

Lawka Pala

Legal Journal on Burma



Number (39)

August, 2011



Burma Lawyers' Council

BURMA LAWYERS' COUNCIL

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BURMA LAWYERS' COUNCIL

Published by the *Burma Lawyers' Council*

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Cover design & layout: *Than Nai Htwe (BLC)*

Funded by: **Friedrich Naumann Stiftung (FNS)**

**WISDOM IS POWER TO TRANSFORM A SOCIETY INTO
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Legal Journal on Burma

Legal Journal on Burma is published three times a year by Burma Lawyers' Council. The journal contains academic articles relevant to legal and political issues in Burma including: constitutional reform, rule of law, federalism, refugees, judicial independence, martial law, and religious freedom. Articles are written by practising lawyers, academics, and experienced Burmese opposition activists. The views expressed in the articles are those of each author and not of Burma Lawyers' Council. The journal also, where relevant, reproduces copies of important documents relating to Burma, such as statements on behalf of the Burmese parliament. The journal's production is funded by the Friedrich Naumann Stiftung from Germany.

Suggestions, or contribution of articles, for Legal Journal on Burma are most welcome. Any enquiries regarding content or subscription should be directed to the Bangkok Office of the Burma Lawyers' Council.

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Part A: Impunity in Burma

The Dangers of Soldiers Judging Soldiers

Burma's Constitutional court can protect some civilians from the dangers of the Courts-martial system, if it is brave enough. But for others, there is currently no legal protection from military impunity.

By U Myo and James Tager

**Originally published in Mizzima*

A review of Burma's 2008 Constitution leaves one with the realization that the document creates a judiciary that is designed not to promote the interests of justice but rather the interests of the regime. From the Presidential appointment of Justices with only the pretense of Parliamentary approval, to the subjective and vague provisions under which Justices can be impeached and removed from office, to the Constitutional guarantees of amnesty for all manner of crimes committed by the government, there are a number of Constitutional provisions that serve to subvert the rule of law within Burma. The provisions establishing a separate system for military justice are no exception. The 2008 Constitution carves out a separate legal system for the military, beholden to no-one but the Commander-in-Chief of the military. Soldiers, the authors of the 2008 Constitution seem to believe, can only be judged by soldiers.

In fact, the recent Constitution goes the furthest of Burma's successive Constitutions in keeping the military separate from the judicial system that governs the rest of the Union. Burma's 1947 Constitution, established after the country's independence from Britain, made the Supreme Court the highest law of the land



and allowed Parliament to determine to what extent the military system could restrict the Constitutional guarantees of due process. Even the 1974 Constitution, established under General Ne Win's military dictatorship, created a Council of People's Justices which oversaw all the courts of the state, including courts of military justice. It is only in the 2008 Constitution that Burma's military courts become a system completely unto themselves. Under this Constitution, one cannot appeal outside the military to protest a decision made by the military courts. By setting itself apart from the law that governs the rest of Burma, the military also places itself above the law.

Nowhere is this more obvious than under Article 343(b) of the new Constitution, which makes the Commander-in-Chief the final authority on military justice. He can overturn the ruling of the Courts-martial, giving him the power to undo any punishment handed down by the Courts. The Commander-in-Chief, however, is not a legal professional. He does not have the requisite training, background, or even motivation to consider the demands of justice. Instead, his sole concerns are military ones. If the Commander-in-Chief determines that the needs of the Defence Forces are best served by allowing high-ranking military officers to commit all manner of crimes, there is nothing to stop him from doing so.

Similarly, Article 319, which states that the Courts-martial shall adjudicate Defence Services personnel, enables an extended military court system where civilian victims are liable to receive unfair treatment. The ranks of the military judiciary come from medium-level officers. In a dispute where the defendant is another officer, and the accuser is an enlisted man or even a civilian, the military judges will naturally be biased towards their fellow officer. While a civilian court system is primarily tasked with ensuring the interests of justice, the Courts-martial have a collection of other goals, such as the maintenance of military readiness and discipline, to consider when conducting their affairs. And while the civilian court system may be confusing for those who are not legally educated, the military justice system contains its own set of unique procedures and rules that are likely to make court proceedings seem entirely incomprehensible to civilians.

Such a situation creates dangers for groups such as military families, who under this system are vulnerable to abuse from military officers and who have no avenue for recourse but that of a military court. As a hypothetical, imagine a situation wherein a Defence Services officer attacks the relative of one of his enlisted men. The family's best chance for a fair trial lies within the civilian courts, but cases such as these will be tossed out of the civilian courts in favor of a trial before a Court-martial. As long as civilian courts are denied jurisdiction over cases like these, civilian families of military members will be forced to operate in a legal system where the odds are stacked against them.



However, there may be a way to safeguard the rights of these vulnerable groups while working within the Constitutional framework: It depends on whether the Constitutional Tribunal, Burma's highest authority for Constitutional questions, would consider the argument that crimes committed by military members who are acting in a non-military capacity can fall within the jurisdiction of the civilian courts.

There are a variety of offenses that members of the Defence Services may commit that have nothing to do with their duties as members of the military. Drug smuggling is a relevant example, as it is an open secret that the military is intimately involved with the drug trade. Imagine a case where an off-duty military officer, out of uniform, is arrested for possessing drugs. The police may not even know the suspect is a military officer when they arrest him, and yet his status as a member of the military protects him from appearing before a civilian court.

But despite the lengths the Constitution goes to in order to insulate the Courts-martial system, the document does not actually state that the Courts-martial shall be the *exclusive* adjudicator of Defence Services personnel by mere virtue of their being members of the military. The Constitutional Tribunal could determine that if members of the Defence Services are arrested for crimes that are not related to their status as military members, these crimes can fall under the jurisdiction of the civilian courts.

Such an interpretation gains strength from the words of Article 343, the article that makes the Commander-in-Chief the final authority for the Courts-martial system. Article 343 refers to "the adjudication of military justice." While military justice can be interpreted as "a system of justice dealing with members of the military," it is more appropriately interpreted as a "a system of justice dealing with military matters." The prosecution of a military man for drug smuggling has nothing to do with that man's role in the military. Similarly, an officer who engages in a domestic dispute is not acting in his capacity as an officer of the army.

Article 20 of the Constitution makes a similar statement: that the Defence Services has the right to independently administer and adjudicate all affairs of the armed forces. Presumably, this includes judicial affairs. But drug smuggling is not an armed forces affair, even if it is practiced by members of the armed forces.

The Constitution also declares, in Article 294, that the authority of the Supreme Court cannot infringe on the powers of the Courts-martial. However, questions



over jurisdiction are separate from questions of authority. To put it another way, deciding when cases go to a certain court is different from determining the hierarchical relationship between courts. Although the Constitutional Tribunal's ruling would affect whether individual cases would end up in a Court-martial or a civilian court, the ruling would not affect the Courts-martial's ability to exercise control over its own affairs.

For a public-spirited lawyer or judge, it should be possible to at least propose this interpretation to the Tribunal. Article 323 of the Constitution provides any court with the right, and in fact the obligation, to bring a Constitutional issue to the Constitutional Tribunal if the provisions of a certain law are suspected of contravening the Constitution. If a member of the military were to be arrested and tried in civilian court for offences committed while off-duty, there would necessarily arise a dispute over whether civilian law could apply to the defendant. The Constitutional Tribunal, if it was willing to act to safeguard the rights of military families and other potential victims of abuse from off-duty military members, could then find that civilian laws apply to members of the Defence Services when their alleged crime is an "off-duty" one. The military member would not even have to be officially off-duty at the time; the relevant test could simply be whether his alleged crime was related to his military service. The Courts-martial's exclusive jurisdiction over military personnel would thus be confined to "on-duty" crimes committed as a result of that person's role as a member of the military.

It is fundamental to point out that although this step by the Constitutional Tribunal would go some way towards creating accountability for crimes committed by members of the Defence Services, it is nowhere near enough to curb the system of impunity that results from the Constitutional guarantees which place the military outside the rule of law. The variety of abuses committed by the military over the years often result from high-level official and unofficial policies and military practices which are carried out throughout the ranks of the Defence Services. It is lamentably easy to provide illustrations of such policies: the infamous Four Cuts policy promulgated by the military in ethnic areas is one such example. Others include the military's policy, officially banned but unofficially practiced, of forcibly recruiting child soldiers and using forced labor for military projects. Instances of military members performing acts of sexual abuse in ethnic areas are similarly the result of the military practice of sexual violence as a weapon of warfare, as numerous women's groups have proven and despite the vocal but disingenuous protestations of innocence on behalf of the government. It is a deeply distressing fact that these crimes are committed by military members in connection with their status as members of the Defence Forces.



These types of crimes will never be impartially prosecuted within the military system, which would rather cover up the truth about the human rights abuses that result from its own policies. True change will only come from serious reform, such as significant amendments to the Constitution or even the drafting of a new Constitutional document, reforms that will not occur with Burma's present military-controlled government. But in the short-term, the Constitutional Tribunal could take the brave step of finding military members who commit non-military-related crimes subject to the authority of civilian courts. Such a step would probably go against the will of Burma's generals, but it would help protect one vulnerable group from the dangers of Burma's military, a military that is otherwise accountable only to itself.

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Burma's System of Impunity: A Legal Argument for Why Burma Cannot Find a Domestic Resolution for its Heinous Crimes

By James Tager

As a variety of international actors, including over a dozen countries and a score of civil-society organizations, increase their calls for a United Nations-mandated Commission of Inquiry to be established for the purpose of investigating the systematic violation of human rights in Burma, the Burmese regime has repeatedly argued that “An independent investigation in international law requires the exhaustion of local remedies.”¹ This statement is accurate to the point that, if Burma were both able and willing to impartially and effectively investigate human rights violations through domestic mechanisms and to appropriately act on the results of such investigations, the international community would be obliged to wait for domestic judicial systems to run their course before initiating an international investigation of heinous crimes within Burma. If, however, Burma cannot or will not hold its human rights violators accountable, it becomes both the right and the responsibility of the international community to intervene.

Currently, the existing system of impunity within Burma renders it impossible to obtain an impartial examination of human rights violations within the country—violations for which high-ranking members of the Burmese government bear responsibility. Despite the fact that Burma has a new



government that claims to be both civilian-led and democratic, the system of impunity within the country remains unchanged from its years of formal military rule. In fact, recent events, such as the establishment of the 2008 Constitution and the 2010 elections, have only served to entrench this system, despite their democratic veneer.

The Burmese government, realizing that the acknowledgment of a system of impunity in Burma leads to the complete dismissal of their argument that international action is not needed to advance the cause of justice within Burma, has vigorously denied that such a system exists. Burma's Attorney General, Dr. Tun Shin, declared at the country's Universal Periodic Review earlier this year that:

“There is no impunity in Myanmar. No one is above the law. The legal maxim nemo est supra leges² is the accepted principle. Citizens, military and police personnel are not above the law and action will be taken against them when the law is breached.”³

At its Universal Periodic Review, the government delegation also denied the existence of any political prisoners or prisoners of conscience,⁴ claimed that allegations of sexual violence were merely attempts to discredit the armed forces,⁵ and asserted that government censorship in Burma was consonant with the maintenance of fundamental rights.⁶ As numerous international organizations have demonstrated these claims to be patently false, it is clear that the Burmese government's allegations that there is no culture of impunity cannot be taken at face value.

At its Review and within other forums, the Burmese government has advanced several arguments to support its assertion that there is no system of impunity within Burma: First, that the recent Constitution has advanced the rule of law and created a democratic system; second, that the judiciary is sufficiently independent; third, that lawyers within Burma are free from a climate of pressure that would influence their role as officers of the court; and fourth, that the government-created Human Rights Body is an effective tool for judging human rights violations.

All of these assertions are patently false, as this paper will demonstrate. This paper will first explain how the 2008 Constitution has enshrined a system of impunity that makes it impossible to achieve an impartial examination of human rights abuses domestically. In the next section, it will show how the judicial



system is completely dependent on the will of the executive, and has been constructed to serve the interests of the ruling military elite. Third, this paper will illustrate how lawyers within Burma are not free to adequately represent their clients' interests when those interests contravene the will of the ruling regime. Next, it will present the case for how the domestic Human Rights Body within Burma is a completely ineffective tool that is led by the same government officials who are supposed to fall within the Body's scrutiny. And finally, it will show how the legislative system within Burma has been set up to ensure that any reforms to this system of impunity will be blocked by the military.

While this paper does not claim to offer a complete list of the legal mechanisms which constitute a system of domestic impunity within Burma, it seeks to remove any confusion as to this point: The legal system within Burma is completely incapable of bringing high-level perpetrators of human rights violations to account. Therefore, international legal action such as the establishment of a United Nations-mandated Commission of Inquiry to impartially investigate reports of human rights violations is the only way for the international community to honor its responsibilities to the people of Burma and promote the cause of justice and peace throughout the country.

Article 445: The Immunity Clause

Perhaps the gravest example of how impunity is enshrined in the 2008 Constitution is Article 445, commonly known as the Immunity Clause, which states that "No proceeding shall be instituted against the said [previously-ruling] Councils or any member thereof or any member of the Government, in respect of any act done in the execution of their respective duties." This provision acts as a guarantee of amnesty for any government official who has committed any crime, as long as the crime was committed as a result of their official duties. The military general who committed war crimes, the chief of intelligence who arrested and tortured political dissidents, the army commander who used forced labor for construction projects and who forcibly recruited child soldiers; all of these characters could find refuge from the consequences of their acts, which are accepted as crimes under international standards, by hiding under the auspices of Article 445. This is in contravention of customary international law, for which there is no amnesty for heinous crimes. It is also, more notably, in contravention of Burma's treaty obligations as a signatory to the Convention on the Prevention and Punishment of the Crime of Genocide⁷ and the Geneva Conventions.⁸



The Genocide Convention stipulates that punishment for commission of the act of genocide is independent of whether the offender is a private individual or member of the government.⁹ The Geneva Conventions similarly state that signatories have a duty to pass legislation criminalizing grave breaches of the laws of war, to bring perpetrators of these breaches to justice, and to redact domestic law contrary to the provisions of the Conventions.¹⁰ Signatories are also prohibited from absolving themselves or others from liability for these breaches of the laws of war.¹¹ These international obligations stand in stark contrast to Article 445, which appears to place a complete shield of amnesty over government action. By enshrining such immunity within its Constitution, the Burmese government has completely abnegated its responsibility to hold its members to account for the role they have played in the commission of heinous crimes against the people of Burma.

The Judicial System: Independent in Name Only

Appointing Judges

The President of the Union of Myanmar is given complete power in choosing the head of the Supreme Court, or the Chief Justice of the Union. While the President's nomination must be confirmed by Parliament,¹² the legislature is in fact confined to confirming that the nominee passes a set of Constitutionally-prescribed qualifications. Unless the nominee fails to meet these qualifications, which govern such basic criteria as ensuring that the nominee is a Burmese citizen, the Parliament has no authority to reject the President's nomination.¹³ To underscore this lack of legislative autonomy, there is no Constitutional clause allowing the Parliament to vote on whether to approve a presidential nominee; legislative compliance is assumed. As a result, the Chief Justice owes his appointment completely to the President.

Together, the Chief Justice and the President choose the nominees to fill the remaining seats on the Supreme Court. Again, the legislature's role is confined to an examination of the nominee's biography in order to confirm eligibility for the position.¹⁴ Similarly, the President is able to appoint his choice for the Chief Justice of the different Regions and States within Burma, albeit with the "co-ordination" of the Chief Justice of the Union and the Chief Minister of the region or state.¹⁵ The exact level of consent required, by either the Chief Justice of the Union or the relevant Chief Minister, to constitute a threshold level of "co-ordination" may later need to be determined by Burma's Constitutional



Court. Regardless, these provisions demonstrate that the Constitution ties not only the Supreme Court but rather every level of the judiciary within Burma to the President. These connections undercut any hope that the judiciary can operate as an effective check to the power of the ruling regime.

The President himself, under the 2008 Constitutional structure and within the traditional power structure of the ruling junta, is deeply beholden to the military. The military is one of the three groups within Parliament allowed to choose a nominee for President.¹⁶ The military is also guaranteed 25% of the seats within Parliament,¹⁷ providing them with a large voting bloc to ensure that their candidate is selected. This voting bloc is strengthened by the retired military members of Parliament, who are nominally civilians but who can be expected to vote in lockstep with their active-duty counterparts. Beyond this, members of the only major political party within Burma, the Union Solidarity and Development Party, which began as the political wing of the military establishment, can also be expected to cast their votes in support of the military's favored candidate. In fact, the current connection between the Union Solidarity and Development Party and the military junta is so strong that international observers have begun to refer to it as the "military-Parliamentary complex."¹⁸ With this in mind, it becomes clear that the President is chosen not to impartially steer the country but rather to act as a representative for the interests of the junta.

The President shares Executive powers with the powerful National Defence and Security Council, a collection of junta leaders that includes several high-level military members. In an Executive-invoked state of emergency, the President devolves sovereign powers to both the Commander-in-Chief and the National Defence and Security Council, which then operate with no checks against their power¹⁹ and with complete amnesty for any measures taken during the state of emergency.²⁰ Beyond its perpetuation of a system where the military junta operates above the law, this arrangement of executive power also ensures that the President must work most closely with other members of the junta in order to operate effectively.

As yet another means of manifesting control over the President, the military is single-handedly able to impeach the President, though not to remove him. The necessary number of members of Parliament to impeach the President is "not less than one-fourth" of either House,²¹ which happens to be the exact number Constitutionally granted to the military. As a result, the military can trigger a Parliamentary investigation into Presidential "misconduct" at any time, placing



the President in a precarious position if he ever disagrees with the initiatives of his compatriots in the military junta. Presidential appointments to the judiciary are thus a stand-in for the military's preferences, including allowing the appointment of ex-military personnel to top judicial posts. Notably, the foremost judicial post in the Union, that of the Supreme Court's Chief Justice, is held by former deputy chief justice Tun Tun Oo, a former high-ranking officer who began his legal career in the military advocate general office. Such an appointment demonstrates the ease with which the military is able to control the composition of the Burmese judicial system.

Dismissing Judges

While the Constitution appears at first glance to provide some protection against a justice's summary removal from office, in reality the charges upon which a judge can be removed are subjective and vague. Sufficient charges include "misconduct" or "inefficient discharge of duties assigned by law."²² Justices are also required to be "free from party politics";²³ breach of this provision also would constitute cause for dismissal.²⁴ The requirement that judges be free from party politics is similar to the Constitutional provisions prohibiting the abuse of religion for political purposes.²⁵ The provisions against "abuse of religion" provide the government with a tool to use against members of the Buddhist clergy who protest the regime and against leaders in ethnic communities with large Christian or Muslim constituencies. Similarly, the prohibition against members of the judicial branch engaging in party politics can be easily abused by the regime. And although the actual dismissal of a Justice requires two-thirds of the legislature, the President is allowed to impeach any Justice on his own initiative.²⁶

The members of the Constitutional Tribunal of the Union, which serves as the final authority on Constitutional matters, are more isolated from the Executive during the appointment process than members of the Supreme Court of the Union. The President only appoints three of the members of the Constitutional Tribunal, including the Chairperson, with the Speakers of both houses of Parliament also allowed to appoint three members each.²⁷ However, the President is similarly allowed to impeach members of the Tribunal for such violations as "misconduct,"²⁸ "inefficient discharge of duties assigned by law,"²⁹ or involvement in the activities of a political party.³⁰ This provides the President with a significant measure of power over the job security of those who decide how to interpret Constitutional provisions.



