in Thai Law or any other legal foundation. Furthermore, the argument in regards to deductions for food and shelter are easily dismissed when the math is done and the figures show the migrant workers are being over-charged even if this was a legitimate basis for paying under the minimum wage. In addition the food and housing provided (with no alternative or choice on the worker's behalf) falls below any minimum standards for human decency either Thai or International. For example on August 31st 2004 two hundred workers acquired food poisoning from the food supplied by their employer who subsequently refused to provide expense for medical treatment or pay the required sick days pursuant to the 1998 LPA regardless of his negligence.<sup>14</sup>

In 2001 the Thai Government put in place a registration process by which Burmese migrant workers were able to legally register themselves enabling them to both stay and work in Thailand lawfully. The number of migrants who registered in 2001 was 560,000 and in 2002 was 350,000 and finally the number has fallen to 290,000 for 2003.<sup>15</sup> The reason for the dramatic decline in the number of migrants registering is the fact while the registration papers are added cost to the migrants there exist no added benefits in exchange for the additional cost. Employers regularly confiscate the original copy of the registration papers and supply the migrants with copies of the originals. However, under the registration regulations the migrants are required to have the original registration papers on their persons at all times and thus the employers' practice of confiscating the original and supplying the copies opens the migrants to harassment by Thai Police and Immigration Officials. On a regular basis migrant workers are stopped by Thai Officials who demand the migrants produce the originals of their paperwork and when they are unable to they're required to pay bribes and if they're unable to pay they are arrested or deported. The employers' reasoning for the confiscation of the originals is to protect his/her investment in the workers because they fear the workers will simply run off to better employment opportunities once they have acquired their paperwork. There are two major defects with this reasoning; first, if the employer paid the minimum wage and provided a safe and healthy work condition no worker would seek better em-

ployment; second, the registration process is in place to protect the migrants and is not meant to be a security measure for the employer. The Thai government likes to pronounce its 2001 registration process as a successful step in protecting the rights of migrant workers and promoting their security, however, as has been shown above the process does neither. If the Thai government were truly interested in protecting the rights of migrant workers they need not add more regulations and laws to their books but rather merely enforce their own Labor Laws (such as minimum wage, overtime pay, and work-hour limits) and also ensure the work conditions in regards to migrants meet international standards.

The International Convention on the Protection of Rights of All Migrant Workers and Members of their Families<sup>16</sup> which entered into force on July 2003 states, "Taking into account the principles embodied in the basic instruments of the United Nations concerning human rights, in particular the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination against Women and the Convention on the Rights of the Child,". Thus, while Thailand has neither signed nor ratified the Convention on Migrant Workers, Thailand is still compelled under its obligations pursuant to ICCPR, ICESCR, and others to recognize the rights delineated in the Convention on Migrant Workers. The Convention states in Article 22 that, "It shall be unlawful for anyone, other than a public official duly authorized by law, to confiscate, destroy or attempt to destroy identity documents, documents authorizing entry to or stay, residence or establishment in the national territory or work permits. No authorized confiscation of such documents shall take place without delivery of a detailed receipt. In no case shall it be permitted to destroy the passport or equivalent document of a migrant worker or a member of his or her family". Thus the Thai employers' practice of confiscating the originals of the Burmese migrant workers' registration documents is a direct violation of the obligation owed by Thailand to respect the human rights of Burmese migrants pursuant to Article 22 and in accordance with Thailand's obligations under International Human Rights Instruments.

The Thai Constitution pursuant to Section 30 declares equal justice for all before the law and Section 45 states, "A person shall enjoy the liberty to unite and form a union, league, co-operative, farmer group, private organization or any other group".<sup>17</sup> The Thai Constitution's promise to equality and freedom of association are directly contradicted by the 1975 Labour Relations Act (LRA)<sup>18</sup>, Article 87 that states the ten persons needed to apply for legally registered union are required to be of Thai nationality. Also, Article 100 of the LRA states that the elected leadership of the union or union committee members is also required to be of Thai nationality. Thus, despite the Thai Constitution's promises of equality and freedom of association Burmese migrants workers are deprived

of the fundamental rights to unionize and collective bargaining on the very basis of their being Burmese and not Thai nationals. Under the LRA Burmese migrants are able to join Thai unions, however, there are numerous reasons why this is not a real possibility. To begin with many employers employ only Burmese at their factories or workplace such that in reality there is no Thai union to join and the Burmese cannot form their own in accordance with Sec. 87 of the LRA. Furthermore, even where there are Thai labours employed they are normally paid the minimum wage so there is no incentive for them to form a union for the benefit of the Burmese. In addition there are both language and cultural barriers that prevent Burmese and Thais joining together to form unions. Finally, employers intentionally hire majority female workers with the knowledge that culturally Burmese females are less likely to assert their rights let alone form unions or approach male dominated Thai unions for membership. The Thai government's reasoning for not allowing the Burmese migrants to unionize is the opaque logic of "National Security" without giving any clarification or explanation. When the Thais normally apply the term "National Security" to the Burmese migrant workers it is in regards to what the Thais argue is a rise in crime rates, drug trafficking, and environmental destruction accompanying the arrival of the Burmese migrants. However, it is confusing to understand how the right to unionize and struggle for minimum labour protections relates to the rise in crime, drug trafficking, and environmental destruction. It is also important to point out in regards to the rise in crime its usually the Burmese who are the victims of these rising crime rates at the hands of Thai employers and citizens. Therefore, the only logical reason one is left with in relation to the Thais opposition to allowing Burmese migrants to unionize is the fear that Burmese unions would do what the Thai government has neglected to do; enforce the Thai Labor Law and ensure the implementation of international labour standards. Thus, in contrast to the SPDC's politically motivated reasons for opposing the unionizing of Burmese people the Thai government's reason is one born of the desire to exploit the situation of the Burmese for monetary reasons.

The denials of the freedom of association and assembly and in turn the rights to unionize and collective bargaining under Art. 87 and Art. 100 of the NRA contravene the Thai Constitution pursuant to Sec. 30 and Sec. 45. These deprivations of fundamental human rights are also breaches of numerous international obligations to which Thailand is a party to. While Thailand has not ratified the Core Conventions 87 (Freedom of Association and Protection of the Right to Organize Convention, 1948) and 98 (Right to Organize and Collective Bargaining Convention, 1949), Thailand is still obligated to respect this Core Conventions. Thailand is a founding member of the International Labor Organization and thus is compelled to uphold the Core Conventions as the 1998 International Labor Conference adopted the ILO Declaration on Fundamental Principles and Rights at Work states:

2. Declares that all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accor-

dance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining;<sup>19</sup>

Furthermore, the Core Conventions are considered as inseparable from being a member of the ILO and therefore the Thais are obligated to respect these fundamental rights and prohibited from restricting their exercise.<sup>20</sup> Therefore, by denying Burmese migrant workers their rights to unionize and collectively bargain the Thais are in violation of the international obligations and duties which the Thais voluntarily acceded to.

