

Burma and National Reconciliation: Ethnic Conflict and State-Society Dysfunction

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It is maintained that Burma's 'ethnic conflict' is not per se ethnic, nor that of the kind faced by indigenous peoples of, for example, North America, but a conflict rooted in politics. Following the collapse of Burma's General Ne Win's military-socialist regime in 1988, the issue of ethnic conflict has attracted the attention from both observers and protagonists. This attention became heightened following the unraveling of the socialist bloc and the emergence of ethnic wars in those hitherto (presumed) stable socialist nation-states.

Introduction: The Problem of State-Society Dysfunction

The ethnic resistance movements in Burma were previously perceived by most observers as insurgencies by disgruntled tribal isolates fighting against the modernizing and unifying state. Especially following the emergence of new nation-states in the 1950s, political scientists cheered for the new leaders of these countries and their attempts to 'modernize' their 'backward' societies. Resistance of societal segments, especially ethnic groups, to the state was frowned upon as obstructing the laudable nation and state-building efforts of the modern state and its leaders. The ethnic conflict problem was not seen as integral to the larger, more basic problem of disjunction. This was especially the case after 1962, between the military-monopolized state and the society at large. That there was dysfunction in state-society relations in Burma is now recognized, but the ethnic dimension of state-society dysfunction has never been fully appreciated. This insight is critical for those seeking to gain a clear understanding of Burma's current crisis. The conflict in Burma is deep-rooted.

Solutions can only be found if the real issues of conflict are examined, such as territory, resources and nationality, rather than the previously accepted but superficial explanations.

When resistance of societal segments is considered obstructive, especially when these segments are ethnic-based, it constitutes an important dimension of state-society dysfunction. The need for national integration in Burma is inarguable. The problem is how it is to be defined and achieved. Integration has both vertical and horizontal dimensions, i.e. between state and society, and between the different elements of a society. Attempts at national integration ignoring these dimensions are likely to divide rather than unite. Ethnic resistance was condemned by leaders and governments of post-colonial states, and likewise by their respective former foreign patrons, as reactionary tribal hold-outs. Often, ethnic resistance was portrayed by ruling regimes as instruments of external, 'imperialist' powers or agents. Contributing to the confusion was a situation where cold-war protagonists were encouraging ethnic discontent and rebellion in order to destabilize the state of the rival power.

Ethnic Conflict in Burma: Some Basic Definitions

Even today, when it is recognized that the various 'ethnic rebellions' form a part of Burma's state-society dysfunction, there remains some confusion regarding the nature of ethnic conflict. One current perspective sees the ethnic conflict in Burma in terms of ethnic minorities fighting for democratic rights or cultural-identity rights, or equal opportunity, like the African-American and other minorities in the United States. Even Burma's ethnic non-Burman¹ groups and leaders, at least some of them, have been drawn into the "minority rights, equal opportunity" paradigm. Some ethnic leaders and activists have even defined themselves as 'indigenous people', although this term refers to native people or aboriginals marginalized and displaced by white settlers. The use of the term 'indigenous people' in the Burma context is odd because all ethnic segments, including the Burmans or ethnic Burmese, are indigenous in the sense that they are all native to Burma.

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The ethnic non-Burman segments of Burma, especially the Shan, Kachin, Karenni, Chin, and Rakhine, are neither ethnic minorities nor indigenous peoples. As will be clarified below, they (like the Burmans) are peoples or nations. They moreover have had the experience of administering themselves, albeit under British supervision, for about five decades.² They also have, like the Burmans, their own history, or rather, a sense of history. In their own states or home territories the ethnic non-Burmans, in fact, comprise collectively the majority, and the Burmans the minority. Because of their role as co-founders of the Union of Burma, by virtue of the 1947 Panglong Accord, the

ethnic non-Burman nationalities consider themselves the founding nations of the country. They have used the term 'ethnic nationalities' rather than 'ethnic minorities' to refer to themselves collectively.

Burma's 'ethnic conflict' is not per se ethnic but political, in a very fundamental way. The conflict is political because it is both about ethnic identity and rights, about democracy and equal opportunity, and about building nation and state. It involves political fundamentals as to how a nation is to be built, defined or identified, by whom, and in what direction. It has much to do with problems arising from the application of nation-building formulae by the state or by a set of power-holders.