Impeachment is not the only way for a member of the judiciary to leave office, however. He is also allowed to resign, and while the Constitution mentions that this resignation must be of the justice's "own volition,"³¹ the ruling junta has previously used forced resignations as a tactic for controlling the Supreme Court. In 1998, the State Peace and Development Council (the junta's previous incarnation), "permitted the retirement" of five out of the six judges of Burma's previous Supreme Court.³² No reasons for their mass resignations were provided.

Finally, the Constitution provides another avenue for executive control over the will of the judiciary by allowing a range of acceptable numbers of judges to sit on both the national Supreme Court and the regional High Courts. For the Supreme Court, the President is allowed to appoint between seven and eleven Justices,³³ while for the High Court of a state or region the President is allowed to appoint between three and seven Justices.³⁴ These malleable figures allow the President to counteract the will of resistant Justices by placing additional Justices, more pliant to his will, on the bench. Thus, even if the President is unable to dismiss a Justice or compel his resignation through non-legal means, he can counteract the effect of a noncompliant Justice through additional appointments. The regime has proven more than willing to use court-packing tactics in the past: Although the 2000 Judiciary Law restricted the pre-Constitutional Supreme Court's numbers to twelve, the military regime did not hesitate to appoint justices to the Court in excess of this number in order to help ensure a compliant judiciary.³⁵ With the new Constitution, the junta will be able to similarly manipulate the membership of the judiciary while remaining within the letter of the law.

Impeachment, enforced resignations, and court-packing are all tactics the military-led "civilian" government have at their disposal to control the behavior of high-level judges, even after the Justices have been appointed to their positions. Combined, these tactics provide the regime with a powerful level of control over the judiciary, further ensuring that the judicial branch will not operate independently and that their actions will not be impartial.

Lawyers: Controlled through Punishment and Intimidation

While judges follow the orders of the regime, there is another class of "officers of the court" who are controlled by the regime through a system of punishment and intimidation. The Burmese legal system has a long record of putting lawyers who advocate for causes contrary to those of the regime, most commonly



defense lawyers for clients arrested on politically-motivated charges, at a serious disadvantage within the courtroom. The court may label their questions or evidence inadmissible, or deny them access to necessary files or evidence. Lawyers have been prevented from speaking with their clients in public or even from meeting with them at all. In several cases, defense lawyers have been arrested for contempt of court or other trumped-up charges, and sent to prison during their clients' case.³⁶ The persecution of lawyers who attempt to represent a legal counterpoint to the wishes of the government stands in stark contrast to the promises of the 2008 Constitution that the government would enhance the principles of Justice, Liberty and Equality.

Burmese law contains many vague and arbitrary laws subject to subjective determinations, which can be used by both the police and judges to punish lawyers advocating causes that contravene the will of the regime. One such example is the Law Relating to forming of Organizations, which contains clauses criminalizing organizations that commit acts that "may effect [sic] or disrupt the regularity of state machinery".³⁷ This law, which criminalizes even the potential for disruption and offers no criteria for judging what constitutes disruption, has even been used against individuals, such as lawyer Pho Phyu during his defense, in early 2009, of farmworkers whose land had been confiscated by the government.³⁸

Burmese law also contains provisions that appear tailored to provide judges with tools to arbitrarily punish lawyers who challenge court proceedings. The Contempt of Courts Act,³⁹ which has remained unaltered since 1926, provides a penalty for up to six months in prison, along with a fine, for lawyers found to be in contempt of court. The Act makes no effort to define the characteristics of contempt, making any determination of contempt completely dependent on the will of the judge. Human rights groups have pointed out that this dangerous lack of definition for 'contempt' has led to systematic abuse of the provision on the part of judges. For example, in 2008, lawyers U Aung Thein and U Khin Maung Shein withdrew from representing detained democracy activists as part of an agreement with their clients to protest the unfairness of the trial. The lawyers pointed out that they were being prevented from meeting with their clients and preparing an adequate defense, and that the family members of the accused were not allowed to enter the courtroom. In response, the court found both lawyers in contempt of court and sentenced them to several months in prison.⁴⁰



Besides the Contempt of Courts Act, the Burmese Penal Code contains a provision (Article 228) declaring that “Whoever intentionally offers any insult, or causes any interruption to any public servant, while such public servant is sifting [sic] in any state of a judicial proceeding, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.”⁴¹ The provision is similarly open for abuse by the courts; “any interruption” is a broad category that essentially allows the judge to punish a lawyer for any disagreement with the course of court proceedings. Although this provision attempts to penalize the same behavior as the Contempt of Courts Act, the fact that Article 228 is apart from the Contempt of Courts Act means that there is no impediment to a court finding a lawyer guilty of contempt under both bodies of law, essentially doubling the sentence to a maximum of one year in prison.

Beyond imprisoning defense lawyers, the regime has also found it fit to simply suspend or disbar lawyers with whom they disagree, preventing them from practicing law. For example, U Aung Thein, while serving as the legal advisor to Daw Aung San Suu Kyi in May 2009, had his license revoked on the charge that he was not abiding by legal ethics.⁴² This is not an isolated example of the regime disbaring a lawyer for political reasons; the Asian Law Resource Center has compiled a list of over 200 Burmese lawyers who have recently been suspended or deregistered, and reports that many such suspensions or disbarments are a result of actions “that the authorities found inimical to their interests.”⁴³ The Center also points out that:

“In a country with lawyers numbering in the thousands, this is a large percentage that speaks to the attempts to contain and coerce the profession as a whole. The ALRC has followed a number of cases of deregistration closely and is aware that the lawyers who have suffered this penalty have been informed by written communication of what has happened to them and have been denied the opportunity to present a defence, although the law allows for this.”⁴⁴

The Burmese government’s willingness to use both procedural and substantive legal rules to prevent defense lawyers from providing their clients an adequate defense within the domestic legal system are far from acceptable by international standards. For example, the indictment of defense lawyers for attempting to defend their clients against the government appears to be in violation of Articles 7 and 10 of the Universal Declaration of Human Rights, both of which aim to safeguard the principle of equal protection before the law.



Similarly, Burma's castigatory attitude towards activist lawyers violates several provisions of the Basic Principles on the Role of Lawyers, a set of guidelines released by the United Nations in 1990 to govern the safeguarding of the proper role of lawyers.

Among other requirements, the guidelines include basic principles regarding access to lawyers, such as the prohibition against making access to lawyers dependent on political stance or other opinions;⁴⁵ the assurance of a defendant's prompt access to a lawyer;⁴⁶ and the necessity of providing adequate access to a lawyer without censorship or interception of lawyer-client information by authorities.⁴⁷ Governments are similarly tasked with ensuring that lawyers are not prevented from pursuing legal practice due to political views or other opinions.⁴⁸ The Burmese government, through its interference with the legal rights of political arrestees and its punitive actions against lawyers who dare to take such cases, fails to meet this basic threshold of safeguards intended to ensure an adequate role for lawyers within Burma's domestic judicial system.

With the vagueness of certain laws, and with other laws seemingly having no *raison d'être* other than to punish those seeking to defend their clients against the assertions of the regime, the Burmese legal system is currently incapable of ensuring that lawyers who seek to speak out against power will be respected and protected from government excess. As long as lawyers remain unprotected from punitive action as a consequence of their legal advocacy against the will of the regime, a system of impunity remains in place.

***The Military Courts-Martial: Live by the Sword,
be Judged by the Sword***

Even if the regular court system operated independently from the ruling government, a large portion of the junta's crimes would remain protected by the Burmese system. The Constitution establishes a separate set of military Courts-martial, not beholden to the Supreme Court, that adjudicate all crimes committed by the Burmese military. While many countries possess their own courts-martial systems, there are normally restrictions on the jurisdictional reach of these courts, as well as institutional checks on the power they wield. Not so in Burma, where the government remains within the power of the military establishment.

The jurisdiction of Burma's Courts-martial has little in the way of limitations; the Constitution says only that the Courts-martial "shall adjudicate Defence



Services personnel.”⁴⁹ With such an unrestricted mandate for the Courts-martial, it appears unlikely that a member of the military will ever fall within the jurisdiction of a civilian court, regardless of the alleged crime. To underscore the point that the military is outside of the traditional court system, the Constitution also goes on to explicitly declare in a separate provision that the Courts-martial fall outside the jurisdiction of the Supreme Court of the Union.⁵⁰

Human rights groups have amassed a comprehensive amount of information pointing to the Burmese military as the perpetrator of a large range of crimes. The Harvard Law report “Crimes In Burma” declared in 2009 that past “numerous military campaigns against ethnic nationality groups led to a litany of human rights violations.”⁵¹ International observers state that these crimes continue on to the present day. In his 2010 report to the Human Rights Council,⁵² Special Rapporteur on the Situation of Human Rights in Myanmar, Tomás Ojea Quintana, described some of these crimes reported to have been committed by the Burmese military, including forced displacement,⁵³ forced labor,⁵⁴ recruitment of child soldiers,⁵⁵ rape and sexual violence,⁵⁶ pillage and destruction of villagers’ livelihoods,⁵⁷ extrajudicial killings,⁵⁸ indiscriminate attacks upon civilian populations,⁵⁹ and the use of anti-personnel landmines.⁶⁰ All of these categories constitute serious violations of international law, and similarly constitute actionable offenses under the Rome Statute of the International Criminal Court.

It is fundamental to underscore the fact that these crimes are not simply isolated incidents committed by low-level soldiers without direction; instead, they are part of a comprehensive campaign to break ethnic resistance to the Burmese military junta, initiated by high-ranking military commanders and enforced by military order throughout the chain-of-command. For decades, the Burmese military has utilized a “Four Cuts” policy that aims to weaken ethnic militias by cutting them off from access to resources within ethnic areas.⁶¹ This policy, which equates the widespread victimization of ethnic civilian populations with official military strategy, has had the direct consequence of officially validating and in fact mandating the above-listed human rights abuses. Similarly, other systematic abuses such as forced portering and the recruitment of child soldiers can be directly traced to military strategies promoted at a high-level within the military. With the courts-martial serving as the only means to judge Defence Services members, the Burmese legal system has created a situation where the military is in charge of investigating human rights abuses that directly result from its own high-level policies.



In addition to the jurisdiction, the composition of the military judiciary underscores the low likelihood of receiving an impartial trial for military members accused of heinous crimes. Judges for Burmese Courts-martial are typically composed of medium-level military officers, hardly a credible source for impartially determining whether the Burmese military regime has committed systematic war crimes or other heinous crimes. Any credible examination of the military's role in these crimes has to be investigated and presided over by a body other than the military, and this will not happen under the current system in Burma.

The Constitution further declares that “the decision of the Commander-in-Chief of the Defence Services is final and conclusive” in regards to the adjudication of military justice,⁶² a provision which grants the Commander-in-Chief appellate power over the decisions of the Courts-martial. Were the Courts-martial to return a guilty verdict against a soldier accused of heinous crimes, the Commander-in-Chief could simply overturn it. This renders the entire Courts-martial system dependent on the will of the Commander-in-Chief, who can prevent his subordinates from being held to account for enforcing military policies that led directly to systematic human rights violations. It also renders the Commander-in-Chief above the law; there is no domestic court capable of punishing him for any offense.

The Burmese Human Rights Body: A Smokescreen

Outside of the traditional court system is Burma's Human Rights Body, which has existed in some form since 2000 but which was re-launched by the regime after the events of the 2007 Saffron Revolution in an attempt to forestall international criticism. The government has pointed to its Human Rights Body as proof that it is willing and able to handle human rights violations domestically. The government junta explained in its Universal Periodic Review that the Body, as part of the Ministry of Home Affairs, received 503 complaints between January and August 2010. Of those complaints, “action had been taken on 199 complaints, 203 complaints were under investigation and 101 complaints had been found to be false.”⁶³ However, in his March 2011 report to the General Assembly, Professor Quintana pointed out that the Human Rights Body had admitted that, out of these more than 500 complaints, not a single one of these complaints involved crimes against humanity or war crimes.⁶⁴

Even were the Human Rights Body to investigate these crimes, any attempt to indict or even investigate the actions of military members in connection to war



crimes or crimes against humanity may fall afoul of the Constitutional provisions designating Courts-martial as the exclusive judicial body for crimes committed by the military. In fact, although the Body is mandated to accept “complaints and communications from those whose human rights are reportedly being violated, carrying out necessary investigations and taking proper actions although they are not included in the mandate of the Body,”⁶⁵ it is unclear what these proper actions would be. Without specified “proper actions” within the mandate of the Body, the power of the Body to compensate victims, punish perpetrators or even announce their findings remains unclear.

The debate over where the Human Rights Body’s limits are drawn is eclipsed by the fact that, even if the Body’s mandate were construed to allow a full range of power to investigate crimes and act upon their findings, the Body would still contribute to a domestic climate of impunity. Significant structural problems render the Body completely incapable of acting as a truly independent guardian of human rights in Burma.

Human rights observers like David Mathieson at Human Rights Watch have pointed out that the Human Rights Body is far from compliant with the international principles that govern such institutions.⁶⁶ The Principles Relating to the Status of National Institutions, or the Paris Principles, drafted in 1993, are intended to provide a blueprint for an adequately impartial national human rights institution. Within this blueprint are requirements that civil society be represented⁶⁷ and that government representatives serve only in an advisory capacity.⁶⁸

The Myanmar Human Rights Body, in contrast, is part the government apparatus. In its Universal Periodic Review, the government admitted that the Body was not yet in line with the Paris Principles, but argued that the Body was “still in its initial stages.”⁶⁹ The claim the Human Rights Body is in its nascence is less convincing upon the recollection that the Body is actually the renewal of a former human right body. The Myanmar Human rights Committee was initially formed in April 2000, and it was reformed as the Human Rights Body in November 2007, when the international community was considering a response to the regime’s crackdown on protestors in the Saffron Revolution.⁷⁰ The Human Rights Body has thus existed in some form for over a decade, making it clear that it is not the immaturity of the organization, but rather the motivations of the government that created it, which prevents the Body from being in line with the Paris Principles.



The government's claim to eventually transform the Body into a Paris Principles-compliant organization is even less convincing when considering the fact that, weeks after its Universal Periodic Review, the government announced an order to "reform" the Human Rights Body. Within the order was the announcement that the Body would continue to be led by Government ministers.⁷¹

These Government ministers, in order to adequately fulfill the mandate of the Human Rights Body, would have to investigate themselves and their departments for violations such as excessive force in repressing protests, politically-motivated arrests, torture, and other abuses of power. Such investigations would include, for example, inquiries into systematic abuses of political prisoners in prisons controlled by the Home Affairs Ministry, even though it is this Ministry that also controls the Human Rights Body. The resulting conflict-of-interest renders it obvious that the government's Human Rights Body exists for a purpose other than that of promoting justice and reconciliation for the country.

The Military's Legislative Stranglehold

As the leaders of Burma's military junta have ensured both control of the judiciary and a Constitutionally-granted amnesty, they have taken similar steps to guarantee that the system cannot reform itself without their consent. The fact that the Constitution guarantees that 25% of all seats within Parliament go to serving members of the military who are all handpicked by the Commander-in-Chief, ensures that the legislature will be hard-pressed to ever act against the military's interests. But the Constitutionally-mandated composition of the Parliament actually renders it impossible to remove the foundations of the governmental system which ensure a climate of impunity for the military and other members of the regime.

In order to amend the Constitution, the Parliament must have the approval of more than seventy-five percent of its members,⁷² providing the military with *de facto* veto power over any proposed Constitutional amendment. This fact undercuts the argument advanced by some international observers that the 2008 Constitution, although fundamentally flawed, nevertheless provides the foundation for gradual reform.⁷³ Such an argument presupposes the idea that anti-democratic provisions within the Constitution can be gradually corrected so that Burmese society eventually ascends to a more democratic level. But such a transformation is impossible within a system where the military can single-handedly block Constitutional reforms.



The International Centre for Transitional Justice, in its September 2009 paper *Impunity Prolonged*, underscores this point by using the example of Indonesia's transition from military rule to democracy:

“One of the fundamental reasons Indonesia has been able to move forward in its transition from military dictatorship to democracy is that the previous guarantee that 30 percent of seats in parliament go to military officers was not entrenched in the constitution. Therefore, those laws could be amended. The quota gradually decreased over seven years and now no longer applies.”⁷⁴

However, in Burma's new “civilian” government it is impossible to repeal the provisions guaranteeing the military 25% of all Parliamentary seats, because this amendment would ironically require the acceptance of the military itself in order to pass. Similarly, amendments to strengthen the role of the judiciary, to limit emergency powers or to provide the legislature with more autonomy in confirming nominees cannot pass without the acceptance of the ruling powers. Even the Immunity Clause cannot be removed without the consent of those who have the most to gain from the Clause's existence. This Constitutional framework paralyzes any prospective transition from a system of impunity to a system of accountability, placing the prospects for justice exclusively outside the ambit of Burma's current legal system.

Conclusion: An Entrenched System of Impunity

The new Constitution has created a system where the judicial branch functions as an extension of the executive, the legislative branch is unable to act without the consent of the military, and government members are given amnesty for their crimes. In short, it has perpetuated the system of impunity upon which the military junta has relied for decades. Judges owe both their appointment and their continued job security to the regime, while lawyers are similarly vulnerable to punishment if they act against the government. The military is responsible only to itself, in the form of military courts-martial which constitute the Constitutionally-approved vehicle for judging crimes of which Defence Service members were a part. Similarly, Burma's Human Rights Body is led by the same ministries of the government that have a vested interest in dismissing or burying human rights complaints.



As a set of legal institutions that aim to promote justice and enhance the rule of law, Burma's domestic system is untenable. As a legal system that aims to protect those in power from the consequences of their heinous crimes, it is quite effective. Burma's legal processes entrench a system of impunity and render victims of human rights within Burma voiceless. The responsibility falls upon the international community to rectify these injustices and prevent the continued commission of heinous crimes. As this paper is being written, the Burmese military has been waging a new series of offensives in ethnic states within Northern and Eastern Burma. This new set of offensives is just one of the long line of abuses committed by the Burmese military, which will not be resolved if the international community continues to believe that Burma has any interest in reforming its behavior without international pressure. The increasing calls for a Commission of Inquiry, an international and impartial investigation into crimes committed in Burma, should be heeded. Burma is incapable of handling such a Commission on its own; instead, the international community must act to promote justice, accountability, and peace for the people of Burma.

(Endnotes)

¹ UN Human Rights Council. "Report of the Working Group on the Universal Periodic Review: Myanmar." 24 March 2011. A/HRC/17/9. ¶ 103(c).