Thailand has ratified the International Covenant of Civil and Political Rights and Article 22(1) states, “everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.”<sup>21</sup> Article 8(1)(a) of the International Covenant on Economic, Cultural, and Social Rights which Thailand has also ratified ensures “The right of everyone to form trade unions and join the trade union his choice.”<sup>22</sup> Article 20(1) of the Universal Declaration on Human Rights ensures “Everyone has the right to freedom of peaceful assembly and association.”<sup>23</sup> Thus, the Thai government’s denial of the fundamental right to unionize and collectively bargain is completely out of step with the legal standards of the international community and is a flouting of the Thais’ obligations as member of the community of nations.

Section 87 and 100 of the Thai Labour Relations Act conflicts with the Thais’ obligation in accordance with the International Convention on the Elimination of all Forms of Racial Discrimination Article 5(d)(ix) ensuring equal access to “The right to freedom of peaceful assembly and association;” and (e)(i) “The right to form trade unions;”<sup>24</sup> Furthermore, the Thai factories’ labor practice of specifically targeting women as their workforce with the intention of depriving these women of their fundamental rights to unionize and collectively bargain is in violation of the Thais’ obligations pursuant to the Convention on the Elimination of All Forms of Discrimination Against Women Article 11.<sup>25</sup> The Thai government repeatedly recites the statement that “Burmese migrants have the same rights as Thai people under Thai laws”, however, the violations against Burmese migrant workers under both Thai and international law are publicly known and tolerated. Thus, the Thai authorities have proven their unwillingness to enforce their own laws let alone international standards in regards to Burmese migrants. Therefore, the only means by which Burmese migrants workers can obtain the justice that is due to them under the law is to protect their own rights through unionization and collective bargaining. The Burmese migrants do not need useless registration policies, rather the Burmese need unions to prevent the exploitation of their precarious situations and they need the Thais to fulfill their international obligations by recognizing the migrants’ right to unionize. As has been shown the SPDC fears unions because their very existence threatens the regime’s illegitimate, corrupt, and oppressive reign in Burma.

In contrast, Thailand is a vibrant democracy which has nothing to fear from the formation of Burmese unions and therefore they cannot pose a threat to national security. Unions are only a threat to national security when national security means oppression, abuse of power, and illegitimacy. Thus, the Thais should not fear unionization of Burmese migrant workers but rather embrace it because it can only strengthen the Thai democracy by extinguishing the exploitation by corrupt sectors of Thai society who are the true threat to Thai national security.

Thus, in conclusion it seems that Burmese workers are faced with a Hobson's choice in which they are forced to choose between crushing oppression at home or exploitation abroad. While the rights of Burmese workers are trampled upon in both Burma and Thailand there is a distinctive difference for the cause of these deprivations. Within Burma the right to unionize and collective bargaining are viewed by the military junta as means by which the citizens of Burma might rise up against the totalitarian regime. In contrast, the Thai government does not see unionization by Burmese migrants as a political threat but rather an economic threat to an elite business minority who wish to exploit the suffering caused by the SPDC at the expense of both Burmese and Thai labours. Both Burma and Thailand are obligated under domestic and international law to respect the Burmese workers freedom of association and right to assembly and in turn their rights to unionize and collectively bargain. Martin Luther King stated, "Injustice anywhere is a threat to justice everywhere". Thus, for the rights of workers throughout the world to be vindicated the rights of Burmese workers in both Thailand and Burma must be achieved. The international community cannot be silent while Burmese workers toil under forced labor in Burma and indentured servitude in Thailand. Thai citizens cannot remain blind to the exploitation of their suffering neighbors by a small number profiting businessmen at the expense of the Thai society as a whole. Therefore, the international community and especially ASEAN nations must demand that citizens of Burma are allowed to exercise their rights pursuant to Conventions 87 and 98 of the ILO. Furthermore, to ensure that Burmese workers in Thailand are afforded the same rights as Thai citizens in accordance with Section 30 and 48 of the Thai Constitution and in line with Thailand's international obligations Burmese migrants must be allowed to exercise the rights of unionizing and collective bargaining.

### Endnotes

1. U.S. Const. amend. I
2. *Karl Marx, Ökonomisch-philosophische Manuskripte aus dem Jahre (1844)*.
3. C. 87 Freedom of Association and Protection of Right to Organize, 1948
4. The Trade Unions Act [India Act XVI, 1926], Inserted by Act XVI, 1949, which came into force 1<sup>st</sup> August 1949.
5. The Trade Dispute Act [India Act VII, 1929], Inserted by Act, X, 1950.
6. The Workmen's Compensation Act [India Act VIII, 1923], Substituted by Act LII, 1951, which

- came into force on 1<sup>st</sup> January 1952.
7. The Payment of Wages Act [India Act IV, 1936], Substituted by Act XVII, 1949, which with exception of sec. 4 thereof, came into force 1<sup>st</sup> August, 1949.
  8. C. No. 98, Right to Organize and Collective Bargaining, 1949.
  9. SLORC Law No. 6/88 of Sept. 30, 1988
  10. See, *No Room to Move: Legal Constraints on Civil Society in Burma*, Zunetta Liddell (1999).
  11. Labour Protection Act B.E. 2524 (1998).
  12. Thail. Const. Chptr. III, § 30.
  13. See Dennis Arnold, South East Asian Research Center: *The Situation of Burmese Migrant Workers in Mae Sot, Thailand*, (2004).
  14. See BurmaNet News, August 31, 2004, at <http://six.pairlist.net/pipermail/burmanet/20040831/000527.html>
  15. Id. Note 13 at 5-6.
  16. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. res. 45/158, annex, 45 U.N. GAOR Supp. (No. 49A) at 262, U.N. Doc. A/45/49 (1990), entered into force 1 July 2003.
  17. Thail. Const. Chptr. III, § 45.
  18. Labour Relation Act B.E. 2518 (A.D. 1975).
  19. ILO Declaration on Fundamental Principles and Rights at Work, 86th Session, Geneva, June 1998.
  20. Id. Note 13.
  21. International Covenant on Civil and Political Rights (ICCPR) (acceding on 29 Jan 1997).
  22. International Covenant on Economic, Social and Cultural Rights (ICESCR) (acceding on 5 Dec 1999).
  23. Universal Declaration of Human Rights (1948).
  24. International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (acceding on 27 Feb 2003).
  25. Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (acceding on 8 Sep 1985).