With regard to nation-building in independent Burma, it is important to recognize that the first foundation stones were laid in 1947 when the Panglong Accord was signed in the Shan State. This politically defining document was signed between U Aung San, the Shan *Sawbwa* princes and representatives of the Shan, Kachin, and Chin peoples. The Panglong Conference reached unanimous agreement that the political freedom of all peoples there represented would be hastened by immediate cooperation with the interim government. It was further agreed at Panglong that cooperation should be implemented by the governor's appointment of an additional councilor, to be nominated by the newly formed supreme council of United Hill Peoples. The councilor would assume executive responsibility for the Frontier Areas. Other agreements at Panglong provided for the enjoyment of democratic rights by all citizens, for continued interim financial aid by the center to the Frontier Areas, for local autonomy, and for immediate consultations looking toward the demarcation of a Kachin State.³ The Panglong Accord defined the political and geographical boundaries of present-day Burma: its peoples would join together in an alliance to obtain independence from Britain and to establish a union of equal and self-determining states—the Union of Burma or *Pyidaungzu*. The Burmese word *Pyidaungzu* means a union of nation-states, implying a federation of states. Federalism is embedded in the Burmese term for the post-1948 Union of Burma. Since Panglong was a historically defining moment and the genesis of present-day Burma, the Pang-long Accord and its underlying spirit are politically hegemonic. Even the successive ruling generals (who have done much violence to the ideals of Panglong) have to pay lip-service to the Panglong Spirit, to the notion of equality between what they call 'national races'.⁴

British Colonial Rule and the Making of Burma

Like all nation-states that emerged after the withdrawal of colonial powers, such as India, Pakistan, Malaysia and Indonesia, Burma is basically the child

of the colonial order. The colonial powers re-arranged the territories that came into their hands and made them into 'modern' entities that later became post-colonial nation-states. Prior to the advent of colonial powers, Burma in its present form did not exist. There were what modern historians describe as Burmese (or Burman) kingdoms that existed side by side with the Mon, Shan, Rakhine, Manipuri, Thai, Lao, and Khmer kingdoms, and which were often in conflict with each other. Wars, both intra-kingdom dynastic fighting and inter-kingdom conflicts, were endemic. The kingdoms were however neither solely territorial nor based on ethnic sentiments or solidarity. That is, they were not national kingdoms but dynastic or personal systems of power and domination.

In the final British annexation of Burma in 1885,⁵ the Burmese king and court had hardly any control over the areas north of the capital city of Mandalay. Moreover, an alliance of Shan princes, called the Limbin Confederacy, was poised to march on to the capital to overthrow King Thibaw (whose mother was Shan, the Hsipaw Princess). The Shan princes wanted to install their candidate, the Limbin Prince, on the throne. There was at that time no Burmese kingdom to speak of. A year after the fall of Mandalay, the British met with the Shan princes at Mong Yai and negotiated the inclusion of their princedoms in British India as protectorates under the Viceroy. The British then proceeded to reorganize the areas beyond India ('farther India' or 'British Indochina') that had come under their control. By the 1930s, British Burma was separated from India and organized into two distinct parts, namely Ministerial Burma (the homeland of the majority ethnic Burmese) and the Frontier Areas. The latter included the present-day Shan, Kachin, and Chin States, and parts of the current Karen and Arakan/Rakhine State. The present Karenni State was treated more or less as a protectorate, and the Wa area was classified as un-administered territory.