² "No one is above the law"

³ A/HRC/17/9, at ¶ 103(g).

⁴ *Id.* at ¶ 51.

⁵ *Id.* at ¶94.

⁶ *Id.* at ¶56.

⁷ Burma became a signatory to the Convention on December 20, 1949, and ratified the Convention on March 14, 1956.

⁸ Ratification and accession on August 25, 1992.

⁹ "Convention on the Prevention and Punishment of the Crime of Genocide." Adopted by the General Assembly on 9 December 1948. Article IV

¹⁰ "First Geneva Convention, 1949." Article 49.

¹¹ *Id.* at Article 51.

¹² Known as the Pyidaungsu Hluttaw.

¹³ "Constitution of the Republic of the Union of Myanmar." September 2008. Article 299(d)(ii)

¹⁴ *Id.*

¹⁵ *Id.* at Article 308(b)(i).

¹⁶ Article 60(b)(iii).

¹⁷ Articles 141(b) and 109(b).

¹⁸ Mathieson, D.S. "Burma's 'Disciplined Democracy is a Mockery of U.N. Standards.'" 4 April 2011.

¹⁹ Article 427.

²⁰ Article 432.

²¹ Article 71(b)

²² Articles 302(a) and 311(a)



- ²³ Articles 300(a) and 309(a)
- ²⁴ Articles 302(a)(ii) and 311(a)(ii)
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- ²⁶ Articles 302(a) and 311(b).
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- ²⁸ Article 334(a)(iii).
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- ³⁸ e.g. Mizzima News Group. “Lawyer Pho Phyu May Be Released.” Mizzima. 4 February 2010. Available from : <<http://www.mizzima.com/news/inside-burma/3482-lawyer-pho-phyu-may-be-released.html>>
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⁶¹ See e.g. “Crimes in Burma.”

⁶² “Constitution of the Republic of the Union of Myanmar” at Article 343(b).

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⁷⁴ “Impunity Prolonged: Burma and its 2008 Constitution.” International Center for Transitional Justice. September 2009. Page 31.

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THE NEW REGIME'S JUDICIARY UNDER THE 2008 CONSTITUTION

By B.K Sen

Chapter 6 of the 2008 Constitution of Myanmar addresses the judiciary and outlines the formation of the courts. There are three types of courts created under the Constitution, namely the Union Supreme Court with its lower domestic courts, the Military Court and the Constitutional Tribunal. The Supreme Court has no jurisdiction over the Constitutional or Military Courts. The three institutions are independent of one another but, ironically, the Constitution states that the Supreme Court is the highest court of the Union. Matters in the Military Court or Constitutional Tribunal cannot be referred to the Supreme Court, so it is patently wrong to say that it is the highest court. This lack of authority is made clearer in Article 295 which sets out the disputes the Supreme Court can handle, including appellate/provisional jurisdiction and other original judicial powers that are vested in the Supreme Court. Thus, the presentation of the Supreme Court as a high court equivalent to that of other countries is misleading since most foreign supreme courts do not have such limitations. Referring to the Supreme Court as the highest court in the Union is appropriate only in relation to its ability to issue enumerated writs and act as a court of final appeal for domestic legal matters.

Section 295(b) of the 2008 Constitution states that the Union Supreme Court is the highest appellate court of the Union. No appeal is available from the Military Courts or Constitutional Tribunal to the Supreme Court. Hence Section 295(b) is also misleading. Article 298 states that the Chief Justice may present information regarding the judiciary to the Parliament. According to Articles 299(ii)-(iv), the Chief Justice and other Supreme Court Judges will be nominated by the President. This effectively means that the executive controls the judiciary, violating the cherished principle of judicial independence.



When reading the constitution as a whole, it becomes apparent that the domination of the military is supreme and the judiciary is a mere arm of the political system under the shadow of military domination. While some provisions give the appearance of democracy and independence, other provisions essentially nullify these principles. Authoritarianism is the hallmark of the 2008 Constitution, and the Constitution has not created a legal order in which an independent judiciary is empowered to review the legality of all official acts. Furthermore, the Constitution has not codified the separation of powers among the three branches of government.

A vital part of the transition to a constitutional democracy in Burma is the transformation of the judiciary into a fully independent branch of government. The military regime has totally undermined the principle of judicial independence in the Constitution. The Union Solidarity and Development Association (USDA) dominates political life and controls the Executive branch, national assemblies and local governments. Thus, any analysis of the relationship between the judiciary and other branches of government is largely an analysis of the USDA's attitude towards the judiciary and its belief about the role that judiciary should play. The Constitution was the product of military mind and attitude of the military to independence of judiciary is well known over three decades of its misrule.

The matter of selection of judges is intrinsically bound with judicial accountability. It is critical to the public perception of independence and impartiality which the Constitution does not provide. Basic constitutional values and the rule of law are each dimensions of the transition to democracy as are ethnic and gender justice, and judicial accountability. The appointment of judges with strong underlying values, and independence, is similarly aimed at achieving these goals.

The study of the transition of South Africa's judiciary from an apartheid regime to a democracy is pertinent and one can draw many lessons as Burma is transitioning from a military regime to a "disciplined democracy." A fundamental factor in evaluating the independence of the judiciary is the selection process of judges. In South Africa, judges are selected by the Judicial Service Commission (JSC), a constitutionally-mandated body composed of judges, practicing advocates and attorneys, academics, members of the legislative and executive branches, and presidential appointees. The diverse membership of the JSC provides a significant check and balance to the power of the executive to make such appointments. The President of South Africa, after consulting with the JSC, appoints the Chief Justice. Appointments of all judges are preceded by the consent of the JSC.



The independence of the judiciary stems from the notion of separation of powers whereby the executive, legislature and judiciary are three separate parts. Separation ensures that the executive cannot interfere with the judiciary. These basic principles are missing from the 2008 Constitution. The judiciary should decide matters impartially on the basis of facts and in accordance with law without any direct or indirect restriction, improper influence, inducement, pressure, threat or interference. The rights of parties before a court should be respected so that impartiality of the judiciary is seen to be practiced. Judges should be free to form and join association or represent their interests, to promote their professional training to protect their judicial independence. In the selection of judges there should be no discrimination. The racial and gender composition of the judiciary influences public perception of judicial independence. Ethnic nationalities must be provided with representation in the team of judges. Conditions of service and tenure are to be secured and there should be no arbitrary insecurity in judicial terms. Disciplinary proceedings, suspension and removal should only be possible with a two thirds majority of National Assembly votes and the consent of a JSC-type body is a must. The present constitution does not provide these provisions.

The role of the judiciary as guardian of the constitution ensures that the fundamental rights of citizens as stipulated in the constitution are held paramount. Rule of law is supreme when the judiciary serves as an impenetrable bulwark against the excessive assumption of power in the executive or legislative branches. The power of judicial review allows the judiciary to investigate and even invalidate acts of others that are held to be *ultra vires*.

Although the Constitution guarantees fundamental rights, thousands of political prisoners are languishing in jail. The Supreme Court has the inherent power to take judicial notice of illegal detention and release the person concerned. Section 296(a) states that the Supreme Court has powers to issue writs of habeas corpus, mandamus, prohibition, quo warranto, and certiorari.

As independence of judiciary is important, equally important is to free the judiciary from corruption. This is the most serious malaise for the judiciary. The Constitution does not provide an institution which can eradicate this sickness. The process of impeachment for higher court judges and disciplinary proceedings for all judges does not provide sufficient scrutiny. In spite of their existence, corruption is rampant. An independent judiciary must be formed vested with all powers of investigation, trial and punishment.

Independence of the judiciary is not the *sine quo non* of obtaining justice. Courts must also act according to law as understood by the judges. Unfortunately, in Burma, Judgment is given in many cases according to the bribe received. This is



partially due to the fact that the laws in Burma are archaic and outdated as most are of colonial origin. For example, a prisoner under trial will stay in jail for years as the trial drags on because provisions for bail are outdated. Accused persons cannot be granted bail. The Criminal Procedure Code, Penal Code, Evidence Act, and Civil Procedure Code our British colonial masters' gifts to the Constitution, provide for many laws but not much genuine relief. A Law Revision commission must be formed. The state of existing laws nullify whatever glamour has been put on the face of the constitution.

The judiciary under the Constitution is merely old wine in a new bottle. The 2008 Constitution has rendered the judiciary a cog in the bureaucratic machinery and justice is as elusive as ever. The pre-constitution era of the judiciary has not changed as the constitution has made no dent on it. Who will say that the present judiciary is different from the military-ruled judiciary? The vicious cycle continues. It lends truth to the contention that democracy is fake and the constitution a great fraud. In determining a nation's rank in political civilization, no test is more decisive than the degree in which justice, as defined by the law, is actually realized in its judicial administration. If this test is applied to Burma it is a sad, negative story. The role of the judiciary as a vital component of the government has for too long been ignored in Burma.

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Part B: Special Features

The Burmese Government in Exile: Outcast but not Irrelevant

By Stephanie Swigert

I. Introduction

The National Coalition Government of the Union of Burma (NCGUB) is one of the world's approximately two-dozen self-proclaimed governments in exile.¹ Traditionally, the term "government in exile" has been used to refer to a political entity that has been forcibly deposed and claims legitimate governmental authority over its home state with the consent and recognition of the hosting state from which it conducts its activities.²

During World War II, allied governments from occupied continental territory fled to the United Kingdom and continued to operate in exile. These governments were fully recognized by both the United Kingdom's government and much of the international community.³ Outside of similarly extraordinary circumstances, however, international recognition of governments in exile is almost nonexistent.⁴ As a result, the term is used loosely to describe political groups claiming to have legitimate political authority in their home state, regardless of whether or not the host state recognizes the group's legitimacy. The NCGUB, together with its exiled parliament, the Members of Parliament Union – Burma (MPU), comprise just such a political body.

Contemporary exiled governments vary greatly. Perhaps the most widely known and internationally well-respected government in exile is the Central Tibetan Administration (CTA). The Tibetan government in exile was formed in 1959



after the Dalai Lama's escape from Tibet following a failed uprising against the Chinese occupation.⁵ As the official head of the Tibetan Government in Exile, the Dalai Lama met with world leaders, raised awareness about the plight of Tibetans under China's rule, and continued to advocate for self-determination for Tibet. In April 2011 he stepped down from his political role, and the Tibetan diaspora elected the Harvard-educated Lobsang Sangay as Prime Minister. Representing a well-organized and motivated exiled population, the Central Tibetan Administration has been highly effective in shaping opposition strategy, raising awareness, and applying pressure to the international community.⁶ The Tibetan government in exile stands in stark contrast to some self-proclaimed "governments in exile" that have little local or international influence and no real basis for their claims to power.⁷ In terms of both legitimacy and respect, the NCGUB falls somewhere in between these two ends of the spectrum.

II. Background

The NCGUB was formed in December 1990 after Burma's ruling military junta, the State Law and Order Restoration Council, refused to recognize the results of popular elections held in May the same year. In those elections, the National League for Democracy (NLD) won over 80% of the popular vote. When it became clear that the junta would not allow for a democratic transition, the MPs-elect and the NLD Central Executive Party convened the July 1990 "Gandhi Conference" to seek recognition of the election results and a transition of power. At the conference, the "Special Leading Committee" was elected and given authority to create a political transition plan.⁸ In accordance with resolutions passed by the seven-member committee, a few elected MPs crossed the border to Thailand to institute a parallel government in exile. Dr. Sein Win, first cousin of Daw Aung San Suu Kyi, was elected to serve as Prime Minister of the newly formed NCGUB.⁹

In June 1996, representatives elected in the May 1990 elections formed the Members of Parliament Union – Burma (MPU) to act as the Parliament of the NCGUB and to decide the exiled government's policies, elect a prime minister, and confirm his cabinet appointments.¹⁰ In 2002, at the fourth Convention of Elected Representatives, the NCGUB released the Bommersvik Declaration outlining and the exiled government's broad goals. These include ending military rule, instituting democracy, and establishing a federal Union of Burma.¹¹ Both organizations' more immediate objectives focus on facilitating talks between Daw Aung San Suu Kyi and the ruling junta with the goal of transitioning to full democracy in Burma.¹² Unlike the allied governments in World War II, the Burmese government in exile does not intend to take political control of Burma in the event of democratic change. One of the NCGUB's declared principles, in fact, is that it will be dissolved once democracy and human rights



are restored to Burma.¹³¹³ The National Coalition Government of the Union of Burma (2009) <<http://www.ncgub.net/>> Accessed

The NCGUB's intention, then, is to use their mandate to advocate for democratic change and help facilitate democratic transition.

III. Challenges Facing the Burmese Government in Exile

The NCGUB faces challenges unique to its position as a government in exile. Three major, interrelated challenges are: maintaining cohesion among the Burmese pro-democracy community, ensuring adequate representation of the population they purport to represent, and building legitimacy among both the international community and the Burmese opposition movement.

A. Representation

Although the NCGUB and the MPU are composed of representatives elected to Parliament in the 1990 elections, the exiled government has, in recent years, faced criticism for being unrepresentative of the Burmese democracy movement.¹⁴ Indicative of this criticism was the January 2009 announcement by the National Council of the Union of Burma (NCUB), that it would form a new parallel government in exile that would be more inclusive of Burma's myriad ethnic groups.¹⁵ The NCUB is an umbrella group of exiled opposition organizations, including the MPU, which has similar objectives to the NCGUB.¹⁶

The desire for an inclusive, representative government in exile seems natural for a pro-democracy movement. But opening up the NCGUB and the MPU to members other than MPs elected in the 1990 elections would create a representational dilemma for the organization. Although expanding representation of ethnic groups would improve governmental representation, it would do so at the risk of disenfranchising the pro-democracy movement within Burma. A new election would be necessarily limited to the diaspora, as the logistics of conducting an election for an exiled government within the borders controlled by the repressive ruling party are prohibitive. Because the NCGUB and the MPU are comprised of the representatives elected by those who voted in the 1990 elections—both those who still live inside Burma and those who have since fled—the organizations would face a distinct representational deficiency by holding elections limited to the diaspora.

Even if the NCGUB and the MPU remain closed to new members, their mandate diminishes with time. When the NCGUB was formed in 1990, its members had been elected less than a year prior, and their mandate to form a government



was still fresh. As the amount of time elapsed since the 1990 elections increases, however, the exiled government's claims of political relevance are weakened. Significant developments within Burma, including the adoption of the 2008 Constitution, the ostensible separation of the ruling Junta's military and political wings, and the 2010 'democratic' elections, might, in a functioning democratic system, be accompanied by a shift in opposition party's political strategy that would be tested at the ballots. For the exiled government, however, fresh elections within Burma are logistically impossible, and accordingly, the Burmese lose a powerful mechanism by which to hold the exiled government accountable for their strategic decisions.

Despite this loss, a lack of full representation should not, on its own, condemn the NCGUB and MPU to irrelevance. For, unlike the exiled governments of WWII, and, for that matter, traditional non-exiled governments, the Burmese government in exile does not engage in most normal political functions. They do not, for example, legislate or direct military strategy. Their activities are primarily confined to lobbying the international community, and the primary goal of their lobbying efforts—to bring about democratic change in Burma—is shared by the greater opposition movement. While a failure to achieve full representation may limit their effectiveness, as discussed in further detail below, it does not immediately impact the lives of the government's constituency.

B. Cohesion

The NCGUB's perceived failure to achieve adequate representation of the contemporary pro-democracy movement exacerbates a second challenge faced by exiled governments: maintaining cohesion within the opposition movement. A cohesive pro-democracy movement speaking with a unified voice is more likely to secure and maintain the attention of the international community. Because lobbying and advocacy are the primary goals of the NCGUB and the MPU, a lack of cohesion, symptomatic of the inability to ensure accurate representation, may negatively impact the effectiveness of Burma's government in exile in achieving its goals.

Among the opposition movement, some exiled groups have recognized the need for cohesion. In 2009, Pado David Taw, the joint-secretary of the Ethnic Nationalities Council, a coalition of ethnic political organizations, said: "We badly need unity and consolidation at this juncture. We need to pave the way for setting up of a sole, unified and consolidated united front, which will be more effective."¹⁷

The lack of cohesion among the exiled community became public in January 2009, when the NCUB announced the formation of a new parallel government



in exile.¹⁸ The announcement followed a division between the two groups over the NCGUB's failure to support the NCUB's 2008 campaign to challenge the credentials of the Burmese junta in the UN General Assembly.¹⁹ The credential challenge, which aimed to unseat the junta's representatives to the UN and replace them with elected representatives of the Burmese people, was ultimately unsuccessful.²⁰

A lack of cohesion in an exiled community does not always result in impotence. Tibetans in exile, for example, are sharply divided over not only strategy, but over the ultimate goal of their movement.²¹ Some members of the movement call for nothing less than full independence from China. Others, like the Dalai Lama, advocate a "middle way" characterized by greater autonomy for the Tibetan people while preserving the essential interest of China in Tibet.²² This sharp division over the movement's end goal has not, however, paralyzed the Tibetan exiled community. This may be due in large part to the Dalai Lama himself, who has acted as a righteous, charismatic, and internationally respected spiritual and, until recently, political leader.

Unlike the CTA, the NCGUB lacks such dynamic leadership, further exacerbating the lack of cohesion among the opposition movement. The NCGUB, as elected representatives of the Burmese people, would seem the natural group to lead the movement from outside of Burma. The organization, however, has been criticized for failing to take an active leadership role in the pro-democracy movement.²³ This might, in part, be attributed to the shortcomings in the leadership abilities of Prime Minister Sein Win.²⁴ Although Daw Aung San Suu Kyi has a tremendous amount of respect in the international community and serves as an inspirational leader of the Burmese pro-democracy movement, her political activity has been consistently stifled by the regime. Additionally, though her decision to remain inside Burma allows her to act as a leading force for democratic change from within the country, and as inspiration for the exiled opposition movement, it prevents her from acting as the actual head of the NCGUB. The exiled government must overcome the challenge of both maintaining cohesion and leading the opposition without the movement's most well-known and well-respected leader at its helm.

Despite the drawbacks discussed above, fresh elections among the diaspora may improve the effectiveness of the exiled government. By allowing the MPs elected in 1990 to remain a part of the exiled government, while also opening it up to new members through a vote among the diaspora, the Burmese government in exile could enhance representation, giving the opposition movement greater control over the strategic decisions of the exiled government and thereby improving cohesion. Elections would also draw on fresh talent to find new leadership. These changes could improve the government's effectiveness on



the international stage and help it overcome a third challenge – perceived legitimacy.

C. Legitimacy

A third obstacle faced by exiled governments is the continuous struggle to achieve and maintain legitimacy, both within their constituencies and more broadly in the international community. A failure to acquire or maintain internal legitimacy can quickly render an exiled government impotent.