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## Legal Commentary

*Janelle Saffin \**

*Principal Act-The Rangon Police Act, Burma Act IV (15<sup>th</sup> June 1899)  
Section 51-three month limitiaton clause to take action for criminal acts  
Issue-Child Soldiers taken into the Armed Forces in violation of the law barred and/or  
their parents, from taking action due to Article 51  
Applicable Acts-Limitations Act 1908-The Police Act 1945-Burma Interpretations Act  
1948, Penal Code 1948 as amended 1954-Criminal Procedures Code 1948 as amended  
1954-Burma Army Act 1948 as amended 1960, , and the Convention on the Rights of  
the Child accession 1991-the Child Law 1993*

Burma has a regrettably large number of Child Soldiers; the exact number unknown but indicated to be as high as 70,000. In the concluding observations of the Committee of the Rights of the Child:Myanmar. 24/01/97. CRC/C/15/Add.69 it was said: "The Committee strongly recommends that the army of the State party should absolutely refrain from recruiting under-aged children, in the light of existing international human rights and humanitarian standards. All forced recruitment of children should be abolished as well as their involvement in forced labour." That was 1997 and in 2004 the situation remains unacceptably unchanged, despite some welcome military government multilateral policy initiatives.

Burma's military ruling regime, the State Peace and Development Council (SPDC) presided over by Senior General Than Shwe, has rejected the fact that they do have child soldiers, and denies any involvement. They have however, taken certain actions that demonstrate that they know this practice prevails, such as the issuance of orders to prevent it. They have not however changed primary conditons at fundamental levels so that the practice will abate.

Some authorities have also stated to various agencies at various times, not publicly, that if a child is taken 'accidentally' into the army, through 'lying' about his age or through a 'rogue' soldier, then their parents or guardians cannot take legal action against such action essentially to have the child returned, if they do

not do so within three months.

It would appear that they are relying on a limitation clause on criminal action, in the *Rangoon Police Act IV of 1889*, ostensibly still in force, or at least on the books in Burma. It applies as the name says to the area known as Rangoon renamed Yangon by the then SLORC. The operative Section is 51 and is found in Part V *Limitations on Proceedings*. It says as follows:

**Section 51.** All criminal proceedings against any person which may be lawfully brought for anything done or intended to be done under the provisions of this Act, or under the general police-powers hereby given, shall be commenced within **three** months after the act complained of shall have been committed, and **not** otherwise. The Act also applies to military police officers (Section 3) and gives certain powers to the Commissioner of Police of Rangoon (an outdated post) with respect to taking action vis-à-vis the Army Act.

Those authorities who invoke the three month limitation on criminal action must be referring to this act and are we submit 'clutching at straws'. In addition to the obsolescence of this act, it is in practice overcome by later laws of general application in the police, penal, criminal procedures, and limitations areas. Namely the Limitations Act 1908, the Police Act 1945, the Penal Code, and the Criminal Procedures Code of 1948 as amended 1954, the Burma Army Act 1948 as amended 1960, the Burma Interpretations Act 1948 and further common law judicial practice. More recently there is Burma's accession in 1991 to the Convention on the Rights of the Child (CRC) and the SLORC's promulgation of the concomitant national Child Law of 1993, that was passed to give effect to the CRC. It is stated that it is meant to have overriding applicability, but comports with this in neither form nor practice.

Note the following few examples of a wide range of provisions that could be invoked for a remedy and/or prosecution, regarding children being forced into the Armed Forces. The Penal Code, Section 361, states that taking or enticing any minor under 14 years of age in the case of a male, or under 16 years of age in the case of a female, (it is worth noting that this in itself violates the Child Law given the age of 14 years) or any person of unsound mind, from the charge of the lawful guardian without his or her consent is tantamount to kidnapping the minor from the lawful guardianship; Section 363 states that whoever kidnaps any person shall be punished with imprisonment for a term which may extend to 7 years, and shall also be liable to a fine; and the Code of Criminal Procedure, Section 552, states that upon complaint made under oath to a district magistrate of the abduction of a child under the age of 16 years, for any unlawful purpose, the district magistrate may, after such inquiry into the truth of the complaint as he may consider necessary, make an order for the immediate restoration of such child to his parent, guardian or other person having the lawful charge of such child, and may compel compliance with such order, using such force as may be necessary.

The CRC prescribes that no child under the age of 15 years can be in the Armed

Forces vis-à-vis armed conflict and a subsequent Optional Protocol of 2002, that the SPDC has not acceded to, prescribes it as 18 years. It is worth highlighting that the Child Law makes a legal distinction between a child, being 16 years and younger and a youth being 18 years and younger; which is problematic itself and in breach of the CRC. It is also worth noting that the SPDC has given public undertakings that no child under the age of eighteen years can join or be forced into the Armed Forces.

The Child Law states clearly that it has overarching powers to provide for the safety and security of children and this is further demonstrated by the SPDC's representatives who have made such claims to the UNCHR's Committee on the Rights of the Child. The SPDC's *National Committee on the Rights of the Child* has also been delegated legal authority to enforce the Child Law. "The Government of Myanmar formed a National Committee on the Rights of the Child (NCRC) in 1993 to systematically enforce the Child Law." [MYANMAR'S 2<sup>nd</sup> PERIODIC REPORT TO THE COMMITTEE ON THE RIGHTS OF THE CHILD, Received by the Committee, 11 June 2002]. Chapter 4, section 5, of the Child Law-(a) Protecting and safeguarding the rights of the child; (b) Giving guidance as may be necessary in order that the relevant government departments and organizations may implement effectively and successfully the provisions of this law; gives the NCRC specific power. Of itself it is an odd precept violating the rule of law, giving the implementation, enforcement and monitoring to a 'Committee' however, it exists and the NCRC is then the primary body that should be using its legislative implementing power more seriously vis-à-vis children abducted-coerced into the Armed Forces.