Under the British, there was still no Burma in its current form. It has been held by a number of Burman nationalists that the British deliberately divided Burma in accordance with their 'divide-and-rule' policy. What can be said about the divide-and-rule thesis, however, is that it assumes that the population of Burma was homogenous or had already been unified as a nation in the current sense of the word. In this context the term 'divide-and-rule' is untenable and fails to take account of practices that were common to all colonial powers. Rather than being moved by the 'divide-and-rule' imperative, which anti-colonial nationalists often attribute to colonial powers, the widely practiced system of direct and indirect rule was based on administrative convenience, informed by the economic-commercial viability of the real estate in question. That is to say, areas that were accessible from the sea, fertile, productive, and where an infrastructure could be built at low cost, were usually placed under direct rule, whereas the hinterland with hardly any infrastructure, controlled by traditional rulers, was loosely supervised by colonial officers. In Burma, the Irrawaddy basin constituting the Burman homeland, i.e. Burma Proper, was ruled directly and thus became developed and reached

some degree of modernization. The Frontier Areas were left to their own respective rulers and became less developed. British Burma was, like French Indochina, a mix of expedient bureaucratic-administrative arrangements, and it was this patchwork of differently administered and differently developed territories that would form the Union of Burma after the Panglong Accord.

Nation-Building Formulas and the Rise of the Military

Three major schools of thought can be distinguished with regard to Burma's post-independence (mainly Burman) leaders on nation-building. One school of thought, associated with U Aung San, the architect of independence, held that Burma was to be a union of States based on equality of all national groups. The principles of 'unity in diversity' and self-determination, implying the widest of autonomy for the States, would underpin the Union. This was the vision that led to the signing of the Panglong Accord in 1947, a year before independence.

The second school of thought was adopted by the post-Aung San AFPFL⁶ leaders. This vision was embodied structurally in the 1947 Union Constitution. It provided for a unitary form of state, decentralized to some degree but not federal. This formula gained ascendancy and was in force for almost twelve years, from 1948 to 1962, but was certainly not in keeping with the Panglong Spirit or with the vision of U Aung San. Nevertheless, it worked after a fashion but Burma's ethnic nationalities seethed with discontent and civil war raged. The relationship between the members was asymmetrical: there was the Mother country (*Pyi-Ma*, the Burma State) and around it revolved a set of subordinate constituent states. The relation of, say, the Shan State to the Burma State was similar to that between Scotland and England. In concept it can be said that there were seven Scotlands in Burma, all revolving around Rangoon.

The third school of thought was fascistic and narrowly ethno-nationalistic. It held that the Burmans had built an empire through defeating and conquering the lesser 'races' such as the Mon, Rakhine, Shan, and Karen. In this formula, Burma had been unified by 'Burman conquest' since the 11th century, by great kings such as Anawratha, Bayinnaung, Alaungpaya and Bodawpaya. According to this nationhood vision, the British had forcibly dismembered this unified kingdom and through their divide-and-rule policy further alienated the hitherto unified 'races' of Burma from each other. From this perspective, held by the military and successive ruling generals, nationhood and nation-building would be no problem: all national 'races' would be kept together by a strong state, and nationhood or unity would be achieved by obliterating all differences through forced assimilation or 'Burmanization'. The military looked

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forward to everyone becoming Burmans as in the good old days. From this point of view, cultural and ethnic diversity was deemed to be undesirable and dangerous because diversity was divisive. It was therefore imperative that the solidarity of the Union had to be maintained and safeguarded by the armed forces, otherwise the country would fall apart or become a chaotic arena of warring 'races' as in Bosnia.⁷

Although the Shan, Kachin, and other ethnic nationalities' leaders found the 1947 Constitution unsatisfactory, they went along with it until the coup in 1962, because they had been assured that it could be amended at any time in the future. Also, the fact that independent Burma immediately became a battleground between the AFPFL government and its erstwhile allies (the Red and White Flag communists, the People's Volunteers Organization, Burman army mutineers, and later, Karen army mutineers and Pa-O rebels in the Shan State) gave the non-Burman leaders very little option but to stand with the AFPFL, or rather behind U Nu. The alternative was revolution and communist victory.