Legitimacy in the eyes of the international community is equally as important as internal legitimacy, and can be even more difficult to achieve. A primary goal of many exiled governments is recognition by the international community as the legitimate government of the state from which the organization is exiled. Outside of wartime, this form of recognition can be nearly impossible to achieve, and no states currently recognize the NCGUB as the legitimate government of Burma. Although international law allows for recognition of governments in exile, many states maintain a policy of recognizing only other states, not governments.²⁵ The United States is somewhat of an outlier among western democracies in that it has a more flexible policy that allows for the discretionary recognition of governments. In 1994, for example, Congress recognized the Tibetan government in exile as the true representatives of the Tibetan people, without recognizing Tibet as an independent state.²⁶ Despite the pressure the United States has put on the Burma to democratize, however, it has not recognized the Burmese exiled government as the representatives of the Burmese people.

Barring full-out recognition, exiled governments can seek international support in other ways. During his time as the leader of the TCA, for example, the Dalai Lama met with heads-of-state and policy-makers to advocate for Tibetan autonomy.²⁷ His meetings often drew international attention, galvanizing the Chinese government to warn of potential damage to diplomatic relations if the meetings moved forward.²⁸ China's reaction may reflect the perceived threat posed by CTA, and, in turn, the organization's effectiveness as an exiled government.²⁹ The Palestinian Liberation Organization (PLO) also successfully sought out alternative types of international support. In 1974, while it was essentially acting as an exiled government for the Palestinian people, the PLO was granted permanent observer status to the United Nations General Assembly,³⁰ ensuring a permanent voice for the Palestinian independence movement in an international forum.

International recognition of the legitimacy of the NCGUB has been less forthcoming, perhaps in part as a result of a lack of internal cohesion and the failure to ensure representation of the exiled community. Diplomatic challenges, such



as difficulty arranging meetings with foreign government officials, reflect the failure to obtain international legitimacy. Prime Minister Sein Win has experienced the drawbacks of a failure to attain international legitimacy. His attempts to meet with officials in India and China, and to move the NCGUB's headquarters from Maryland to India, for example, have been rebuked by both countries' governments.³¹ Improved representation and cohesion brought about by fresh elections might help counter the perceived lack of legitimacy, both within the opposition movement and, by extension, among the international community.

IV. Conclusion

In many cases, contemporary governments in exile are little more than lobby groups.³² Other opposition groups have called on the NCGUB to fill a greater role.³³ Considering the tremendous obstacles facing the NCGUB, their limited effectiveness should not come as a surprise. Although their influence is limited, their very existence serves as a constant reminder to the international community that the legitimacy of Burma's ruling party is disputed. As elected representatives, the NCGUB and MPU have a strong legal basis from which to build international support and lobby for democratic transition in Burma. To do so, however, they must first unify the opposition movement in its common goals, address the calls for enhanced representation by holding fresh elections, and re-establish themselves as the legitimate voice of the Burmese people.

(Endnotes)

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The USDP: An Unlawful Association

By Lane Weir

Introduction

For decades, Burma's ruling elites have committed atrocities against many segments of the Burmese population. Ethnic minorities have been violently suppressed, political dissidents have been imprisoned and small landowners have been subject to arbitrary land confiscations. Despite occasional power struggles within the military controlled government and periodic reshuffling of its leadership, these atrocities have continued unabated.

In 2008, a new state Constitution was adopted through a fraudulent referendum process. Article 445 of this 2008 Burmese Constitution states:

...all policy guidelines, laws, rules, regulations, notifications and declarations of the State Law and Order Restoration Council [SLORC] and State Peace and Development Council [SPDC]... shall devolve on the Republic of the Union of Myanmar. No proceeding shall be instituted against the said Councils or any member thereof or any member in the Government, in respect of any act done in the execution of their respective duties.¹

This provision grants impunity to Burma's ruling elite for actions taken in their capacity as SPDC and SLORC officials. The atrocities authorized or committed by these officials cannot be the subject of criminal prosecutions or civil lawsuits, frustrating these means of seeking justice.



However, other domestic laws may still provide a mechanism through which ruling figures in past and present Burmese governments could be held responsible for their acts. This paper examines how the governing Union Solidarity and Development Party (USDP) could be classified as an unlawful association under Burmese domestic law. It then employs the *Unlawful Associations Act* (UAA)², the *Political Parties Registration Law*³ and the 2008 Constitution to analyze the consequences of such an organization being declared “unlawful.” This analysis demonstrates one mechanism through which criminal sanctions could be brought against individuals responsible for the acts of aggression and intimidation perpetrated against the citizenry of Burma over the past two decades.

Background of the USDP

The predecessor to the USDP, the Union State and Development Association (USDA), was a mass organization formed in 1993 by the ruling State Law and Order Restoration Council (SLORC) in an effort to counterbalance the widespread public support for the opposition National League for Democracy (NLD). As a result of compulsory membership for many citizens, including students and government employees, the USDA’s membership grew quickly, exceeding 24 million people by 2007.⁴ Though the USDA was officially the “social welfare organization” of the SLORC and SPDC governments, it was more commonly viewed as being the violent and “thuggish civilian wing of the military junta.”⁵

The USDA was closely associated with the ruling generals of the SLORC and SPDC governments. In fact, General Than Shwe was the “leading patron” of the USDA’s governing Panel of Patrons.⁶ The other members of the Panel were also key figures in the SLORC/SPDC juntas. As a result of the extensive powers afforded to it by the military rulers, the USDA wielded significant and arbitrary powers over important social and economic matters for almost two decades.

Though the USDA was not officially a political organization, from as early as 2002 leading figures in the Burmese government indicated that it would eventually become a political party as part of the regime’s “Roadmap to Democracy.” In 2002, the Minister of Defence, General Maun Bo, suggested that “when the government has faced enormous economic crises in the country [it has been solved] with the strength of the USDA... Therefore [the USDA] must work hard against other groups in a political match.”⁷

In the run up to the 2010 elections, the Union Solidarity and Development Party was established. On 29 April 2010, Prime Minister Thein Sein (also a member of the USDA’s Panel of Patrons) applied to register the USDP as a political



party.⁸ Subsequently, all USDA assets, including offices, members and financial resources, were transferred to the USDP. Following this massive shift of resources, the USDA was dissolved.⁹ Most observers noted that the only differentiation between the two associations was a minor name change. Even the government, at that time, indicated that the “USDP is inherited from the national force of the state, the USDA.”¹⁰

Unsurprisingly, the USDP used the resources it acquired from the USDA, in combination with extraordinarily restrictive electoral laws and a corrupt electoral process, to win the 2010 election in a landslide. As a result, the USDP became Burma’s governing party.

The Unlawful Associations Act

Implemented by colonial authorities in 1908, the UAA has been used by military-controlled governments since 1962 to punish dissenting voices in Burmese society by arbitrarily and capriciously declaring organizations to be “unlawful.” The *Act* has not been used as a mechanism through which associations responsible for committing atrocities against civilians have been disbanded and punished. Instead, it has been used as a mechanism of oppression.

Article 15 2(b) of the *Act* states that an unlawful association is one that “has been declared to be unlawful by the President of the Union.” In using this provision to declare the Burma Lawyers’ Council (BLC) to be unlawful in 2009, Home Affairs Minister General Maung Oo said the BLC was “hurtful to the rule of law in the Union of Myanmar, stability of the state and community peace.” The *Act* was also employed to sentence the Burma VJ reporters to long prison terms for their association with the independent Burmese media organization Democratic Voice of Burma (DVB).¹¹

A related provision, Article 15 2(a), states that an association is also unlawful where it “encourages or aids persons to commit acts of violence or intimidation or of which the members habitually commit such acts.” It is this provision that could be used to make a clear case that the USDP is an unlawful organization under Burmese domestic law.

An Unlawful Association

The USDP is guilty of committing acts of violence and intimidation and is therefore an unlawful association. To prove this, one could look at any number of atrocities coordinated by the USDP or the USDA. For example, in 1996, the USDA attacked Daw Aung San Suu Kyi’s motorcade. Over the last two de-



acades, the USDA has used violence and intimidation in order to enlist membership in the USDA, garner “support” for the SPDC’s “roadmap to democracy” and create civilian militias and security forces that have been used to spy on, intimidate and oppress political dissidents.¹² Perhaps the most obvious example of a violent act orchestrated and executed by the USDA is the Depayin Massacre of 2003.

In 2003, Daw Aung San Suu Kyi and other NLD leaders conducted a tour through many different regions of Burma. On 3 May the town of Depayin was the site of a massacre of more than 70 NLD supporters.¹³ Thousands of individuals, including 5,000 USDA members, were recruited to launch attacks against NLD leaders and supporters. The USDA’s involvement in the attacks has been well documented. One man stated that he and his companions were offered daily wages, meals and liquor at the USDA office in exchange for their participation in the massacre.¹⁴ Another witness recalled that USDA leaders with megaphones and other USDA members, wearing USDA uniforms, were spotted gathering and organizing for the planned attack.¹⁵ Another witness testified that someone asked her “What has your Indian’s wife Aung San Suu Kyi done for you? We [presumably the “social welfare organization” USDA] have built bridges and roads on which you all can walk.” He then proceeded to violently assault her and her companions.¹⁶

USDP officials may contest that the accused party for the massacre, the USDA, is a different entity from the USDP and therefore it cannot be held accountable for its predecessor’s actions. However, Article 18 of the *Act* states that “an association shall not be deemed to have ceased to exist by reason only of any formal acts of dissolution or change of title, but shall be deemed to continue so long as any actual combination for the purposes of such association continues between any political members thereof.” By virtue of this provision, the aforementioned mass transfer of resources from the USDA to the USDP offers conclusive evidence that these organizations should be treated as one and the same under Burmese domestic law. As a result, both organizations would be equally liable for acts committed by either organization and, therefore, equally unlawful under domestic law. The USDA is the USDP and therefore the USDP can be held responsible for the “violent acts of intimidation” committed by the USDA in the past. Therefore, under the *Unlawful Associations Act*, Burma’s governing party is an unlawful organization.

Party Over

As an unlawful association, the USDP would be legally ineligible to register as a political party or contest elections, and its members could not serve in govern-



ment. Section 3(b) of the *Political Parties Registration Law* states that when the Union Election Commission:

...receives the application [of a proposed political party], it shall scrutinize the particulars mentioned in the application and shall give permission to establish as a political party if they are found in conformity with the provisions of Section 4 of this Law. Commission shall reject the application if they are found not in conformity with the provision of the law.

Sections 4 and 10 go on to state that a person who wishes to establish or join a political party shall not be a member “of an organization which is declared by the Union as... [an] unlawful association... or person who is not having contact with said member of unlawful association directly or indirectly, or abetting the said unlawful association.”

This argument, advocating that the USDP should not be recognized as a political party, also has a strong Constitutional basis. Under Article 407, entitled “the right of non-existence of political parties,” the Constitution states that a party shall not have the right to continued existence where it has “been declared an unlawful association under the existing law.” Where a political party is found to infringe a stipulation of Article 407, that party’s registration is to be revoked pursuant to Article 408.

As an unlawful association, Section 4 of the *Political Parties Registration Law* requires the USDP be stripped of its ability to register as a political party. As members of an “unlawful association,” USDP leader Thein Sein, along with other members of the USDP, would be ineligible for political office under the USDP banner. USDP members would no longer be members of the government and would therefore be ineligible for the constitutional protection from prosecution afforded members of the government.

Penal Consequences

The UAA also provides a mechanism for holding USDP members criminally responsible. It may be argued that Article 445 of the 2008 Constitution protects USDP members from prosecution for acts committed while they served in government, even after they are removed from office. However, article 445 does not grant immunity for membership in an unlawful association or for the actions of that organization. Put simply, the Constitution affords protection only for actions by the state government not for those of a “social welfare organization” or other association.



Article 17 of the UAA states that whoever is a member “of an unlawful association... shall be punished with imprisonment for a term which shall not be less than two years and more than three years” and whoever “manages or assists in the management of an unlawful association.... [s]hall be punished with imprisonment for a term which shall not be less than three years and more than five years.” This provision overcomes the impunity granted to SLORC and SPDC officials in the 2008 Constitution by targeting activities undertaken by the USDA. Burmese leaders such as Than Shwe and Thein Sein have been intimately involved in the activities of the USDA/USDP and may be considered managers of the organization. As a result, those involved with the USDP could be convicted for their membership in or management of an unlawful association and sentenced to as much as five years in prison.

Conclusion

In the presence of an independent judiciary, employing the *Unlawful Associations Act* to target the USDP would provide a strategy through which individuals responsible for Burma’s oppressive rule could be brought to justice. This *Act* has formerly been used only to oppress opposition by misconstruing peaceful organizations, such as the BLC and DVB, as being “hurtful” to the rule of law, stability of the state or community peace. However, it could alternately be used to circumvent Constitutional provisions providing impunity to appropriately punish those individuals responsible for atrocities such as the Depayin Massacre.

When genuine reform comes to Burma, neither a law as subject to misuse as neither the “Unlawful Associations Act” nor a constitutional provision granting impunity to past and present leaders should continue to exist. Until that day, however, this analysis demonstrates one way in which the existing Burmese legal framework could be used to prosecute those who have persecuted political opposition, ethnic minorities and Burma’s most vulnerable populations for decades.

The reality is that Burma’s legal system and judiciary is heavily biased in favor of current authorities and is plagued by corruption. It is therefore improbable that it could provide an independent venue for those connected to the government to be prosecuted under the aforementioned statutes. The perpetual political control enjoyed by members and cronies of the military and the USDP ensure that legitimate claims against well-connected individuals are not advanced.

Thus, absent an independent judiciary, the strategy discussed in this analysis could not be employed successfully. However, regardless of the practical difficulty created by a corrupt judiciary and military controlled government, the fact remains that the USDP is an unlawful association under the letter of Burmese



domestic law. Highlighting this fact, and the logical repercussions under Burmese law, exposes another facet of the hypocrisy of one of the most oppressive regimes in the world and underscores the need for real reform.

(Endnotes)

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⁹ Ibid. At Page 39 the authors state that “

although the USDP did not explicitly link the party with the USDA at the time of registration, over the following months, USDP statements, actions and members made it explicitly clear that the USDP was borne out of the mass organization. The USDP had inherited USDA's membership, policies, resources, and moreover, its formidable physical clout and threatening reputation as a violent wing of the SPDC.

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ACTION IN BURMA: THE INTERNATIONAL RULE OF POLITICS

*By Pia Dutton**

INTRODUCTION

This article considers whether international intervention by the United Nations in Burma can be justified according to principles of current international law (*jus ad bellum* as distinguished from the *jus in bello*). Those propositions which are put forward as principle but do not as yet form part of positive law are assessed and distinguished from current international norms. It is argued that in reaching impasse and political stagnation, the Security Council has undermined principles of legal certainty and consistency extant, and held sacrosanct, by the international community as well as within many domestic jurisdictions including Burma itself¹. The article considers that while Security Council Resolution 1973 (2011) may have shifted the language of intervention to “responsibility” nevertheless this remains a matter of semantics. Indeed, the international community only exercises *powers*, as opposed to *duties*, in respect of other individual states. However, certain reforms of the relationship between the organs of the United Nations are put forward which would help to better enforce the international rule of law, rather than perpetuating the international rule of politics and bowing to the political will of the Permanent Members. Moreover, whilst action with regards to Burma is crucial not only as a moral necessity, should such a reform be recognised, it would become a matter of legal necessity.



I. THREAT TO PEACE AND ITS EVOLUTION

The central justification for action in Burma would be the evolved 'Threat to Peace' doctrine. With the revolution of the concept of 'sovereignty'² has come the evolution of the doctrine of 'threat to international peace and security' under Chapter VII of the UN Charter. This section discusses the evolution of Article 39 determinations and Section III will illuminate the similarities between these cases and the situation in Burma.

Traditional Conceptions

Article 39 under Chapter VII of the UN Charter provides:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Article 41 and 42 to maintain or restore international peace and security.

Article 39 gives the Security Council the power to determine whether particular circumstances amount to 'threats to peace' and what action should be taken to combat those threats. Under Article 42 the Security Council is empowered to 'take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security' having determined that peaceful measures, under Article 41, would be inadequate. It is not clear that all peaceful measures as might be used under Article 41 are inadequate and that use of force would be necessary in Burma. However, whether any form of intervention at all, including an extreme case of the use of force, can be justified here will be considered here for the sake of completeness.

Prior to the 1990s the prohibition of the use of force, enshrined in Article 2(4) of the UN Charter³, remained sacrosanct⁴. State Sovereignty was perceived as absolute, breach of which permitted only *in extremis*. The concern for Lauterpachtian notions of 'no violence'⁵ manifested in two ways. Firstly, the international community were reluctant to determine the legal basis of intervention, post an Article 39 determination, as 'enforcement action' under Article 42. Between 1961 and 1964 the UN peacekeeping force in the Congo was authorized to use force to end the civil war.⁶ Despite providing for 'the use, of force, if necessary, in the last resort'⁷ the International Court of Justice, in the *Certain Expenses* case⁸, determined the intervention not to be 'enforcement action.'⁹ Such commitment to the principle of 'no violence' made identifying interventions under Article 42 difficult. Article 39 actions were instead labelled 'peace-



keeping' or 'self-defence', obfuscating the legal basis for the action. Secondly, there was an overemphasis of the 'international' element enshrined in Article 42 and in the 1948 debates on Palestine, the United Kingdom stated that any threat to peace must be a threat to 'international'¹⁰ peace. Similarly, Resolutions relating to the Congolese situation referred to the presence of Belgium troops as contributing factors to the 'threat to peace'.

The Evolving Concept of 'Threat to Peace'

Later practice of the Security Council expanded the use of enforcement action to meet threats to peace and eroded the 'international' element of those threats¹¹. Franck states:

The literal Charter text would appear to preclude any international action unless such "domestic" crises begin to threaten international peace. That threshold, however, has been *gradually lowered* in the practice of the United Nations' principal organs.¹²

Increased use of enforcement action may partly be due to the logical conundrum of an intervention for the 'massive flows of refugees'¹³ yet not for prevention of 'a governments' slaughter of its own ethnic or political minorities.'¹⁴ Further, the concept of 'sovereignty' was revolutionised and semi-humanised.¹⁵ Though the principle of humanity does not pre-empt the vital element of 'collectivity' there has, nevertheless, been a shift away from the notion of *absolute* sovereignty. Whilst Article 2(4) still has resonance, neither 'political independence' nor 'territorial integrity' shield states committing serious human rights violations against its citizens any longer.

The lowered threshold has led to Article 39 determinations in circumstances such as (i) internal armed conflict, (ii) humanitarian crises and, (iii) disruption to democracy.¹⁶ Each of these requisite components will be considered in relation to Burma in Section III. Cassese argues that the evolved threat to peace doctrine amounts to 'a *customary* rule [...] which is also operative within the UN legal system, in that it broadens the scope of Chapter VII'. It is this evolved doctrine which governs the international order for maintenance of international peace and security. Arguably, however, a further evolution is imminent into the language, if not the practice, of 'responsibility.'¹⁷



II. PROPOSITIONS AND RULES DISTINGUISHED

Some commentators have argued that not only has the notion of ‘a threat to peace’, as defined within the UN Charter scheme broadened, but that a right to intervene in circumstances where the Security Council has failed to act has grown up simultaneously as a matter of customary international law. Those commentators have argued that a right to unilateral humanitarian intervention should exist, and that if the right cannot be said to be a crystallised legal principle it ought to be.¹⁸ Others have recognised the normative force of the unilateral right but have held fast to positivist views, stating that whilst such interventions remain unlawful, they may nevertheless be morally ‘legitimate.’¹⁹ However, it is submitted that a right to unilateral humanitarian intervention neither exists under current international law nor is it normatively desirable.²⁰ Others have suggested that even if there cannot be said to a right to intervene unilaterally, there may nevertheless be a responsibility to do so when certain ‘just cause thresholds’ and ‘precautionary principles’ are satisfied.²¹ It is submitted that whilst proper recognition of a collective responsibility to protect victims from heinous crimes may be normatively desirable, any form of unilateral right which does away with “collective” element, surely cannot be said to be beneficial to the international legal order.