The NCRC also has an Advocacy Sub-Committee, that has the legal mandate to advocate for such children, in both the particular and the general. Further, Section 13(c) of the Child Law prescribes that "the child shall be given the opportunity of making a complaint, being heard and defended in the relevant government department, organisation or court either personally or through a representative in accordance with law, in respect of his rights". (note the Section 2 definition of child as 16 years and under for the purposes of the said law and a youth as between 16 years and under 18 years-this violates the CRC which defines a child as 18 years and under)

### **Conclusion**

It was necessary to give some attention to this particular issue as military authorities have been known to claim that parents, no mention of the young person themselves, are denied taking action due to some vague limitation of a three-month period. It can be said that even if the Rangoon Police Act is used, it cannot be used to deny children their rights according to the general law in Burma, firstly by the operation of the Limitations Act, The Interpretations Act, the Police Act, the Penal Code, and the Criminal Procedures Code, the Burma Army Act 1948 as amended 1<sup>st</sup> October 1960 (the latter beyond the scope of this

commentary, but there is nothing in these acts that could sustain a three-month limitation period regarding children conscripted or coerced into the Armed Forces under any manner), elucidated by subsequent case law and enforcement practice, has determined that the latter makes the three-month limitation for criminal action inoperable.

Secondly and most compellingly, the *Child Law 1993* puts such a claim beyond doubt, by both form and scope, although not without its problems in securing its primacy over other law; however its form and the prevailing SPDC claims and rhetoric of its supremacy, is such that it can and should be invoked to secure both protection and remedies for Burma's children.

I have not addressed civil action, but that is an area capable of effecting a remedy and/or compensation for the child victim.

### **Recommendations**

1. Senior General Than Shwe head of the Armed Forces and the Chairman of the SPDC could (a) publicly declare that no child in Burma, that is a person under the age of eighteen years, will be conscripted into the Armed Forces and (b) if found to be then he will cause immediate and decisive legal action to be taken against those responsible and (c) compensation paid to the child and (d) medical care to be provided free of charge and (e) the child's education including books and resources to be provided free of charge including any additional tuition required.
2. The National Committee on the Rights of the Child's should take immediate and decisive public action on the matter of child soldiers and have its Advocacy Sub-Committee advocate for Burma's children and start a campaign to ensure that no child is forced into the Armed Forces and further conduct a nation wide public education campaign to inform Burma's children and parents that it is illegal.
3. Repeal the Rangoon Police Act 1889
4. Accede to the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts (entered into force 20<sup>th</sup> February 2002)
5. Amend the Child Law 1993 to so that it complies with the Convention on the Rights of the Child
6. Undertake a systematic review of laws to determine which ones do not comply with the Child Law 1993, and amend them for compliance (Recommendations)

tions 5 & 6 to be done simultaneously)

7. Institute rule of law reform, across the legal and judicial sectors

### References

Conversations with agencies and officials in Rangoon

*The Rangoon Police Act, Burma Act IV 1889 (15<sup>th</sup> June 1899) Limitations Act 1908-The Police Act 1945-Burma Interpretations Act 1948, Penal Code 1948 as amended 1954-Criminal Procedures Code 1948 as amended 1954-Burma Army Act 1948 as amended 1960, , and the Convention on the Rights of the Child accession 1991-the Child Law 1993*

\* The author is an Executive Committee Member of the Burma Lawyers' Council

## Press briefings October 22, 2004 on Khin Nyunt

Burma's glorified Prime Minister Gen Khin Nyunt and the Home Minister along with a few others were sacked in a recent sudden purge. Many from the top Military Intelligence met with the same fate. In fact all Khin Nyunt loyalists have been swept away totally, 186. In appearance it is of course a big shake-up. There is rejoicing in the Burmese public that the spy-master has gone although, Sr. Gen Than Shwe, the prime enemy of pro-democracy opposition has consolidated his power. The fact is that both Khin Nyunt and Than Shwe are against restoration of Rule of Law and the differences between the two – euphemistically called “Power Struggle” - were only in approach to consolidation of military power. The former preferred a line to contain opposition and the latter advocated a line of stand-off. The event is nevertheless very significant. It showed that there are cracks in the facade of the invincible military domination. It is not the monolithic, granite like structure that it appears to be from the outside. The opposition failed to take advantage of this situation. In 1988, during Newin's BSSP era, before the uprising took place, the Military Intelligence apparatus collapsed under the weight of its own contradictions and the ground swell of the coming storm. The militant student groups were able to take advantage of its disintegration and launch massive movement. There is no similarity between the two situations. But historic lessons are worth noting. From the events, the following insights emerge from the perspective of law. Although, the M.I has been dismantled structurally, it has been given a white wash and integrated into the army. The regional commanders will wield the intelligence and it will be more concentrated and consolidated power. More power is made absolute, more it will corrupt. “Absolute power corrupts absolutely.” In the structural integration there will not be transparency (it will be military secrecy) and accountability will simply vanish. The Regional Commanders will be fiefs like the days of monarchy and their removal will be at Head of State's sweet will. The Head of the state remains a sword of Damocles over his subordinates. It is history that absolute power generates its own seeds of destruction. Immediately after the event, three press addresses were given. Reading between the lines some conclusions can be drawn.

### **1. Press interview by Gen Thura Shwe Man from SPDC.**

- A. He assured about implementation of the Seven Steps Road Map regarding National Convention.

- B. Policy will remain same towards armed groups.
- C. No change in foreign policy, and
- D. Cabinet ministers can be removed at any time because they are not elected but selected. (It is admission there is no law and they stay at the pleasure of the Head of the State).
- E. Khin Nyunt violated Tamadaw discipline by his insubordination.

Has there been Court-martial or is it a case of finding scapegoats for Army misdeeds?

He said "Khin Nyunt is involved in bribery/corruption and is responsible. He committed certain acts which are not Legal and his family is involved in bribery and corruption."

"Not only illegal but also involved bullying of ordinary citizen and traders." They had to be taken action in accordance with civil and military laws.

Make it transparent,

1. To enable people understand the magnitude of the crime, the modus operandi has to be revealed
  2. What actions – truth has to come out. What legal action, what charges have been framed – which court, all the details have to be given to lend credibility
- 18 personnel from military, 3 civil department given penalties – what penalties, who are the persons, which courts?

General Thura Shwe Man statement is defensive, full of generalizations. Its attempt to show that Junta has acted on rule of Law, it actually flouted the basics of Rule of Law. "The culture of immunity" which military intelligence has embedded in the system has not been revealed.

In concluding speech he stated, "Head of department and some deputy heads of departments at the office of the chief of Military Intelligence Head Quarter committed other important and unlawful acts".

"Joint ventures between Tun Lin Yaung company and intelligence group have emerged".