Blockmans states that ‘humanitarian intervention’, which encompasses unilateral right of intervention, can be defined as:

[T]he threat or use of force by a state, group of states or (an) international organization primarily for the purpose of protecting the nationals of the target state from widespread infringements of internationally recognized human rights, *without authorization by the target state or by the relevant UN organs.*²²

In March 1999, NATO began Operation Allied Force and launched missiles at Serbian targets in Pristina and Belgrade. Though the Security Council had released four Resolutions²³ condemning ‘the use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo, as well as acts of terrorism by the Kosovo Liberation Army’²⁴ it did not authorise enforcement action under Article 42 of the UN Charter²⁵. In Resolution 1199 the Security Council determined that ‘deterioration of the situation in Kosovo’ amounted to ‘a threat to peace and security in the region’²⁶ which gave ample justification for Security Council authorisation. However, the ‘lingering threat of veto’²⁷ prevented any formal authorisation of use of force. NATO intervened, without authorisation, relying upon an amalgamation of various dubious legal grounds. The United Kingdom sought to rely both upon the ‘customary international law



principle of humanitarian intervention'²⁸ and political rhetoric of 'battl[ing] for humanity'.

Before the International Court of Justice²⁹ the United States, tried to fit the invasions within the legal framework of the Charter by arguing that the Resolutions determining a threat to peace justified the use of force under Chapter VII. Similarly, Belgium argued that the action was 'compatible with Article 2(4) of the Charter, which covers only intervention against the territorial integrity or political independence of a state.'³⁰ However, Belgium argued that it needed to go beyond the Resolutions in order to 'develop the idea of humanitarian intervention.'³¹ Walzer³² and Cassese³³ rely on such statements to argue that the parameters are now set for an existing rule of customary international law permitting unilateral use of force, and that if such a rule cannot yet be said to exist it ought to.

A Customary Right to Unilateral Intervention

It is difficult to assert the existence of a right to unilateral humanitarian intervention for several reasons. First, Article 2(4) of the UN Charter lays down the general prohibition on the use of force and whilst it does provide for two exceptions, Articles 51 and 39 of the Charter, neither of these provisions do away with the 'collective' element enshrined in Article 2(7) of the UN Charter.³⁴ Second, though the ICJ left open the possibility of *development* of a practice of unilateral intervention,³⁵ both the *Nicaragua*³⁶ and *Corfu Channel* cases³⁷ were clear that no such right exists under *current* international law. Lastly, in order for such a right to exist under current customary international law the prerequisites of state practice and *opinio juris* should be satisfied.³⁸ In addition to Kosovo (1999), the invasions in Iraq (1991) and Liberia (1990) are cited to support the existence of necessary state practice. Security Council Resolution 688 (1991) did not explicitly authorise force in Iraq and both France and the United Kingdom issued statements asserting an existing right of unilateral intervention to prevent mass human rights violations.³⁹

However, whilst Resolution 688 (1991) may not have been explicit in its authorisation, it can certainly be read into the wording and into the general practice of the United Nations (of zealous intervention into Iraqi affairs in 1991).⁴⁰ Furthermore, a few instances of violation of international law ought not to amount to state practice such as to satisfy the prerequisite of customary international law. States' practice both before and after the Iraq invasion (1991) evince reluctance to intervene without Security Council authorisation, as demonstrated by the French invasion of Rwanda⁴¹ and the United States' intervention in Haiti⁴² (1994). France and the United States were keen to attain endorsement prior to intervention. Blockmans states that such reluctance demonstrates



lack of confidence in the ability of a state to proceed on its own initiative in conducting such intervention and a belief that the expectations of the global community in a post-cold war environment require approval by the Security Council.⁴³

The overlapping between state practice and *opinio juris* is evident here; state practice has traditionally been to wait for Security Council authorisation and that practice in itself evinces an *opinio juris* that to do otherwise would be contrary to international law. However, arguably the defeat of the draft Resolution put forward at the 3988th Meeting of the Security Council⁴⁴ stating that the ‘unilateral use of force constitutes a flagrant violation of the United Nations Charter’⁴⁵ evinces *opinio juris* in favour of a right to unilateral intervention. Whilst this does evince an opinion that the intervention in Kosovo may have been morally justified, this does not equate with an opinion that it was in conformity with principles of international law. Hilpold argues that states may realise the ‘*usus*’ or ‘necessity’ of a particular intervention but this does not amount to an endorsement of the legality of that intervention.⁴⁶ Whilst there may be some attempt to justify unilateral intervention by reference to an existing right under customary international law, a great number of states have doubted the legality of the Kosovo intervention.⁴⁷ It cannot, therefore, be said that the prerequisite of *opinio juris* is satisfied such as to confirm an existing right under customary international law.

Commentators have argued that from a teleological interpretation of the Charter and customary rules an existing right to unilateral intervention can be extrapolated.⁴⁸ Such Dworkinian interpretations, however, confuse what the law currently is with what it ought to be.⁴⁹ Advocates of this right argue it to be the principle providing the best moral justification for the institutional legal history.⁵⁰ Such arguments ignore the prerequisites for what the law actually is, and are better dealt with under a consideration of the normative value of a right to unilateral intervention.

On a positivist’s view of the law, the rules of recognition (*opinio juris* and state practice) are not satisfied such as to affirm an existing unilateral right. States are reluctant to intervene without Security Council authorisation, labelling previous acts of unilateral use of force merely ‘legitimate’, evincing *opinio juris* that such interventions are not ‘legal.’ Furthermore, even on a Dworkinian interpretation of current state practice and *opinio juris*, there must be an *existing* principle which can be used as a tool for moralistic interpretation; it is this solidified principle which is lacking. In addition to which, even a Dworkinian interpretation would not require the Charter to be read at antipodal odds to its purpose and intent (namely a *collective* security system to ensure the maintenance of international *peace*). Unlike the evolution of the threat to peace principle,



which has departed from the four corners of the Charter text, a right to unilateral intervention cannot be said to fall within the scheme or purpose of the Charter nor is it based on an obvious development in state practice.

With regards to whether such a right is normatively beneficial advocates have pointed to Security Council inaction in severe cases, such as Rwanda and Kosovo. Cassese affirms his moral abhorrence for 'sit[ting] idly by'⁵¹ and formulates a normative argument for legitimising a unilateral right to humanitarian intervention. Cassese argues that the combination of modern international trends and the circumstances surrounding the 1999 NATO intervention in Kosovo establish foundations for a unilateral right to humanitarian intervention which can be built upon with a number of strict limitations⁵². Thus, the international community would no longer stand idly by when human rights violations 'shock the conscience of all human beings.'⁵³

There are two problems with Cassese's analysis. The first is that it is not at all clear that the relevant circumstances surrounding the 1999 NATO intervention would arise in the same way again. The second, and arguably the most important difficulty, with the purported right to a customary unilateral right to intervention is that of abuse. Indeed, whilst Cassese does acknowledge the difficulties of potential abuse⁵⁴ and 'enormous risks of escalating violence'⁵⁵ he does not articulate the means for preventing those eventualities, save that the right should be used 'with great circumspection.' This begs the question as to *who* would be able to ensure such circumspection given that we are no longer speaking of a collective decision. Blockmans attempts to address the difficulty of potential abuse by a precise statement of the requisite circumstances to legitimate a unilateral use of force for humanitarian purposes. Similarly, Goodman postulates that a rule of unilateral humanitarian intervention would 'discourage wars with ulterior motives'.⁵⁶ He reaches this conclusion by reference to *'The politics of justification'*⁵⁷ which determines that the political rhetoric of 'humanitarian intervention', and the criteria pertaining thereto, would constrain later military action. Thus, the 'blowback effects' of a political statement that there exists a humanitarian crisis and that the prerequisites for legitimate intervention are justified, would have a restraining effect on any aggressive or self-interested action by the intervener state.

However, it is submitted that in fact neither Blockmans nor Goodman does away with the serious repercussion of abuse. Hilpold points to a similar list of legitimising criteria to that of Cassese and Blockmans and states that they are 'hurdles which can be taken even by a state acting *mala fide*.'⁵⁸ The mere existence of legitimising criteria does nothing to restrain the aggressor state without it later being held to account either for a misunderstanding, or bad faith statement, of their existence. Goodman would argue that the aggressor state would be held to



account by their electorate. This assumes that the electorate will necessarily become aware of the non-existence of one of the legitimising criteria and that the aggressor state will necessarily feel confined by electoral opinion. This simply cannot be the case, as evinced by the 2003 US invasion of Iraq. Moreover, such a restraint would require the aggressor state to be internally accountable when the breach is of international law and against an *external* territory. Thus, aside from the fact that a right to unilateral intervention entirely eradicates the Lauterpachtian ideal of non-intervention and the notions of *collective* security enshrined in Article 2(7) of the UN Charter, it lends itself to abuse by warmonger states. Thus, the right to unilateral humanitarian intervention does not form part of current international, nor should it do so.

The Responsibility to Protect (R2P)

The Responsibility to Protect doctrine (R2P) is borne out of the same concern to prevent ‘future Rwandas and Kosovos.’⁵⁹ R2P invokes the notion of ‘responsibilities’ and shuns the idea of ‘rights’, yet the doctrine as currently applied in practice does little more than a properly construed ‘threat to peace’ doctrine. Section IV suggests that there is normative force in reforming the relationship between the organs of the United Nations such as to enforce a check on Security Council determinations. However, the argument that such a check should exist by means of devolution of all power, to authorise use of force, to the Member States encounters the same difficulties as the right to unilateral humanitarian intervention.

The ICISS Report begins with the assertion that a state has a responsibility to protect its own citizens and where a state fails in that responsibility, whether through incapacity or unwillingness, a second responsibility to protect falls on the international community to act through the UN.⁶⁰ ICISS details a continuum of obligations⁶¹ from the ‘responsibility to prevent’⁶², through to the ‘responsibility to react’⁶³ and the ‘responsibility to rebuild.’⁶⁴ The Report states that legitimate use of force requires five components: ‘The Just Case Threshold’ and ‘Precautionary Principles’⁶⁵. First, there must be ‘just cause’ meaning that there is ‘serious or irreparable harm occurring to human beings, or imminently likely to occur.’ Such harm would involve either (i) large scale loss of life (with or without genocidal intent) as a result of state action or inaction or, (ii) large-scale ethnic cleansing whether by means of killing, forced expulsion, acts of terror or rape. Second, the intervention should be carried out with the ‘right intention’ such that the *primary* purpose, despite other purposes, must be to prevent human suffering. Third, military action must only be used as a ‘last resort’ such that there is a responsibility to explore possible peaceful resolutions and there must be reasonable grounds for believing that measures less of use of force would not succeed. Fourth, the means used for intervention must be



'proportionate' and the scale, duration and intensity of the action must be the minimum necessary to secure the objective of the intervention. Last, there must be a 'reasonable chance' of military action being successful in meeting the relevant threat. The ICISS Report further determined that where the five prerequisites have been satisfied but there has been a failure by the Security Council to authorize action either the General Assembly should consider itself seized of the matter, or an individual state or regional organization might legitimately intervene.⁶⁶

Three responsibilities can be drawn from the ICISS Report: (i) the responsibility of the sovereign to its own territorial state (Sovereign Responsibility), (ii) the responsibility of the international community to react through the Security Council (Collective Responsibility) and (iii) the responsibility of regional organizations or other individual states towards those subject to international crimes in other states (Individual Responsibility).

(i) Sovereign Responsibility

This responsibility posits that 'sovereignty' is no longer a linguistic shield against 'the historical flood of imperial interventions by the more powerful states'⁶⁷ but entails a duty akin to Rousseau's social contract. The ICISS Report endorses the shift away from Westphalian notions of non-intervention to a 'humanized sovereignty' which requires that when a state manifestly fails to discharge its obligations to protect the fundamental rights of its citizens it becomes accountable.⁶⁸ This shift already forms part of international law under the evolved threat to peace doctrine.

(ii) The Collective Responsibility

It is in respect of the second responsibility (of the Security Council to react to atrocities occurring in other states) that a difference between the normative argument of the ICISS Report and the practice of the Security Council is discernable. The second responsibility, articulated in ICISS, will be here termed the 'Collective Responsibility.' How far this 'responsibility' has force of law depends upon whether the original articulation is perceived as a legal *duty* or merely a legal *power* to state that there exists a moral responsibility to intervene. If the ICISS Report is interpreted as an argument in favour of the latter there are many examples of R2P in current international law, not least Security Council Resolution 1973 (2011)⁶⁹ enforcing no-fly zones in Libya. However, if ICISS is seen as an endorsement of a legal duty it is difficult to say that there is such an obligation in practice.⁷⁰

Arguably, the endorsement of R2P in international fora means there is an exist-



ing legal duty to protect those subject to mass atrocities in other states. The World Summit Outcome Document of 2005 acknowledged that '[t]he international community through the United Nations, also *has the responsibility* to use appropriate diplomatic, humanitarian and other peaceful means...to help protect populations'⁷¹ and Security Council Resolutions 1265 (1999), 1296 (2000), 1674 (2006) and 1706 (2006) are frequently cited as evidence of an existing responsibility under international law.⁷² Indeed, Resolution 1674 (2006) endorsed the approach of the 2005 World Summit Outcome Document whilst Resolution 1706 (2006) stated that it was 'the responsibility of the Government of Sudan to protect civilians under threat of physical violence.'⁷³

Evans argues that 'the whole point of embracing 'the responsibility to protect' is that it is capable of generating an effective, consensual response in extreme cases, in a way that 'right to intervene' language simply is not.'⁷⁴ However, whilst it may be that the language of 'responsibility' has an effect on political will it does little to alter the current legal obligations under the UN Charter. The only way in which R2P might alter substantive legal principle would be if there were effective mechanisms for enforcing that responsibility. To the extent that the R2P doctrine has been incorporated into existing international law, it only imposes an obligation when the Member States agree that it does so. Thus, the so-called 'responsibility' arises only as and when those subject to it deem it to exist. For example, it is interesting that there was a so-called 'responsibility to protect' civilians in Libya, yet in almost identical circumstances in Syria, no such duty arose. Surely a responsibility which arises only when Member States agree as much, resembles *a power* to react to morally reprehensible circumstances more than an enforceable legal duty. Further, it can be argued that R2P is not an enforceable duty under current international law because of the indeterminacy as to what it requires.⁷⁵ Bellamy states that there are benefits in 'preserving flexibility for the future'⁷⁶ but that the lack of specificity undermines R2P's status as an existing legal norm. Disagreement as to what specific action is required or the cause, existence and scale of events taking place all cause hesitation and a weakening of the 'compliance-pull.' Therefore, until there is a means for enforcing this 'responsibility' to protect victims of international crimes, the responsibility cannot be said to have force of law. All that exists in practice is a power to act in circumstances which the Security Council judge fit and when they deem themselves morally obligated; in the same way as the evolved 'threat to peace doctrine' operates.

(iii) Individual Responsibility

A legal duty on individual states or regional organisations⁷⁷ to use force independently of authorisation by the Security Council lacks normative force as it may lead to wayward imperialism⁷⁸ without an independent check on whether the



just cause threshold or precautionary principles are satisfied.⁷⁹ Though it could be argued that the language of ‘responsibility’ has a firmer constraining ‘blowback effect’⁸⁰ than the language of rights, the legitimising criteria may still be fulfilled by a State acting *mala fide* in the absence of assessment of the veracity of those political statements by the international community⁸¹. Moreover, it would place larger states under a sharper responsibility than smaller states. That responsibility would both place intervener states under additional burdens and allow them to wield greater power. Thus, for the same dangers of abuse, noted above, this would not be a beneficial development.⁸²

III. BURMA

A statement of the relevant principles of international law is as follows: there is a power to intervene in order to protect those subject to gross human rights violations under Article 39 of the UN Charter. Further, those violations must satisfy the practical requisites of the evolved threat to peace doctrine.

Chesterman determines that there are three evolved prerequisites for Security Council action under Chapter VII: (i) internal armed conflict, (ii) humanitarian crises, and (iii) disruption to democracy. However, at the Dumbarton Oaks Conference, the permanent members deliberately left the definition of ‘threat to international peace and security’⁸³ open for a case-by-case analysis. Thus, it is difficult to discern certain criteria for an Article 39 determination. However, a Report commissioned by Vaclav Havel and Archbishop Desmond Tutu entitled “Threat to Peace Report: A Call for the UN Security Council to Act in Burma”⁸⁴ (2005) identified six crises in Burma and ample factual justification for a threat to peace determination under Article 39. It examines prior practice of the Security Council and clarifies the requisite elements for such a threat to exist. These elements include: (i) overthrow of democracy; (ii) conflict among factions; (iii) human rights violations; (iv) refugee outflows; (v) drug trafficking and (vi) HIV/AIDS.

(i) Overthrow/Disruption of Democracy

In 1960, U Nu became the first democratically elected prime minister and won a landslide victory in the elections. In March 1962, General Ne Win staged a military *coup d'état*, putting the elected cabinet into ‘protective custody’ for several years. U Nu was not released until 1966 by which time Ne Win’s Lanzin Party had established itself as a tyrannical regime of just thirty three men who promoted the ‘Burmese Way to Socialism’⁸⁵ and became the Burmese Socialist Programme Party. Ne Win imposed censorship and nationalisation of



the press, required membership of the Party's youth organization and brought about economic ruin through outlawing all private economic activity.⁸⁶ These conditions led to the 1988 student uprisings and the birth of Aung San Suu Kyi's Party, 'National League for Democracy' (NLD). The uprisings gave the military a unique opportunity to stage a coup to 'save Burma.' Thus, the State Law and Order Restoration Council (SLORC) took power through force claiming to restore peace. In reality, SLORC represented only a cosmetic change from Ne Win's government and martial law was once again instigated.⁸⁷ Inexplicably, SLORC permitted elections in 1990 where the NLD won 392 out of 485 constituencies. The junta ignored the result and the State Peace and Development Council (SPDC), formerly SLORC, continued to rule Burma through oppressive martial law with General Than Shwe at its head.