"The entrepreneur should inform the reason why they have donated, then unnecessary interrogation will not be conducted". This amounts to getting statements on inducement and promise not to take action. This itself is illegal. Everything should be done in accordance to process of law. "They will be protected in accordance with the law NIB has been dissolved to deter bribery, corruption and influence by improper ways and intimidation by the state services personnel."

## **2. Briefing by Prime Minister Lt. Gen. Soe Win**

His address was targeted to the Entrepreneurs. Quote; “bribery and corruption should be greatly reduced” “Clean and dynamic state mechanism which does not oppress the people” has to be placed. The conclusion is that for decades unfettered and oppressive actions had taken place “Entrepreneurs are the economic power groups”. The Junta suddenly realizes the vital role the entrepreneurs play in development as well as in destabilizing the regime. “We must correct our previous misconduct and misbehavior” Entrepreneur also conduct business and full protection of the law as well as the Rule of Law will be given. Already in the midst of political crisis, if economy is destabilized, there will be disaster for Junta. Hence woo the entrepreneur “At this time the hard work of the entrepreneurs are most crucial”.

“There should be equal profit sharing between the state and entrepreneurs”

The entrepreneurs are no fools. They know that they have no role in decision making. That economy and trade laws are all white wash, everything is decided under the counter. No law enables the aggrieved to go to court of law. Court also has been ripped of all powers to settle disputes between State and Entrepreneurs. Junta is now on horns of dilemma.

## **3. Briefing by Secretary (1) Lt. Gen. Thein Sain and Chairman of N.C convening commission**

Seven steps future political programs will continue to implement the agenda step by step. It will resume with the coming of the open season. There was no mention of making the National Convention inclusive and the need for a congenial environment to make it a success. Even if the Junta moves in the way it plans, it cannot circumvent a referendum and general election on the basis of it's constitution if the referendum votes for it. The two battle grounds will be real points of engagement between the polarized forces. Opposition has to make full preparation as other countries are showing and see that the Junta's process boomerangs. The people will assert no matter what kind of fear or intimidation is let loose. Let not the election be stolen this time.

The simultaneous press briefs by three top of the Junta at the same time and same day are significant. This could have been done by one person. But as the issue was Rule of Law, - and it's systematic and gross violation, there was a need for the new faces to give assurances. It started with the release of prisoners but mostly convicts. Only a few political prisoners have been released and that also not the prominent ones except Min Ko Naing. It appears like a limited amnesty covering criminals. The political process of peaceful transition is long way away.

## 2004 AMERICAN PRESIDENTIAL ELECTION; WIN, LOSS OR DRAW FOR RULE OF LAW IN BURMA

The question of whether the United States 2004 election result is a positive or negative event in regards to the restoration of the Rule of Law in Burma is a mixed bag. From the perspective of the Democracy Movement in Burma there are both pros and cons to the November 2<sup>nd</sup> election results which must be carefully weighted in order to answer this question.

To begin with, as NLD spokesman U Lwin stated in an interview with the Associated Press compared with the 1990 election result in Burma the highly contentious election results in the US appear as how a democracy is intended to work. As U Lwin stated, "I watched the closely contested U.S. election with great admiration because it clearly demonstrates the maturity of a democratic nation. We must emulate and take as an example the way both leaders reacted to the election victory". Thus, in terms of a model of how democracy works in a peaceful manner when there exists deep divisions in terms of the opposition of the opposing parties the '04 election results may be viewed in a positive light in relation to the return of the Rule of Law in Burma. Furthermore, as U Lwin pointed out, "Both Democrats and Republicans have consistently supported Myanmar's democracy movement and human rights issues". Under Democratic President William Jefferson Clinton the US levied economic sanctions against Burma in 1997. In response to the 2003 Depayin Massacre the US under the helm of the Bush Administration passed the Burmese Freedom and Democracy Act of 2003 which Bush extended pursuant to an Executive Order in 2004. Under the Bush Administration in September 2004, the Secretary of State again designated Burma a "Country of Particular Concern" under the International Religious Freedom Act for particularly severe violations of religious freedom. Furthermore, under the Bush Administration the US co-sponsored the annual human rights resolution on Burma at the 2003 UN General Assembly and the annual Burma resolution at the 2004 UN Commission on Human Rights, both of which were adopted by consensus. Thus, the Bush Administration has been a highly vocal critic of the military junta in Rangoon and it can only be expected the US will continue to publicly criticize the regime and demand the freeing of all political prisoners and the recognition of the 1990 elections results.

While it is true that the US under the Bush Administration has been a vocal critic of the SPDC and has publicly supported the restoration of the Rule of Law in Burma it must be analyzed whether the Bush Administration's policies in regards to International Law and Global Policy in fact harm the Burmese struggle for the return of the Rule of Law. Many critics of the Bush Administration's policies argue that US has weakened international law in terms of human rights and the legitimacy of humanitarian intervention. Furthermore, it has been argued that the unilateralism of the Bush Administration has made it more difficult for the international community to cooperate in regards to dealing with pariah states.

The horrific acts which occurred on September 11<sup>th</sup> 2001 shocked the world and left the American public feeling vulnerable and fearful. In response the Bush Administration unleashed what it has titled the "War on Terror", the consequences of which threaten both the civil liberties of Americans and the human rights of persons from around the world. The Bush Administration's embracement of tactics such as "Torture Lite" and "Torture by Rendition" threaten the respect for the *Jus Cogen* proscription against the use of torture, embodied in the Convention Against Torture. Furthermore, the stance which the Bush Administration has taken towards the detainees in Guantanamo Bay in relation to the detainees' access to US Courts to challenge their detention has had a corrosive effect in terms of respect for International Covenant on Civil and Political Rights proscription against arbitrary detentions. Also, the Bush Administration's arguments on the application of the 1949 Geneva Conventions in relation to the pursuit of the "War on Terror" have been a set back to humanitarian law and the prevention of war crimes. In the wake of the criminal acts perpetrated on September 11<sup>th</sup> the Bush Administration pushed through the Congress the "Patriot Act". This dubiously named piece of legislation has eerie similarities to the 1950 Emergency Provision Act which the SPDC uses in Burma to repress the democracy movement and prohibit the exercising of the freedoms of association and expression. Both acts are overtly broad and vague allowing for abuse of discretion and neither act protects against arbitrary detentions. Thus, the policies which the Bush Administration has adopted in its "War on Terror" have weakened the very international norms which the international community seeks to have upheld against the SPDC.

The Bush Administration has not only decried the formation of the International Criminal Court but has and is actively seeking to undermine the ability of the ICC to persecute the perpetrators of human rights atrocities and vindicate rights of their victims. Under Bush's stewardship the US in an unprecedented (and possibly unlawful) move "un-signed" the Rome Statute and the Bush Administration has sought to weaken the court by demanding US allies sign Article 98 "Impunity Treaties" and attempting to dissuade these same allies from ratifying the treaty. The manifestation of the ICC has been heralded as an immense progression in the protection of human rights and the end of the impunity of perpetrators of atrocities. The ICC is at the present moment possibly the

only forum where the victims of the SPDC could obtain justice; however, this would entail a referral of the case pursuant to Article 13(b) of the Rome Statute by the UN Security Council. However, a referral by the UNSC is unlikely without the support of the US, which claims to be an ally of the victims of the SPDC and the restoration of the Rule of Law in Burma.

The war in Iraq, which has been condemned by a majority of the international community, has stymied the efforts of the citizens of Burma in two major aspects. First, the war in Iraq has muddied the waters of the international community in such a way that the continuing atrocities of SPDC have been ignored. With all eyes diverted and focused on US actions in Iraq the military generals in Burma feel free to commit crimes against humanity, war crimes, and acts of genocide with complete impunity. Secondly, the US position as a defender of human rights has been tarnished by its internationally condemned illegal acts of aggression against the nation of Iraq. In addition, the human rights violations which have been perpetrated by US citizens in Iraq have further worked to delegitimize the US's credibility in regards to the demanding other nations abide by international law and respect human rights. Incidents like the Abu Ghraib prison and the killings of civilians allow for rogue governments which commit human rights abuses to merely respond to the US's criticisms that it's a case of the "kettle calling the pot black". Thus, the war in Iraq has caused a distraction to the plight of the Burmese people and eroded the US's position as a human rights defender and supporter of the return of the Rule of Law in Burma.

Unilateralism has defined the Bush Administrations approach to foreign diplomacy. The US under Bush has rejected the internationally accepted Kyoto Treaty, the ICC, and launched a war condemned by the international community as violating international law. If there is to be any progress towards democratic transition in Burma then the international community must be united in its opposition to the SPDC's continuing repression of the Burmese Democracy Movement. At a time when it is being questioned whether Western Sanctions against Burma can succeed without China and India (two nations who opposed the war in Iraq) being brought on board it is even more essential the international community be united. Furthermore, the language of the Bush Administration's "War on Terror" has been adopted by totalitarian regimes to violently suppress legitimate freedom and independence movements and gives the SPDC a sense of legitimacy in waging war against the Ethnic and Democratic Groups. In addition, Burma is now being ravaged by an epidemic of HIV/AIDS due to the dereliction in the governance of the SPDC; however, US NGOs and NGOs which receive funding from the US are having their hands tied in alleviating the situation unless the groups agree to put the emphasis on abstinence to the neglect of contraception. Thus, this policy in regards to HIV/AIDS only fuels the decimation of the Burmese people and worsens the plight of Burma.

In sum it appears that while the Bush Administration will remain an outspoken

advocate of the restoration of the Rule of Law in Burma and critic of the SPDC, however, the policies of Bush harm the cause of democracy in Burma. Thus, in conclusion the harm done by the Bush Administration's policies actually outweigh the good the US authentically wishes to achieve in supporting the Burmese struggle for the Rule of Law in Burma.

## **"The Administration of Justice and Court Procedure in Myanmar"**

*Law Journal, Vol. V, May 2003, No. 1*

*U Ba Kyaing, Director Retired, Office of the Attorney General, Myanmar:*

The learned writer has ably brought out the frame work of running of courts in Burma. But it is only narrative and fails to address the main issue, that the same is according to justice. Author knows that there is military rule in Burma and the administration of law has to be done in the context of the same. He is also aware of the fact that there has been lot of criticisms against the Judiciary and he should have defended the Judiciary. Just giving the frame work has no meaning, its commitment and to what extent Judiciary is fulfilling that commitment are more important. The allegation against the Judiciary is that it has become a tool to perpetuate the junta rule, that there is no separation of power and it is directly under Home Ministry.

The author stated rightly that administration of justice is carried out by the courts of different levels and Law No. 5/2000 is the basis for which seven principles have been laid down (a) It states that administration is to be independently done according law. The article cites no cases to justify that courts are functioning independently. On the contrary hundreds of cases which are political in nature have been perfunctorily decided in giving the maximum imprisonment. Even the Supreme Court has gone to the extent of legislating to favor the junta's directive. In Burma Law Report 1991, a case has been reported which virtually changed the Law of Evidence. The decision of the Supreme Court was that confession/statement given before the Military Intelligence is admissible and conviction on that can be given. Whereas section 24 of the Evidence Act clearly states that such confession/statement before the police is in admissible.

The Article contains headings:- Establishment of courts in Burma, Judicial principles, Jurisdiction of Supreme Court, Powers of the Supreme Court, Jurisdiction and powers of other Courts in Myanmar, the rules of civil jurisdiction, civil litigation application of civil procedure, civil appeals, appeals from orders Reference, Revision, Review, supplemental proceedings, criminal powers of Courts supervision on administration of justice, training courses for judges recruiting

of judges. The lay out may satisfy laymen but it is unsatisfactory to those who want to get a true picture of what is happening inside courts. For examples, many cases on injunction (O39 R-1) ,Stay of suits/executions, attachment before judgment, suits against government, declaratory suits, mandamus, appointment of receiver, framing of schemes, interim orders, many such things which are very important in civil cases have been left out. The basic requirement that a civil case has to be initiated by plaint which must disclose the cause of action, the date when it arose, valuation of the suit and the relief claimed, must be clearly stated, have been overlooked.

Law No. 5/2000 is supposed to be the rock bottom of the court system. In 3 (b), it is stated that aiding in the restoration of law and order and regional peace and tranquility. is a duty of the courts. The issue of Law and order lies with the police. How the court is dragged in? (c) States courts have duty to educate the people. The public has no access to get even the copies of the judgments. They are also never published in News papers which the State controls (e) stated that justice to be in open court.(f) stated about right of defence. There have been several cases where trials had been conducted on annex to jail compound without any defense lawyer (g) states punishment is to be given to reform moral character. But maximum punishment is given in all political cases, violating this consideration.