Thus, there are at least two instances where democracy has been *disrupted* (1990 and 1962), and one instance of a clear *overthrow* of democracy (1962). The differences between the Burmese disruption to democracy and that in Haiti (1991) are threefold⁸⁸. First, Jean-Bertrand Aristide's escape and exile meant that he could instantly call upon the international community to take 'prompt and decisive action'⁸⁹. U Nu could not do so until his incarceration ended in 1966, four years after the coup and installation of SLORC. Second, whilst demands on the international community have been made by Aung San Suu Kyi to 'put pressure on the present regime'⁹⁰ she was not 'overthrown' as democratic leader, as the 1990 elections occurred during SLORC's established rule. The third difference relates to the political interest both of the United States and Organization of American States (OAS) in Haiti. The first two differences between the Haitian and Burmese cases are immaterial. The language of Security Council Resolution 940 (1994) authorized the international community 'to use all necessary means to facilitate the departure from Haiti of the military leadership' and 'the prompt return of the legitimately elected President.'⁹¹ Therefore, what is important is not the linguistic distinction between an 'overthrow' and a 'disruption', nor whether a demand by the elected Prime Minister is made in a timely manner. The required factors are merely that there be an elected government which is ousted from its rightful place and that that government support the intervention of outside forces. Finally, whilst proponents of *Realpolitik* will make much of the American support for the Haitian intervention this not a legal requisite for an Article 39 determination. Therefore, whilst a lack of national interest may be relevant with regards to practical impetus it does not *prevent* a threat to peace determination under Article 39.

(ii) Internal Armed Conflict

Security Council Resolutions 864 (1993) and 1973 (2011), exemplify instances where mere internal armed conflicts have amounted to threats to peace. After



disregarding the Angolan election result in 1992, the National Union for the Total Independence of Angola (UNITA) perpetrated continued attacks on civilians.⁹² After a series of Resolutions condemning the humanitarian crisis in Angola, the Security Council ultimately adopted Resolution 864 (1993) which states that ‘*as a result of UNITA’s military actions*, the situation in Angola constitutes a threat to international peace and security.’⁹³ Therefore the text of the Resolution is clear that it is the use of force by a regime against members of its own population which serves as a practical determinate of a threat to peace.

The ethnic diversity in Burma has led to the forming of rebellious minority groups, including: the Karen National Union (KNU), Karenni National Progressive Party (KNPP), the Chin National Front and Shan State National Army. The 2005 Report⁹⁴ identifies a number of occasions on which there has been warring between these factions and the Burmese National Army; the Report notes the destruction of over 2,500 villages and displacement of 600,000 citizens.⁹⁵ The Burmese National Army has violated a number of ceasefire agreements and continued persecuting the Karenni people⁹⁶ with ‘3,077 separate incidents of destruction, relocation, or abandonment of villages in eastern Burma between 1996 and 2006.’⁹⁷ Such stark evidence of internal armed conflict provides factual basis for an Article 39 determination in Burma.

(iii) Human Rights Violations

The evolution of the Threat to Peace principle is demonstrative of the growing concern of the international community for grave human rights violations perpetrated by regimes against their citizens. The humanitarian crisis which led to Security Council Resolution 794 (1992) encompassed a number of separate elements including the arrival of 140,000 Somali refugees in Kenya, the ‘heavy loss of human life’⁹⁸, widespread starvation, food shortages, disease and warring between ethnic factions. In 1992, the Secretary-General enumerated the urgent humanitarian conditions stating that 4.5 million people were threatened by starvation and disease (with 1.5 million at immediate risk) and that there had been over 300,000 deaths.⁹⁹

Several different categories of rights violations can be identified in order to demonstrate an equivalent crisis in Burma: (a) forced labour, (b) child soldiers, (c) sexual violence, (d) mass killings and torture, (e) forced displacement, (f) arbitrary detention, and (g) disease.

Both the International Labour Organisation Commission of Inquiry on Forced Labour in Myanmar Report 1998 and 2005 UN Commission Resolution detail conditions where workers are forced to build roads, bridges and army camps in Burma, usually under threat of imprisonment or torture.¹⁰⁰ Workers are unpaid



and required to work 14 hour days. Sarkin states that recruitment of workers is carried out by 'arbitrary arrest'¹⁰¹ and under threat of being 'beaten and even killed.' Other studies have put the numbers of labourers and 'human mine-sweepers' at over 800,000.¹⁰² In 1955 the Burmese junta ratified the Forced Labour Convention and later the ILO issued Resolutions¹⁰³ deploring Burmese working conditions. Nevertheless, forced labour persists as 'a saga of untold misery and suffering in Burma.'¹⁰⁴

In 2002 Human Rights Watch determined that of the 350,000 soldiers in the Burmese Army 70,000 are child soldiers.¹⁰⁵ Despite being a signatory to the Convention on the Rights of the Child and Security Council Resolutions 1460 (2003) and 1612 (2005), both expressing concern at the recruitment of children into the armed forces, children as young as seven are still recruited in Burma. Human Rights Watch reported that children are kidnapped and taken to Su Suan Yay training camps where they frequently die from beatings and illness. Those who survive are required to carry out gross human rights violations against ethnic minorities in the Shan, Kachin and Karen states.¹⁰⁶

The Special Rapporteur on the situation of human rights in Myanmar (Myanmar Rapporteur) expressed concern about sexual violence sweeping the country.¹⁰⁷ Between 1991 and 2001, he received reports of 625 rapes of women and children in the Shan State alone and a further 188 cases between 2002 and 2006.¹⁰⁸

Since 1992, the Myanmar Rapporteur and Commission on Human Rights have noted an increase in documented extrajudicial killings and torture.¹⁰⁹ The victims are usually internally displaced persons from the ethnic minorities, accused of belonging to armed ethnic nationality groups.¹¹⁰ However, in 2003 these killings extended to civilians and the Execution Rapporteur intervened in a number of summary executions of women and children accused of supporting Shan soldiers.¹¹¹ In 2006, the Myanmar Rapporteur stated that '[v]iolence against unarmed civilians by the Myanmar military is a very serious concern.'¹¹²

As regards forced internal displacement, in 2006 the Myanmar Rapporteur noted that the 'total number of internally displaced persons (IDPs) who were forced to return and reintegrate into society is estimated to be at least 500,000.'¹¹³ In that same year reports emerged that the military would operate a 'shoot-on-sight' policy for those who tried to return home without prior permission.¹¹⁴

Rampant disease and countless cases of arbitrary detention also evince the humanitarian crisis in Burma. Sarkin argues that the HIV/AIDS epidemic present in Burma could in itself constitute a threat to peace and security. He points to the 440,000 cases¹¹⁵ of AIDS in 1997 as support for UN intervention.¹¹⁶ The black market trade in heroin perpetuates the problem as 'addicts routinely share



needles.¹¹⁷ According to the UN Drug Control Programme ‘there might be as many as 500,000 heroin addicts in Burma.’¹¹⁸ The power-play between the drug war lords and junta exacerbates the crisis in Burma as military officials collude in the profitable narcotics black market.¹¹⁹ Further, the military have arbitrarily detained countless citizens who participated in opposition groups or peaceful protests. The UN Working Group on Arbitrary Detention has issued judgments declaring ‘illegal’ the detention of those incarcerated without charge and due process.¹²⁰ In 2005, the Working Group held the detention of U Tin Oo (Vice-President of the NLD) to be ‘arbitrary’ and in contravention to the Universal Declaration of Human Rights.¹²¹ The Working Group described how U Tin Oo was captured by ‘government-affiliated thugs’ whilst ‘[s]cores were killed and hundreds were wounded during the attack.’¹²² Despite over a dozen Opinions from UNWGOAD, holding such detentions arbitrary and illegal, the regime has released no political prisoners.

(iv) Refugee Outflows

Though the significance of the ‘international’ stipulation in Article 42 of the UN Charter has reduced over time Chesterman nevertheless observes that ‘it appears that [an Article 39] determination is more likely when the internal armed conflict has transborder consequences.’¹²³ In Resolution 794 (1992), the Security Council considered the movement of 700 refugees a day, and resulting 140,000 in Kenya, a threat to peace. Between 1991 and 1992, 250,000 Muslim Rohingya fled from the Arakan state to Bangladesh and over 1 million migrant workers were working in Thailand.¹²⁴ The number of Burmese refugees currently seeking asylum in Thailand, Bangladesh and India are unknown simply because the numbers are so large as to be indeterminate but Sarkin states that ‘[a]t least 250,000 Burmese refugees are found in these countries today, suffering limited health, food and sanitation services, as well as ill-treatment by local camp officials.’¹²⁵

Consistency for Burma

The 2005 Threat to Peace Report formed the basis for a proposed Article 39 determination in Burma but no Resolution was passed owing to vetoes from Russia and China. Though there is legal *justification* for use of force in Burma, it is not legally *required*. However, if the maxims of legal consistency and certainty are to be upheld in international law the Security Council ought to intervene in Burma, though not legally obligated to do so. The above discussion demonstrates the vast lacuna between what the law is and what it should be. Burma is therefore presented as the case in support of the reform in the relationship between the organs of the United Nations to better uphold the International Rule of Law, as opposed to the International Rule of Politics.



IV. SREFORM OF THE COLLECTIVE SECURITY SYSTEM

This Section argues that reform of the relationship between the organs of the United Nations is necessary by recognition of the holistic ‘collective responsibility’ (the second responsibility set out in the 2001 ICISS Report). Reform ought not to involve an overreaction by devolution of power to the individual Member States¹²⁶ but should encourage collective decisions with numerous contributors, as envisaged by the original Charter scheme. However, as matters currently stand, the number of contributors is limited to fifteen particular parties to the Charter, only five of whom have any vital say.

There are two possible reforms of the collective security system which would allow for discharge of the ‘collective responsibility’. Each of these propositions is not without its own difficulties, resolution of which is beyond the scope of this discussion, but they serve as better alternatives to the unfettered rule of politics currently in place.

Collective Responsibility: Primary and Secondary Duties

Before suggesting reforms there are three questions posed by critics of R2P which must be addressed in order to assess its normative value as an enforceable collective obligation.

(i) What are the Correlative Rights?

Welsh states that it is questionable whether R2P intended to impose a real ‘duty’ as it is not clear who would enjoy the correlative ‘right’ or what exactly that right would entail. Would the protected ‘right’ be to liberty, to security, or to protection of a group of certain fundamental rights?¹²⁷ It is imperative to be clear about the exact *responsibility* which must be at the centre of this discussion. The notion of ‘collective responsibility’ can be bifurcated into a primary responsibility to protect those subject to international crimes and a secondary responsibility to answer for breach of the primary responsibility.

R2P, as originally articulated in ICISS, advocated a primary responsibility to those in states subject to international crimes, including genocide, torture and rape as a weapon of war. Security Council Resolution 1973 (2011) appeared to take the correlative rights much further by asserting not only a negative right to be free from serious persecution but a positive right to ‘restoration of peace’.¹²⁸ However, it is only with the luxury of a *power* to abide by a moral responsibility, rather than an enforceable legal duty, that such a broad mandate could be given. Though ‘restoration of peace’ might better correlate with the original ideology



of the Charter, than a narrow conception of only protecting against international crimes,¹²⁹ such a broad correlative right would give way to arguments that the right cannot be clearly identified and runs the risk of jeopardising more fundamental rights.¹³⁰ As Evans argues, '[i]f too much is bundled under the R2P banner, we run the risk of diluting its capacity to mobilize in cases where it is really needed.'¹³¹ It is clear from the ICJ's case law¹³² and World Summit Outcome Document that there was intended to be a narrowing of the correlative rights involved. Where those advocating a right to unilateral intervention could not be clearer than terms such as 'fundamental rights', R2P narrows focus onto international crimes, a focus not even deployed by current practice under the evolved threat to peace doctrine which allows for a broad consideration of mere 'human rights violations'.¹³³ Implicit within the text of the ICISS Report is the idea that legitimate intervention only occurs when there has been violation of the 1948 Genocide Convention amounting to 'large-scale killing'¹³⁴ or 'ethnic cleansing'.¹³⁵ Thus, the 'evasive' correlative rights can in fact be simply articulated as a right to be free from serious international crimes.¹³⁶

The identification of the correlative rights of people in vulnerable nations means very little without the secondary responsibility which the Security Council owes, on breach of their primary responsibility, to the rest of the international community. The notion of a secondary responsibility deriving from breach of primary responsibility is neither a novel nor revolutionary concept.¹³⁷ In *Chorzów Factory* the Permanent Court of International Justice states: 'It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.'¹³⁸ Only on imposition of this secondary responsibility would any real reform of current international law occur. The primary responsibility advocated in the ICISS Report differs very little from the current practice of Article 39 determinations. That is to say that the power to abide by the moral responsibility only differs by way of semantics to a primary responsibility to protect those subject to international crimes. Indeed, it is difficult to imagine that the 'just cause thresholds' of large-scale killing or ethnic cleansing do not always amount to threats to international peace (particularly under the evolved doctrine). The determination of a threat to peace in these circumstances must be because the Security Council recognises that in a 'humanitarian crisis', which will inevitably involve the sorts of international crimes envisaged by the R2P doctrine, people's rights are being violated. Thus, whilst commentators have latched onto a critique of the R2P doctrine which states that R2P cannot be specific as to what correlative rights are involved, this misunderstands where the real reformation in responsibility comes. There would be no change in the current primary responsibility (except as a matter of semantics), the correlative rights would remain those of the people in the troubled nation subject to serious international crimes. The change would be in the recognition of a secondary responsibility, which the Security Council would owe, for breach



of its primary responsibility to protect the people in turbulent nations from international crimes. This crucial change in the recognition of the secondary responsibility would reform current international law.

(ii) On Whom Does the Collective Responsibility Fall?

Bellamy states that ‘R2P is universal and enduring – it applies to all states, all the time.’¹³⁹ Such statements conflate the first ‘sovereign responsibility’, with the second ‘collective responsibility’ of the international community which arises *only* in circumstances where sovereign responsibility has been breached. Academic consensus suggests that the collective responsibility falls on the entire international community. Through ratification of the UN Charter, the international community have appointed the Security Council as bearer of the primary responsibility.¹⁴⁰ However, in fulfilment of the collective responsibility, the international community ought to provide a forum for the Security Council to discharge its secondary responsibility.

Some commentators argue that collective responsibility is borne by each individual state and that those proximate to the atrocities bear an additional burden in the same way as the Security Council. Support is cited in *Bosnia and Herzegovina v Serbia and Montenegro*¹⁴¹ in which Serbia was held to have borne the responsibility to react to genocide due to proximity and possession of information. However, Arbour states that ‘while proximity may matter most in terms of promptness and effectiveness of responses, it should not be used as a pretext for non-neighbours to avoid responsibility.’¹⁴² Under Article 24(1) of the UN Charter, the international community conferred on the Security Council ‘the primary responsibility for maintenance of international peace and security’. If a normative secondary responsibility were recognised this too should remain within the collective body of the international community. To assert that those proximate to international crimes bear an additional responsibility removes this necessary element of ‘collectivity’. Once there has been a determination by the Security Council that international crimes are occurring, there will be practical considerations as to the provision of logistical support which may involve larger powers or regional organizations providing more forces¹⁴³. However, this is a pragmatic point, the legal duty remains borne by the entire international community.

(iii) Can the Precautionary Principles be Determinate?

The difficulty of indeterminacy, articulated by Bellamy,¹⁴⁴ is simply dealt with by the propagation of documents providing further definition and clarification of the criteria which should be used for legitimising use of force under R2P¹⁴⁵. The difficulties seen in the legitimising criteria of the ‘right to unilateral intervention’



dissipate here as the level of clarity required is significantly lower owing to the insurance provided by the ability of the international community *to review* the existence of those criteria.

The Report of the High-level Panel¹⁴⁶ echoed the criteria enshrined in ICISS: seriousness of the threat; proper purpose of the intervening force; last resort; proportional means and a reasonable prospect of success such that there is a reasonable chance that intervention will not result in greater loss of life and breach of rights. Moreover, arguments which assert that flexibility will be unnecessarily curtailed are misplaced and circular; surely the rigidity of no intervention at all is more undesirable than clarifying the prerequisites for that intervention. As yet the criteria cannot be said to have force of law. The World Summit Outcome Document provided merely that the international community is ‘prepared to take collective action [...] *on a case by case basis*’.¹⁴⁷ Moreover, the Outcome Document does not endorse the notion of a ‘collective international responsibility to protect’ in the same way that the Report of the High-level Panel suggests (dealing with it under the rubric of human rights rather than with regards to the duty that the international community owes).¹⁴⁸ However, it cannot be denied that reform is necessary. ‘Future Rwandas and Kosovos’ are not only a possibility but a reality, as evinced by the brutal violations occurring in Burma. Therefore, adopting the clarifying criteria under R2P is normatively desirable as they would provide a means for identifying when legitimate action should occur.

Reforms

(i) Uniting for Peace

The first reform would be to adopt the suggestions embodied in General Assembly Resolution 377 (V),¹⁴⁹ ‘Uniting for Peace’. The resolution resolves that when the Security Council reaches an impasse and thereby ‘fails to exercise its primary responsibility [...] the General Assembly shall consider the matter immediately with a view to making recommendations to Members for collective measures.’ Unlike, a right to unilateral intervention, such reform has both constitutional and practical foundations. Under Article 11(2) of the UN Charter the Assembly may make recommendations on ‘questions relating to the maintenance of international peace and security’ and Article 14 gives the Assembly ‘authority and responsibility for matters affecting international peace.’¹⁵⁰ In practice, ‘Uniting for Peace’ has been invoked on a number of occasions, including in 1960 to assist the Congolese government in restoration of peace in Katanga province.¹⁵¹ However, Article 12 of the UN Charter appears to preclude the General Assembly from making recommendations in areas in with the



Security Council is 'still exercising in respect of any dispute or situation the functions assigned to it in the present Charter.'¹⁵² However, in circumstances where the Security Council has not given proper consideration to the legitimising criteria of (i) the seriousness of the threat, (ii) the proper purpose of the military action, (iii) the requirement of a last resort, (iv) proportionate means and (v) the reasonable prospect of success, the Security Council should no longer be said to be properly exercising its functions on the matter¹⁵³.

(ii) International Court of Justice

Another reform would entail review of Security Council decisions by the International Court of Justice.¹⁵⁴ It has been argued that the *Kadi*¹⁵⁵ case would prevent such a review.¹⁵⁶ Here, however, reluctance to review Security Council Resolutions was expressed by the European Court of Justice which, unlike the ICJ, it is not an organ of the United Nations and review of these decisions does not fall within ECJ competence. Where the ICJ could form a legitimate judicial check upon the decisions of the Security Council, a Court divorced from the Member States of the United Nations obviously could not. In *Certain Expenses*¹⁵⁷, the ICJ noted the implicit secondary responsibility, arising from breach of the Security Council's 'primary responsibility', under Article 24(1) which the Assembly could exercise when the Security Council was paralysed. Implicit within the reasoning is the suggestion that a 'primary responsibility' is not an 'exclusive responsibility.' Similarly, in its Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*¹⁵⁸ the ICJ stated that the prohibition on simultaneous action had been superseded by later practice. Thus, the ICJ could act as a forum for discharge of the international community's secondary responsibility and could make suggestions either of reconsideration by the Security Council, devolution to the General Assembly or of a 'Responsibility not to Veto'¹⁵⁹.

This reform would better enforce the International Rule of Law as opposed to the International Rule of Politics. Peters argues

Under the rule of law there is an obligation to state the reasons on which legal acts are based [...] because it forces the decision- or law-maker to rely on arguments which are admissible in that very legal order, thereby enabling other political actors and those subject to the act to criticize it and eventually to attack it if those reasons are legally and politically unpersuasive¹⁶⁰

Thus, the legitimising criteria of the R2P principle need not be feared for potential abuse or indeterminacy. Those very elements would be questioned by the organs of the United Nations which would put an investigative check on the reasoning of the Security Council.¹⁶¹ In *Tadic*¹⁶² the ICTY stated that the Se-



curity Council does operate under the rule of law. Thus, as Peters argues, requiring the Security Council to provide reasons to the rest of the international community would not require any form of departure from the current legal order as ‘the obligation to state the reasons for the veto already exists as a matter of (unwritten) legal principle.’¹⁶³

V. CONCLUSION

It has been argued that use of force in Burma is justified but not legally required under the evolved threat to peace doctrine (Article 39 of the UN Charter). The humanitarian crisis in Burma differs very little from other instances in which there have been Article 39 determinations (Haiti, Somalia and Angola). The Security Council has thus failed to uphold principles of legal certainty and consistency by vetoing action in Burma. Burma is thus presented as the case for reform of the relationship between the organs of the United Nations in order to better ensure the International Rule of Law and eliminate the dominance of political will.

The UN Charter has now been interpreted to include ‘humanitarian’ and ‘sovereign’ concerns. These notions elide with the original scheme of the Charter to provide a cohesive system for ensuring peace and security. Incorporating ‘collective responsibility,’ with its bifurcated limbs of primary and secondary responsibilities, compliments and maximises that intent. Security Council Resolution 1973 (2011) marks the beginning of the shift into the recognition of a primary responsibility to protect those subject to international crimes. Whilst at present this is merely the language of ‘responsibility’, rather than discharge of a legal duty, Resolution 1973 (2011) may indicate the beginning of the recognition of the responsibility borne by the international community, as a collective body, to protect victims of international crimes.

Law is a living instrument which mutates with changing circumstances. This paper has dealt with positive changes already extant. However, to truly enforce ‘sovereign responsibility’, to insist upon accountability for international crimes, and to genuinely uphold the original UN Charter scheme, a further change is not only desirable but necessary. Burma is surely the case indicative of that necessity for reform. Each day millions suffer at the hands of the military regime, the time has come for action for Burma by way practical implementation of those principles said to be revered by the international community. It is not enough to give rhetorical lip service to those notions of “rule of law” or “accountability”. Practical recognition of the International Rule of law is a matter of moral necessity in order to protect those subject to mass murder, rape and torture. Therefore, this paper advocates the utter abolition of the international rule of politics



and suggests a practical means for the practical recognition of the International Rule of Law.

(Endnotes)

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¹ Constitution of the Republic of the Union of Myanmar (2008), Art 198

² Peters, "Humanity as the Alpha and Omega of Sovereignty", 2009 EJIL 513

³ Article 2(4) of the UN Charter provides: 'All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.'

⁴ Brierly, *The Law of Nations* (Waldock ed, 6th edn, Clarendon Press 1963) 414

⁵ Lauterpacht, *The Function of Law in the International Community* (Clarendon Press 1933) 64

⁶ Security Council Resolution 161A (1961)

⁷ *ibid*

⁸ [1962] ICJ Rep 151, 177

⁹ Chesterman, *Just War or Just Peace? Humanitarian Intervention and International Law* (OUP 2001) 117

¹⁰ 3 UN SCOR (296th meeting) no 69, 2 (UK)

¹¹ Franck, *Recourse to Force, State Action Against Threats and Armed Attacks* (CUP 2002) 40 (emphasis added)

¹² *ibid* 41

¹³ Security Council Resolution 940 (1994)

¹⁴ Franck (n 11) 44

¹⁵ Peters (n 2)

¹⁶ Chesterman, (n 9); Cassese, *International Law* (OUP 2005), 347-351

¹⁷ Security Council Resolution 1973 (2011)

¹⁸ Walzer, "The Argument about Humanitarian Intervention" in Miller (ed) *Thinking Politically*, (YUP 2007); Blockmans, "Moving Into UNChartered Water: An Emerging Right of Unilateral Humanitarian Intervention?", (1999) 12 *Leiden JIL*, 759

¹⁹ Simma, "NATO, the UN and the Use of Force: Legal Aspects," (1999) 10 *EJIL* at 1; see also Cassese in "Ex iniuria ius oritur: Are we Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?" (1999) 10 *EJIL* 23

²⁰ Schachter, *International Law in Theory and Practice* (Kluwer Publishers 1991) 128

²¹ ICISS, Report of the International Commission on Intervention and State Sovereignty, "The Responsibility to Protect", December 2001, www.idrc.ca

²² Blockmans (n 18) (emphasis added); Franck (n 1) 136

²³ Security Council Resolutions 1160 (1998), 1199 (1998), 1203 (1998) and 1207 (1998)

²⁴ Security Council Resolution 1160 (1998)

²⁵ Kritsiotis, "The Kosovo Crisis and NATO's Application of Armed Force Against the Federal Republic of Yugoslavia" (2000) 49 *ICLQ* 330 at 335

²⁶ Security Council Resolution 1199 (1998) preamble

²⁷ Kritsiotis (n 25)

²⁸ Statement of the Secretary of State for Defence George Robertson, HC Hansard, Vol.328, cols 616-617 (1999); Foreign and Commonwealth Office (1992) 63 *B.Y.B.I.L.* 824, 827

²⁹ ICJ Press Communiqué No.99/17

³⁰ CR 99/15 Verbatim Record of 10 May 1999

³¹ *ibid*

³² Walzer (n 18)



³³ Cassese, *International Law* (2nd ed OUP 2005) 373-374

³⁴ Article 2(7) of the UN Charter provides: '[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters that are essentially within the domestic jurisdiction of any State'

³⁵ *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States)*, Merits Judgment of 27 June 1986, 1986 ICJ Rep 14, 109, para 207

³⁶ *ibid* 106-109 and 123-27

³⁷ *Corfu Channel Case (United Kingdom v Albania)*, Merits Judgment, 9 April 1949, ICJ Rep 9,35

³⁸ Lowe, *International Law* (OUP 2007) 280-282

³⁹ *Blockmans* (n 18) 776 – 779

⁴⁰ Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order 1* (University of Pennsylvania Press 1996) 364

⁴¹ Security Council Resolution 929 (1994)

⁴² Security Council Resolution 940 (1994)

⁴³ *Blockmans* (n 18) 776

⁴⁴ S.C.O.R. (LIV), 3988th Meeting, 26 March 1999 (on the NATO invasion of the FRY). The proposed resolution was defeated by 12 votes against to just three in favour.

⁴⁵ UN Doc S/1999/328, 26 March 1999; Franck (n 11) 163-170; Kritsiotis (n 25) 347

⁴⁶ Hilpold, "Humanitarian Intervention: Is there a Need for a Legal Reappraisal?" (2001) 12 EJIL 437, 462; Mendelson, "The Formation of Customary International Law", 272 RdC (1998) 268

⁴⁷ Krisch, "Unilateral Enforcement of the Collective Will: Kosovo, Iraq and the Security Council", 3 Max Planck Yearbook of United Nations Law (1999) 59, 84

⁴⁸ Walzer (n 18)

⁴⁹ Ress, "Interpretation", in Simma, *The Charter of the United Nations – A Commentary* (1995) 677, 42 para 34

⁵⁰ Dworkin, *Law's Empire* (Hart Publishing 1998) 227-228

⁵¹ Cassese, "Ex iniuria ius oritur: Are we Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?" (1999) 10 EJIL 25; Greenwood, "International Law and the NATO Intervention in Kosovo" (2000) 49 ICLQ 926-934

⁵² Cassese, (n 51) 27 Cassese lists limitations which should be put on the unilateral right: i) violations must be "gross" or "mass" and perpetrated directly or with the support of the government, (ii) proof that the central authorities are responsible for the crimes against humanity and that they have on a number of occasions refused to comply with the recommendations or decisions of international institutions and organisations, (iii) the Security Council has refused to sanction enforcement action, (iv) all peaceful means are exhausted, (v) a group of states, and not merely one crusader, preferably with the agreement of the majority of members of the UN agree to intervene, (vi) force is only used for the purpose of halting the atrocities alone.

⁵³ Walzer (n 18) 3

⁵⁴ Evans, 'From Principle to Practice: Implementing the Responsibility to Protect', Keynote address to Egmont Conference and Expert Seminar From Principle to Practice: Implementing the Responsibility to Protect, Royal Institute of International Affairs, Brussels, 26 April 2007; see also Barnett, "Patterns of Intervention" in Falk (ed), *The Vietnam War and International Law* (1969)1164

⁵⁵ Cassese, (n 51) 29

⁵⁶ Goodman, "Humanitarian Intervention and Pretexts for War" (2006) 100 AJIL, 107

⁵⁷ *ibid* 123

⁵⁸ Hilpold (n 46), 456

⁵⁹ Bellamy, "Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit", *Ethics & International Affairs* Vol. 2 (2006) Issue 2, 143-169

⁶⁰ Evans, "From Humanitarian Intervention to the Responsibility to Protect", 24 (2006) WILJ 703-15

⁶¹ *ibid*; See also Arbour "The Responsibility to Protect as a Duty of Care in International law and



practice”, *Review of International Studies* (2008), 34, 445-458, 448; Welsh, Thielking and MacFarlane, “The Responsibility to Protect: Assessing the Report of the International Commission on Intervention and State Sovereignty” in Thakur, Cooper and English (eds), *International Commissions and the Power of Ideas* (Tokyo, United Nations University Press, 2005)

⁶² ICISS, (n 21) 19

⁶³ *ibid* 29

⁶⁴ *ibid* 39

⁶⁵ *ibid* XII

⁶⁶ Deng, *Sovereignty as Responsibility: Conflict Management in Africa* (Washington, D.C.: Brookings Institution Press, 1996).

⁶⁷ Tanguy, “Redefining Sovereignty and Intervention”, *Ethics and International Affairs*, 17, no 1 (2003) 143

⁶⁸ Peters, (n 2); see also Arbour “The responsibility to protect as a duty of care in international law and practice” *Review of International Studies* (2008) 34, 448

⁶⁹ Security Council Resolution 1973 (2011)

⁷⁰ Contra the results of the Chicago Council on Global Affairs and WorldPublicOpinion.org, *Publics Around the World Say UN Has Responsibility to Protect Against Genocide*, 1-2

⁷¹ United Nations General Assembly, ‘2005 World Summit Outcome’, A/60/L.1, paras 138 and 139 (emphasis added)

⁷² Arbour (n 68) 449; Lazarus, “Mapping the Right to Security”, in Gould & Lazarus (eds) *Security and Human Rights* (Hart Publishing, 2010) 331

⁷³ Security Council Resolution 1706 (2006) 6, para 12

⁷⁴ Evans, “The Responsibility to Protect”, *International Relations* 22, no. 3 (2008) 283, 294

⁷⁵ Bellamy, “Responsibility to Protect – Five Years On”, *Ethics and International Affairs*, 24, no 2, (2010) 143-169

⁷⁶ *ibid*

⁷⁷ Article 53 UN Charter

⁷⁸ Alex de Waal, ‘No Such Thing as Humanitarian Intervention: Why We Need to Rethink How to Realize the “Responsibility to Protect” in Wartime’, *Harvard International Review*, December 2007

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⁸¹ Hilpold (n 46)

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¹⁰³ ILO GB. 280/2, para 62

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¹⁵⁴ *Blockmans* (nn18) 785

¹⁵⁵ *Joined Cases C-402/05 P and C-415/05 P, Kadi & Al Barakaat v. Council of the European Union*, 3 CMLR 41 (2008)

¹⁵⁶ *Kidd White*, “Humanity as the Alpha and Omega of Sovereignty: Four Replies to Anne Peters”, *The European Journal of International Law* 20 (2009), 545-567, 546



¹⁵⁷ Certain Expenses of the United Nations, Advisory Opinion of 20 July 1962, 1962 ICJ 163, 164

¹⁵⁸ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory I.C.J. Reports 2004, 136, paras. 27-28

¹⁵⁹ The Responsibility Not to Veto: A Way Forward, Citizens for Global Solutions, White Paper (2010)

¹⁶⁰ Peters (n 2) 569-573

¹⁶¹ Elster, 'Deliberation and Constitution Making', in Elster (ed.), *Deliberative Democracy* (1998) 97, 111

¹⁶² Prosecutor v Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 ct 1995, Case No. IT-94-I-AR72, 105 ILR 419, paras 26–28

¹⁶³ Peters (n 1)

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The Elements Necessary for the Development of a Free Market Economic System in Burma

(August 20, 2011)

1. The Rule of Law and an Impartial Judiciary

For a market economy system to succeed, it must be based on the rule of law and protected by an impartial judiciary. To a large extent, a successful market economy depends on the trust the market participants have in the legal system to uphold their rights and fairly adjudicate their disputes. There must be an efficient, just and affordable judicial mechanism to resolve disputes, including the disputes involving governments. The mechanism must have strong, enforceable safeguards to ensure that the parties are treated fairly. Disputes must be adjudicated based solely on the facts and the law, not on the identity of the party or the relationship the party has to the government. For example, if a business enters into a contract to purchase goods, it must know that it can obtain a legal remedy if the supplier fails to deliver the goods. Businesses justifiably avoid markets that lack fair, efficient and unbiased courts because of the risk of uncompensated loss. In the Yang Chi Oo case in Burma, for example, a private Singapore company made a joint venture with the Burmese government to manufacture beer. The government attempted to nationalize the company before the expiration of their contract. When the parties went to court, the judge ignored the Singapore company's arguments and unjustifiably used its broad discretion under the law to rule for the government. A free market economy cannot succeed in such an environment. The almost complete lack of a judicial



system means that domestic and foreign companies must negotiate directly with the government to resolve disputes.

2. Good Governance

A properly operating market economy system requires good governance. Good governance means an efficient, independent, accountable and open government without corruption and dedicated to the public good. Good governance focuses on four main areas: accountability, accessible information, transparency and a legal framework for development.

(1) Accountability

Accountability means holding government officials responsible for their actions. The laws must clearly provide for this accountability. A healthy market economy also needs strong anti-corruption laws that unambiguously prohibit the improper receipt of gifts and money. There must be clear regulations for lobbyists so that powerful groups cannot have an unfair advantage in policy making. Impartial and fair treatment by the government is critical for attracting investments and maintaining a fair business environment. Government officials must not accept gifts and other incentives from business that might lead to favoritism or even the appearance of impropriety.

Economic failures are to some extent caused by a lack of transparency, cronyism, and corruption. The World Bank in its 2007 Worldwide Governance Indicators ranked the Burmese government as the lowest in the world. In Burma, there is no accountability, transparency, or independent judicial system. Corruption is widespread. Economists and businesspeople consider corruption the most serious barrier to investment and commerce in Burma. Very little can be accomplished, from the smallest transactions to the largest, without paying a bribe. As inflation increases and investment declines, this problem appears to be worsening. Since 1948, corruption is officially a crime that can carry a jail term. However, the ruling generals apply the anti-corruption statute only when they want to take action against a rival or an official who has become an embarrassment. For instance, in October 2004, the SPDC arrested then-Prime Minister General Khin Nyunt and many of his colleagues and family members for corruption. Most citizens view corruption as a normal practice and requirement for survival.

(2) Accessible Information

Information about economic conditions, markets, and government policies must be reliable and accessible to all. For instance, information regarding the government's use of public funds must be available promptly and economically. The government must promulgate laws that require public companies to periodi-



cally release important financial information and to make clear to their investors the risks involved in investing.

To keep the people informed, the government must also publish and distribute the financial budget of the country, the decision record of the parliament and the decisions made at different levels of the federal government relating to the development of the country. The information must be clear, accurate, understandable and complete.

Official statistics released by the SPDC indicate that Burma has experienced double-digit growth since 1999, making it the fastest-growing economy in the world. Releasing this type of false information is one of the characteristics of the current government, undermining the market's ability to accurately assess business needs. In Burma, official statistics are notoriously unreliable (and sometimes even deliberately misstated), and collecting data is difficult. Burma does not publish data on its spending or unemployment.

(3) Transparency

Transparency is a call for open government that results in greater accountability, limited corruption and a dialogue between government and private interests over policy development. The government's actions must not be hidden from the public. A market economy and democracy are founded on citizen participation and decision making. The government alone does not drive the focus and future of a country; citizen input is critical to guide the government's path. Meaningful citizen input and participation are not possible however, without a well-informed public, which means that the government must make available as much information as possible. The people must also be able to contribute to the lawmaking and decision making process through a comment and question procedure. In many democratic countries, the public is given a generous time period to review administrative regulations and provide insights that the government may not have. For instance, comments from companies can provide the government with a business perspective while private individuals may be able to identify ways in which their rights may lack protection under a new law.

Burma lacks regulatory and legal transparency. All existing regulations are subject to change with no advance or written notice at the discretion of the regime's ruling generals. The country's decision-makers appear strongly influenced by their desire to support state-owned enterprises, wealthy friends, and military-controlled companies, such as the Myanmar Economic Corporation and Myanmar Economic Holdings, Ltd. The government often issues new regulations with no advance notice and no opportunity for review or comment by domestic or foreign market participants. The regime rarely publishes its new



regulations and regulatory changes; instead they communicate new rules verbally to interested parties and often refuse to confirm the changes in writing.

(4) A legal framework for development

A legal framework for development means a structure of rules and laws that are clear, predictable and stable. The laws must be applied impartially and fairly to all and provide a conflict resolution mechanism through an independent judicial system. This concept is explained more fully in Element 1 above.

3. Economic Freedom

(1) Minimizing government interference

The government must guarantee economic freedom that is protected by laws. A free market is based on minimal government interference. The government must reduce its role in a market system and should facilitate, rather than participate, in the system. Market participants must provide the direction and fuel for the market, reacting to the supply and demand of goods and services. While the government must at times step in to ensure that the market treats everyone fairly and the public good is not jeopardized, the times it chooses to interfere must be kept to a minimum. Under no circumstances should the government seek to dominate the market or unnecessarily participate in the free flow of products.

In Burma, under the State-Owned Economic Enterprises Law, state-owned enterprises have the sole right to carry out some of the country's major economic activities. The Myanmar Investment Commission (MIC) can make exceptions to this law "in the interest of the State". The MIC has granted some exceptions in the areas of banking (for domestic investors only), mining, petroleum and natural gas extraction, and air services, but as with all major political and economic decisions, this discretion lies solely with the Cabinet and senior generals of the ruling junta.

In its 2007 Index of Economic Freedom, the Heritage Foundation ranked Burma as the fifth most repressed economy in the world. Burma's economy is 40.1% free, which makes it the world's 153rd freest economy out of 157. Burma is ranked 29th out of 30 countries in the Asia-Pacific region.