The article stated that in any case adjudicated by the Supreme court, if the chief justice is of the opinion that any substantial question has arisen in the interest of the public he may cause such question to be heard and adjudicated again by the special appellate Bench (see section 8 of the Judiciary law). It was under this that a previous judgment was set aside reported in BLR 1991. There is no mention of this landmark judgment which now guides the court to enter conviction in all political cases irrespective whether there is evidence of guilt. In the conclusion part the article states that every 6 months a seminar is held by the supreme court relating to administration of justice. At the seminar Secretary-1 of SPDC delivers a speech to be honest and make speedy disposal of cases. The judges by implication are prone to be dishonest. Trials must be speedy never mind whether fair or not. In service training programs are conducted of efficiency". In fact they are for regular brain washing. In short the article does not say anything of Independence of Judiciary and fair trial, the crux in administration of justice.

## BEYOND THE NATIONAL CONVENTION,

*Ashley South, The IRRAWADDY, August - September 2004, Vol. 12 No. 8*

The writer of the article has authored some books on Burma and is an authority in Burma affairs. The main focus of his article is on Burma's cease-fire groups and ethnic nationalities' struggle for self-determination. The article would have been a masterpiece had it combined the aspirations of the ethnic nationalities and the aspirations of the Burmese majority. The two are not separate as many western writers on Burma think and articulate. For the ethnic nationalities self-determination means self-rule. For the Burman majority it is also self-determination which means empowerment of people at the grass root. Both are against centralization and for autonomy of the people. Fundamentally therefore it is a common issue where power can be shared and people can participate in the sharing of power. In other words, it is a Constitutional issue. The National Convention is grappling with that problem. Its proposed principle on which the future Constitution is to be based have not only denied fundamental rights to the nationalities but also it has marginalized people in general. They guarantee "military participation in the future state". It means domination by the military of nationalities as well as the majority Burmans by the military elite. The article could have touched on this aspect to enable the readers get the totality of the political picture.

The article did not address the 1990 May Election which is the crucial stumbling block to the political process. Question rises: will it not be repudiation of the mandate if NLD joins the National Convention at the terms laid down unilaterally by the junta? The junta entered in a dialogue with Daw Aung San Suu Kyi for peaceful transition and suddenly terminated it and put her under house arrest without any explanation to the people. Every step the junta has taken and is taking is against the rule of law. The author could have brought out the salient point that National Convention is targeted to annulment of the 1990 Election. When we look beyond we have to see the present.

The analysis about the cease fire groups is short of reality. Over the years they have not been able to wrest any concessions. The junta tried to corrupt their leaders the article has nicely brought out under the heading at the end "post ceasefire disappointments; missed opportunities for peace building. The author

however miscalculated in stating” it should therefore no longer be possible for the international community to demand a resolution of the NLD - junta conflict first, before addressing “the ethnic question”. It is also uncharitable to state that “for Burma/s ethnic nationalist communities in particular, it represents a milestone in efforts to have their concerns registered on the national political stage”. The very reason why Ne Win made the coup was that all had reached a consensus on the concerns and on the excuse that disintegration of Burma had been planned, the coup was staged.

The 1990 Election is the watershed in Burmese politics and the stake holders have been clearly outlined. What will be “beyond the National Convention will largely depend on the steps laid down in the road map. The article stated that Chief Justice U Aung Toe has stated there will not be any change in the 104 principles. The National Convention may be reconvened to confirm them and it will be sent to the top Drafting Committee to be constituted in that session. Questionnaires will be put to referendum and if yes vote is given, a General election will be held according to the provisions of the designed Constitution. Beyond the National Convention may be the continuation of the junta rule. Depending on the emergence of balance of forces between the junta and the opposition and realization of people that a Constitution is a must for the society to survive, the beyond will surface in its majesty or ignominy.

# NEWS AND NOTES

## Daw Aung San Suu Kyi under sieze

The house arrest break-down

Date	Events	Remarks
20 <sup>th</sup> Jul' 1989 to 10 <sup>th</sup> Jul' 1995	-	6 <sup>th</sup> years
Debarred from Election (9 <sup>th</sup> Jan'1993)	-	1 <sup>st</sup> National Convention
(8 <sup>th</sup> Jan'1996)	-	2 <sup>nd</sup> National Convention
6 <sup>th</sup> Oct 2001 to 6 <sup>th</sup> May 2002	-	19 <sup>th</sup> Months
30 <sup>th</sup> May 2003	Depayin	-
27 <sup>th</sup> November 2004	LAO's ASEAN	Extension 1 year
	<b>Total:</b>	<b>9 years</b>
	<b>Inpolitics:</b>	<b>15years</b>

All the above detentions demonstrate a pattern in Junta's handling of Daw Aung San Suu Kyi. On the eve of all important events which shaped Burma's political history for the past decade, she had been put under house arrest. Not only was she denied any role, she was totally cut off from the main stream of events. According to Junta, she is a "danger", but it does speak of the magnitude of her potentiality. One person alone can change the fate of Junta! Fine, keep her under detention life long and the Junta hopes to be in power life long. Junta has released the legendry figure Min Ko Naing. What is the logic then to keep Daw Aung San Suu Kyi in detention?

The issue of Daw Aung San Suu Kyi under house arrest is not simply a legal or humanitarian issue. It is fundamentally an issue which contradicts Burmese culture and values. A lady, who has become an icon of democracy, is not only harassed and humiliated but dubbed as "dangerous". The supposed law State Protection Law -Section 10 under which she has been put under house arrest states that "government may order up to 5 years detention or house arrest without charge or trial if authorities believe he/she will do, or is doing an act which endangers the peace of most citizens are the security and sovereignty of the State"

There are two ingredients for action;  
 1) endangering peace and law & order  
 2) endangering security & sovereignty

When on 30<sup>th</sup> May 2003, she was put under house arrest. The excuse was the

violent clash in Depayin. The Junta did not hold any public enquiry nor did it allow UN representatives to come for an investigation. The grounds for detention were hopelessly untenable. Assuming there was sufficient material, those materials were obviously enough only to give one year, which the Junta did. During her detention from May up to 29/11 when 1 year was extended, Junta must have fresh materials to implicate her, that she was “dangerous”. Being incommunicado, for a year how could there be fresh evidence? Ridiculous, the cat came out of the bag when Prime Minister Thaksin, stated “Gen Than Shwe told me that there is trouble every time she is released. Burma wants to arrange things and set things in order before freeing her”.