(2) Protecting Intellectual Property

The government must facilitate the work of innovators by passing intellectual property laws. The rules of the marketplace must be established so that new



products or processes are not pirated. Small inventors and large companies will only invest effort and money in research if they know that they will be financially rewarded for their good ideas. In Burma, there is almost a complete stifling of economic innovation by the SPDC. The few instances of innovation are subject to government corruption in the form of forced payments to officials and are often threatened with expropriation or nationalization. Burma's patent, trademark, and copyright laws are all deficient in regulation and enforcement. An intellectual property rights law, first drafted in 1994, still awaits government approval and implementation. Burma has no trademark law, although trademark registration is possible. There is no legal protection in Burma for foreign copyrights.

(3) Antitrust law

An antitrust law must be enacted to prevent companies or organizations from monopolizing the entire economy. This law must be established to (1) prohibit agreements or practices that restrict free trade and competition between business entities; (2) ban abusive behavior by a business dominating a market, or anti-competitive practices that tend to lead to such a dominant position; and (3) supervise the mergers and acquisitions of large corporations. Antitrust law prevents abusive manipulation of the economy by big market participants that seek to hinder competition. It is a critical component of a market economy that keeps the economy running fairly and properly.

(4) Facilitating the lawful transfer of currency

The government must not prohibit the lawful transfer of money and properties that are legally owned, whether the transfer originates from inside or outside the country. Every citizen and foreigner living legally in a country must have the right under law to hold and exchange domestic and foreign currency. The unrestricted transfer of legally owned money and property keeps a market economy moving. Quick and cheap transfers lead to more efficient business transactions. A government that attempts to unnecessarily control or even prohibit the movement of money and property hinders business. While some restrictions are reasonable, such as preventing immediate withdrawal of suspicious transfers in order to prevent money laundering, unnecessary government interference must be avoided. In particular, international transfers of money and property must not be unnecessarily delayed.

Holding currency is a prerequisite to participating in a market. There must be no restrictions on any citizen or foreigner that restrict their right to legally obtain, possess, and utilize domestic currency. Additionally, every person must also have the unfettered right to exchange their domestic currency into foreign cur-



rency, and vice versa. Today's market is increasingly international. Exchange restrictions harm a country's commerce.

(5) The Central Bank and monetary controls

The free formation of financial and monitoring institutions must be protected by law. Moreover, a central bank must have the capacity and authority to ensure the well-being of a free market economy. A central bank, reserve bank or monetary authority, is in charge of establishing monetary policy. Its primary responsibility is to maintain the stability of the national currency and money supply. The central bank may also control subsidized-loan interest rates and assist the banking sector through loans during a financial crisis. The central bank should also have supervisory powers to ensure that banks and other financial institutions do not behave recklessly or fraudulently.

In Burma, the Central Bank of Myanmar devotes a great amount of effort to lending to the government. Although monetary policy in Burma is formally the responsibility of the Central Bank, the Bank actually has almost no influence over monetary conditions for the following two reasons. First, as of 2006 Burma had in place interest rate controls that cap lending rates at 15 per cent per annum and do not allow deposit rates to fall below 9.5 per cent per annum. Given that Burma's inflation rate was estimated at a little over 20 per cent in 2005 (and in 2002, in excess of 55 per cent per annum), putting money in the bank results in an automatic loss. The regime has set these rates to minimize the interest rates paid on government debt. Furthermore, the Central Bank does not have operational independence from the state, and thus has no credibility. It also has little power, as was evidenced during the 2002-2003 banking crisis, when the authority to handle the crisis was given to an obscure brigade commander instead of the Central Bank. The small amount of government bonds held by the general public (much less than one per cent) of indicates the lack of confidence the citizens have in state-created financial assets.

The exchange rate of the Myanmar Kyat is another problem that undermines the effectiveness of the Burmese economy. Burma has a fixed-exchange rate policy that officially links the Kyat to the U.S. Dollar at K6.1:\$US1. The only relevant exchange rate to the people on the streets in Burma, however, is the black market rate, which stands at around K1,280:\$US1, over two hundred times below the official standard. The black market rate changes daily and sometimes hourly depending on the perceptions of the country's prospects. Instead of engaging in currency reform, the SPDC simply tries from time to time to arrest well-known foreign exchange dealers.



4. Macro-Economic Stability

Macroeconomics deals with the broad and general aspects of an economy, such as income, output, and the interrelationship among diverse economic sectors. When government spending expands too far, large deficits, excessive borrowing, monetary expansion and problems in the financial sector often result. In turn, these are followed by inflation, overvaluation of the currency, and a loss of export competitiveness. Excessive borrowing can also lead to domestic and external debt problems and crowding out of private investment.

The Burmese macro-economic policy-making has been characterized as arbitrary, often contradictory and ill-informed. Under the military administration, the country has faced macroeconomic instability such as high inflation, a persistent fiscal deficit largely financed by the central bank, a low savings rate, a widening trade deficit, a drastic fall in foreign investment, and a widening gap between official and free-market exchange rates. Burma's macro-economic policy is dominated by the SPDC's constant demand for the country's output, which far exceeds the regime's ability to raise tax revenue. Consequently, the state finances its spending by selling government bonds to the central bank. This policy, i.e. printing more money to satisfy the government's demands, seriously harms the functioning of the market economy.

Burma's macroeconomic policy-making has been called capricious, arbitrary, selective and sometimes illogical. For instance, in October 2005, the SPDC suddenly announced an eight-fold increase in the retail price of gasoline. In 2004, to slow the rise of domestic prices, the SPDC announced a ban on rice exports, when just a year earlier the SPDC had tried to implement measure to increase rice exports. The SPDC made several announcements in 2005 that exporters and importers in Burma had to use the Euro rather than the US dollar in their transactions.

To ensure the stability and development of the country's economy, a Commission for Economic Observation should be formed comprising legal academicians, government representatives, and economists. The commission should be represented by members from different economic interest groups as well as neutral members. This body will advise the government on economic policy based on their observations of growth, obstacles, opportunities and remedies.

5. Private Ownership Rights

Private ownership rights must be protected by law. Citizens and foreigners must be assured that their legally obtained possessions will not be arbitrarily seized, and that they can obtain a legal remedy before a neutral, independent



judiciary if the government disregards this law. The government cannot nationalize businesses or seize private property except in rare circumstances where the public good is at risk and where adequate compensation is paid. The Burmese Foreign Investment Law (FIL) guarantees that no foreign company shall be nationalized during the permitted period of investment. However, the Burma government has forced a number of foreign companies in various sectors to leave the country because it has not honored the terms and conditions of investment agreements. In the late 1990's, two large Japanese firms voluntarily left Burma after they found they were not able to operate according to earlier investment agreements. Additionally, there have been several cases where the government seized the assets of foreign and local investors without compensation when the investment turned out to be very profitable.

6. Infrastructure Development

The government must promote the basic infrastructure of the country. The infrastructural industries, such as electricity, water supply, communication, and transportation, must be used primarily for the development of the people. Infrastructure is vital to a successful market economy. For instance, many goods are transported on highways, transactions are made over the phone and cable lines, companies depend on reliable energy sources, and everyone needs clean water to live. The government must use its resources to improve the country's infrastructure with the aim of helping the people's living conditions and economic prosperity. Pet infrastructure projects that are aimed to appease political favorites or business contracts that merely help friends must be avoided.

In Burma, the ruling regime has conducted a large program to improve infrastructure in the form of roads, dams, bridges, railroads, port facilities and buildings. Many have questioned, however, the choice of some of the construction, the priorities attached to the projects, the financial costs, the use of forced labor, and the neglect of other potential uses, such as increasing social services. Furthermore, the construction of infrastructure also allows the military more access to the outer areas of the country where they are seeking military control over ethnic minorities and where they intend to exploit natural resources. Thus, the increase in infrastructure appears to have a self-serving purpose.

7. Protecting Labor Rights and Minimum Wages

Citizens' labor rights must be protected by law, and all people must have the freedom to work and choose an occupation. First, everyone must have the right to work. Article 23(1) of the Universal Declaration of Human Rights provides that "everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment." The



laws must facilitate, rather than hinder, the opportunities of citizens to establish businesses, carry out their economic activities and invest their income in worthwhile endeavors.

A minimum wage that allows workers to cover their basic necessities in accordance with the present cost of living must be protected by law. Other labor laws must be enacted relating to worker rights such as same wages for the same work, proper work hours, leisure, job security, wages based on skill level, and allowance of the formation of labor unions. The U.S. Department of State reported in 2007 that the minimum wage in Burma is the miniscule amount of 500 kyat (roughly \$0.40) per day and that an average worker in Burma earns about 500-1000 kyat (roughly \$0.40 to \$0.80) per day.

The fair and proper treatment of workers is a fundamental component of a successful market economy. Business rights must be balanced with workers' rights so that both groups can flourish and collaborate in a mutually beneficial relationship. The Universal Declaration of Human Rights provides clear standards for the protection of people's economic security:

- a. Everyone, without any discrimination, has the right to equal pay for equal work. (Article 23(2))
- b. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. (Article 23(3))
- c. Everyone has the right to form and to join trade unions for the protection of his interests. (Article 23(4))
- d. Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay. (Article 24)

The government must ensure that labor laws make these rights a reality and that offending employers are adequately punished for violations. In Burma, independent labor unions are illegal. Workers are not allowed to organize, negotiate, or otherwise exercise control over their working conditions. Although government regulations set a minimum employment age, wage rate, and maximum work hours, many managers do not follow these regulations. The government uses forced labor in many areas of its work.

8. Freedom to Travel Abroad

The law must protect the right of every citizen to legally travel and live abroad. Countries that not only allow, but also encourage, their citizens to gain international experience reap the benefit in increased cultural understanding and net-



working opportunities which inevitably lead to economic advantages. In Burma, passports are difficult and expensive to obtain without government connections. Passports generally must be obtained through an agent and, since 1996, women under 30 have not been able to apply for work passports. Passports allowing overseas study are only issued if the applicant is officially sponsored by the government. The time that it takes to receive the passport can take between a few days and many months, depending on the applicant's age and the amount of bribes paid.

9. Human Resources Development and the Role of Technology

Every citizen must enjoy the opportunity to receive human resource development provided by the government. Safeguards must be in place to make certain that these services are accessible without discrimination. A strong market economy depends on the adequate development of a skilled workforce. The government must use sufficient resources to enhance the population's ability to contribute to the economy.

Every citizen must also have the right to study modern communication methods, such as internet and e-mail, and explore, collect and distribute information using these methods. Restrictions on technology inhibit market economies. Today's international markets depend heavily on modern communication methods for their efficiency, accuracy and reliability. Business opportunities on the internet are unparalleled in history. A society needs to know how to find these opportunities, take advantage of them and create the opportunities of tomorrow. The markets economies that do not keep up with the quickly changing technology in the business world remain narrow and experience slower growth.

10. Social Development, including Education, Health and other Social Services

The government must provide adequate education and health care services, regardless of race, class, nationality, or social background. Free education must be guaranteed by law in order to produce the skilled workers necessary for a market economy system. The government must also identify social goals such as poverty reduction, gender equality, reduction of infant mortality rates, improvement in reproductive health services and environmental preservation.

The long military rule and mismanagement in Burma have resulted in widespread poverty, poor health care and low educational standards. Extremely low spending on education and health have undermined the formation of a skilled



workforce and reduced economic opportunities. Today the education system at all levels is crumbling because the regime has allocated minimal resource to public education. Of the national budget, over 40 percent is used for military forces while less than 1 percent is used for all civil education. Article 26(1) of the Universal Declaration of Human Rights provides: “Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.” The standard of these opportunities must be high enough to produce qualified employees who are able to contribute to their employers immediately and make a positive impact on the economy. Business leaders and government officials need to understand that a market economy depends on even the youngest and most vulnerable of society being well-educated. Future leaders come from the next generation.

Similarly, Burma’s health care system is a disaster due to inadequate budget allocations. International reports rate Burma’s health services the second worst in the world. There is inadequate medicine supply and medical equipment in public hospitals and patients must pay high costs under the cost sharing health system. Furthermore, Burma is close to an HIV epidemic. A high number of young girls at high risk of contracting HIV are being trafficked to Thailand and China to work in the sex industry. According to the UN and other sources, only about 40% of Burmese households consumed calories at or above the recommended daily allowance, and only 55% consumed enough protein.

11. Regional Economic Development

The government must take steps to balance economic development between rural and urban states and divisions. Urban areas naturally develop more quickly than rural ones as a result of population imbalances. While the government must not unnecessarily meddle in a market to force rural development when there is little demand, it must also formulate policies to ensure that all of its citizens are able to enjoy a reasonable standard of living. For instance, essentials such as electricity, water and transportation routes must be accessible by rural inhabitants even though a private company may not find it economically feasible to extend services to the area. In such a case, the government may need to intervene to make sure its rural citizens are able to participate in the country’s development. Similarly, development must be fairly spread throughout the states and divisions without favoritism. Currently the ethnic minority areas in Burma suffer from economic neglect. Furthermore, agriculture, which provides the livelihood for the majority of the Burmese people, is chronically (and, often deliberately) under supported.



12. Opening the Domestic Market to the International Economy

A country's laws must ensure participation in the international economy through trade, foreign direct investment (FDI) and Overseas Development Assistance (ODA). Nowadays, no country can develop without opening up to the international economy. Economic mismanagement by the SPDC means that Burma attracts little foreign investment. The little money that does arrive is strongly concentrated in the gas and oil sectors, and other extractive industries. Little employment results from these investments, and there is negligible technology and skill acquisition. To make matters worse, all of the revenues from Burma's exports of gas and oil are collected by the regime. Very little FDI makes its way to industry, and even less to agriculture.

Burma is regarded by the international business community as a high risk destination for foreign investment, and a difficult place to do business. In a recent report on economic freedom, the Washington-based Heritage Foundation ranked Burma third from the bottom (above only Iran and North Korea) with regard to restrictions on business activity. According to the Foundation, "pervasive corruption, non-existent rule of law, arbitrary policy-making, and tight restrictions on imports and exports all make Burma an unattractive investment destination and have severely restrained economic growth." Some investors report that their Burmese military partners make unreasonable demands, provide no cost-sharing, and sometimes force out the foreign investor after an investment becomes profitable.

To illustrate the importance in good policy-making, the Asian Newly Industrialized Countries (NICs) share an important common feature of having an open and outward-looking economic strategy. Evidence of this policy is demonstrated by their high export to gross domestic product ratios. A focus on exports has enabled them to raise their total productivity factor. In contrast, Burma has not exploited the advantage of international trade due to its closed door policy.

Moreover, the Asian NICs have depended on various forms of foreign capital flow to supplement their domestic capital formation. With a very low level of saving, Burma needs foreign investment and foreign aid to fill both its savings-investment gap and foreign exchange gap. The actual FDI into Burma has been slow compared with China and Vietnam as a result of frequent changes in rules, import restrictions, and other restrictions on the movement of goods and services or trade practices. Dealing with the different ministers causes further delays and operational costs.



The Minimum Elements Necessary in a Constitution for the Development of a Country's Economy Based on a Market Economy System

- (1) For a market economy system to succeed, it must be based on the rule of law and protected by an impartial judiciary.
- (2) Private ownership rights must be protected by law. Moreover, an antitrust law must be enacted to prevent companies or organizations from monopolizing the entire economy.
- (3) The government must not favor one company over another. The government must establish a conflict resolution office or other judicial mechanism related to the economy to resolve disputes fairly between companies and employees, governments or local authorities.
- (4) The free formation of financial and monitoring institutions, including a central bank, must be protected by law. The amount of money used in the country and the printing and production of the money must be operated by a central bank.
- (5) The parliament must independently manage the country's budget, deciding how much income is obtained from taxes and other methods and how much money is spent, and release this budgetary information to the public.
- (6) The government must not confiscate the legally owned property of citizens, whether moveable or immovable, or land leased and property owned by foreigners, without paying fair market value.
- (7) In order to develop a country's economy, the law must protect the citizens' ability to freely produce goods and trade domestically and internationally from interference by other businesses and organizations.
- (8) The law must protect the right of every citizen to make a living and choose an occupation, as well as to legally travel and live abroad for work and study purposes.
- (9) Every citizen must have the right to study modern communication methods, such as internet and e-mail, and explore, collect and distribute information using these methods.
- (10) No one shall prohibit the lawful transfer of money and properties that



are legally owned, whether the transfer originates from inside or outside the country.

- (11) Every citizen and foreigner living legally in a country must have the right under law to hold and exchange domestic and foreign currency.
- (12) The government must promote the basic infrastructure of the country. The infrastructural industries, such as electricity, water supply, communication, and transportation must be used primarily for the development of the people. Every citizen must enjoy the same opportunity to receive human resource development promoted by the government, including an education and health care services, regardless of their race, class, nationality, or social background.
- (13) A properly operating market economy system requires good governance, including transparency, accountability, and restraint from corruption. The government must reduce its role in a market system and should facilitate rather than participate in the system.
- (14) To keep the people informed, the government should annually publish and distribute the financial budget of the country, the decision record of the parliament and the decisions made at different levels of the federal government relating to the development of the country. The people must have the right to access information related to the government's performance and activities and provide comments and questions.
- (15) Everyone shall have the same job opportunities based on their level of education and skill. Free education must be guaranteed by law in order to produce the skilled workers necessary for a market economy system.
- (16) A minimum wage that allows workers to cover their basic necessities in accordance with the present cost of living must be protected by law. Labor laws must be enacted relating to worker rights such as same wages for the same work, proper work hours, leisure, job security, wages based on skill level, and allowance of the formation of labor unions.
- (17) To ensure the stability and development of the country's economy, an agency such as a Commission for Economic Observation should be formed by law comprising legal academicians, government representatives, and economists.



- (18) The government must facilitate domestic and foreign competition, inventors, skilled workers, and research relating to economic development.
- (19) To operate a market economy system properly, the government must restrain itself from interfering in and prohibiting economic activity. The government must try to balance the economic development between rural and urban states and divisions.

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Burma Lawyers' Council

EVERYONE IS EQUAL BEFORE THE LAW.

Wisdom is power to transform the society into
a just, free, peaceful and developed one.

MISSION STATEMENT

“By vigorously opposing all unjust and oppressive laws, and by helping restore the principle of the Rule of Law, the Burma Lawyers Council aims to contribute to the transformation of Burma where all the citizens enjoy the equal protection of law under the democratic federal constitution which will guarantee fundamentals of human rights.”

THE STATUS OF ORGANIZATION

The Burma Lawyers' Council is an independent organization which was formed in a liberated area of Burma in 1994. It is neither aligned nor is it under the authority of any political organization. Individual lawyers and legal academics have joined together of their own free will to form this organization.

OBJECTIVES OF THE BLC

- Promote and assist in the educating, implementing, restoring and improving basic human rights, democratic rights, and the rule of law in Burma;
- Assist in drafting and implementing a constitution for Burma, and in associated matters of legal education; and
- Participate and cooperate in the emergence of a Civil Society in Burma.

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