### **Dictators Beware**

Gen. Pinochet faces hundreds of charges from families of people killed during his regime, which began with a military coup in 1973. They claim he ordered the torture, kidnapping and assassination of dissidents. In an earlier human rights case, Gen. Pinochet’s defense lawyers successfully prevented him from being tried when the Supreme Court ruled his mild dementia made him mentally incompetent. The Operation Condor case passed a key hurdle in August when the Supreme Court upheld a lower court decision to strip Gen. Pinochet of immunity from prosecution, which is granted to former presidents in Chile. The homicide and kidnapping charges field relate to nine disappearances and one death that occurred in the 1970s as part of “Operation Condor”, an intelligence-sharing network of South American dictators who helped each other hunt down dissidents.

Gen. Pinochet’s immunity has been removed in two other human rights cases, and still holds in all other cases against him. But he has yet to be tried because so far his mental health defense has prevailed at the Supreme Court level. The Chilean judge formally charged General Augusto Pinochet with homicide and kidnapping in one of many pending cases related to human rights abuses committed during his 72-years rule, and ordered house arrest for the former dictator. He is also being investigated by the Chilean courts for possible tax evasion or corruption after revelations this year that he had millions of dollars stashed in secret offshore bank accounts. The Government of President Ricardo Lagos released a report of tortures committed during the dictatorship. And a month ago, Chile’s armed forces for the first time took responsibility for dictatorship-era abuses.

### **Thai follows path of Burma’s Junta: Commission raps Thailand (Human Rights abuse in Thailand)**

The Thai government has refused a request from the United Nations’ special rapporteur on extrajudicial killings to participate in the Tak Bai investigation.

At least 85 protesters died at the hands of police and military in Tak Bai, 78 of them of suffocation after they were piled into trucks for transport to an army camp. More than 30 Muslims were killed when security forces stormed the historic Krue Se mosque where they had taken shelter.

The AHRC also said more cases of torture in Thai police stations and other facilities have also been exposed over the years, citing a recent case in Ayutthaya province where police resorted to electrocution, suffocation and beating over a minor criminal allegation. The rights group pointed out that Thailand had yet to ratify the UN Convention Against Torture and bring it into domestic law.

*The Nation (Newspaper)*  
11/12/2004

### **Lesson for Burma in prosecutions of High Society drug rings: Ex- 'Tatler' editor jailed for drugs**

A British journalist addicted to crystal methamphetamine or "ice" was jailed for two years here (Singapore) yesterday after admitting three drug consumption and possession charges. Nigel Simmonds, 40, former editor of high-society magazine Singapore Tatler, was the first person to be jailed out of 14 charges following a police sting in October that busted an elite cocaine and party-drug ring. Simmonds, who has lived in Singapore for 13 years and previously worked for the South China Morning Post newspaper in Hong Kong, faced more than 10 years in prison but Subordinate Court judge FG Remedios handed down the minimum sentence.

The relatively short sentence followed a plea by Simmonds' lawyers that his Japanese wife and four-month-old daughter would have to leave the country with no source of income if he were jailed. They also said Simmonds' career as a journalist was in tatters since he lost his job at Tatler. The case made headlines in Singapore and Britain.

"All that he had worked for in the last 13 years has been destroyed. Our client was in a position of international repute and fame, being a magazine editor of some note," the mitigation pleas said. Simmonds pleaded guilty to one charge of possessing 0.48 grams of ice, as well as two separate charges of consuming ice and cocaine. Local media described the police operation as the busting of a high-society drug ring, with a French chef, a Sri Lankan artist and a Tunisian marketing manager among those charged. Simmonds' lawyers said he was not a partygoer but rather a secretive ice addict who hid his drug-taking even from his wife.

"He is genuinely contrite and remorseful," his lawyer Shashi Nathan told the

court yesterday.

**If Burma is to intensify fight against Corruption it must not stop with Khin Nyunt & NIB:  
Legislature, parties top graft poll in Indonesia, second to police in RP**

As if to confirm public indignation towards corrupt politicians, a report from an international corruption watchdog in Jakarta this week said that Indonesia's House of Representatives and political parties were among the worst corrupt institutions in the country. In its corruption barometer report for 2004 issued on Wednesday, Transparency International Indonesia (TI Indonesia) said that the House and political parties ranked first and second in the corruption index, followed by the customs and excise office, the judiciary, the police and the tax office.

In measuring the corruption index, TI Indonesia interviewed more than 1,200 people in Jakarta, Surabaya and Medan between July and September. The survey claimed that the immigration office was perceived by Indonesian as being the least corrupt government agency. Other institutions that have low level of corruption are non-governmental organizations. The Indonesian Military (TNI) was placed in the middle ranks, just above educational institutions.

TI Indonesia's studies were parallel with the results of similar surveys conducted in 62 countries around world. TI Indonesia secretary-general Emmy Hafild said that corruption in the two institutions was manifested in several ways, including bribery by companies of House members who planned to scrutinize them on their dubious activities. Also House members acted as brokers to help private companies get government contracts and received financial inducements when conducting "fit and proper tests" for public officers. In its recommendations, TI Indonesia said that to prevent political parties and the House from becoming the new hallmarks of corruption in the country, greater accountability was required from both institutions. In the Philippines, meanwhile, the Philippine National Police is perceived as the most corrupt institution in the country, said TI. The national police got a score of 4.2 on a scale of 1.0 (not at all corrupt) to 5.0 (extremely corrupt).

Tied in second place were political parties and the legislature, each with a score of 4.1. Church groups were rated as the least corrupt at 2.1. In third place was the customs service with 3.9, followed by tax revenue agencies with 3.8; registry and permit services with 3.6 and the military with 3.4.

*The Jakarta Post,  
Philippine Daily Inquirer,  
Asia News Network*

## **New democratic Constitution; Key Lessons for Burma Rebuilding Afghanistan**

*International Community must help on the road towards independent democracy*

However, with resolute leadership and the help of the international community there is reason to be confident that he can succeed, as he put it in his speech, in “opening a new chapter in our history”.

Under Karzai’s interim leadership the country has already made solid gains. Afghans adopted a new constitution viewed by many observers as the most progressive in the region and held their first democratic vote, despite repeated attacks. Three million Afghan refugees displaced by more than two decades of fighting have returned home, and women and girls are back in school or in the workforce, from which they were barred under the previous, fundamental Taleban regime. The economy is also rapidly gaining strength and stability.

Yet much of this progress could be undermined if Karzai cannot spread and reinforce Kabul’s control over the entire country. The key to doing this will be the selection of a competent Cabinet that are able to deliver basic services, such as security, water supply, power and roads. This cabinet, which Karzai is expected to name in the first quarter of next year, must also be representative of the ethnic, cultural and geographical diversity of the country so that it can advance national reconciliation.

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