In many ways, the armed struggle led by the communists and their allies strengthened ties between the leaders of the ethnic nationalities and the AFPFL. However, at the same time, the insurgents (Burman communists, and the Karen with their ethnic allies among the Pa-O and Mon) bolstered the importance of the military to the extent that during the 1950s it had become very powerful and gained much autonomy. The incursions of U.S.-backed Chinese nationalist Kuomintang irregulars in the eastern Shan State further reinforced the power and autonomy of the military. In fighting the insurgents and the Kuomintang, the military also took on administrative functions in areas where martial law was imposed. Moreover, the 1957 split in the ruling AFPFL party into two camps and many sub-factions again strengthened the position and autonomy of the military. The split created a power vacuum at the very top, and it was only a matter of time before the military ventured onto the political stage, which it did in 1958. The then Prime Minister, U Nu, was requested by Brigadiers Aung Gyi and Tin Pe to hand over power to the army, albeit temporarily, so that the political confusion stemming from the AFPFL split could be sorted out. U Nu agreed and, with the sanction of parliament, the military ruled as a caretaker government for two years. In 1960, as promised, the military held an election which U Nu won overwhelmingly on an anti-military platform. In addition, U Nu promised to make Buddhism the official state religion. In 1962, however, the military marched back to power, and has been ruling Burma ever since.

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Nation-Building by Ne Win and the Military

The military's nation-building formula dovetailed nicely with its top-down

idea of state-society relations, still with a command-and-control orientation. The military's fascistic view of nationhood and tight control may be owing to Japanese influence, since the army was trained by the Japanese during the Second World War. Under General Ne Win's rule, from 1962 to 1988, the fascistic, chauvinistic vision of nationhood became entrenched within the military. As a result of the outbreak of insurgencies at the onset of independence, the military was at once brought to the forefront as the defender of the new (AFPFL) state. That role garnered substantial power for the army, because the AFPFL leaders were not only the military's political masters but also dependent on the army to fend off dangers—particularly dangers caused by the communists. The eventual effect was that the military became a power unto itself.

The military took on the task of nation-building according to its notion of nationhood. This formula has not only been destructive but also a failure in terms of creating a viable multi-ethnic nation-state. It can be said that what was of utmost concern to the military (as self-acclaimed 'nation-builders') was Chapter 10 of the 1947 Constitution, which granted the Shan State the option of secession after 10 years of union. The military, however, set out to preempt the Shan from exercising that option, whether or not they actually planned to do so. The military intimidated the population by sowing terror, and it fomented opposition in the Shan State towards the *Sawbwa* princes, whom the military accused of hatching plots to dismember the Union.

Everywhere the military went in the Shan State, they unleashed on the population their brutal power with apparent immunity. It was only after the 1988 people's uprising that atrocities in the non-Burman areas came to light. Previously, because Cold War strategies had dwarfed all other issues, and because the ethnic non-Burmese resistance was regarded as tribal rebellion, stories of widespread atrocities perpetrated by the military were dismissed as rebel propaganda. As 1958 drew nearer, the military resorted to beating and torturing village headmen, accusing them of hiding arms in preparation for an armed uprising. The military also set out to terrorize the local populace in other non-Burman areas as a display of power. Thus, the military's nation-building efforts created a situation where the non-Burman segments of the population were alienated by military actions carried out by and for the state. The state came to be perceived by the ethnic non-Burmans as alien to society and harmful to their welfare. The situation of 'lack of fit' between the state and the ethnic non-Burman segments, and the policy of terror by systematic atrocities, naturally provided ethno-nationalist resistance in the non-Burman States.

The military's nation-building formula, and their brutal methods, did not promote any sense of nationhood among the ethnic groups but instead created a situation of vertical dysfunction between the state and the significant non-Burman segment of the broader society. When the military seized power in 1962, they hoped to win the support of the Burman populace. The generals

claimed that drastic action was necessary because the Union was threatened by the 'secessionist plots' of Shan princes. However, the cruel massacre of university students in Rangoon on 7 July 1962, four months after the coup, alienated the Burman population from the new military regime. Moreover, further imposition of repressive control in all spheres of society turned the Burman populace against the military and against the 'socialist state' which it monopolized.

The problem of state-society dysfunction was further exacerbated in 1988 when the military staged a bloody comeback following the collapse of Ne Win's military dictatorship, the military-socialist BSPP (Burmese Socialist Program Party) regime.

The Politics of National Reconciliation

Especially since 1962, state-society relations in Burma have become increasingly dysfunctional. The state generally remains unresponsive to the needs and problems of Burmese society. However, it is quick to respond to the priorities of the armed, uniformed elements within the state. A situation has developed in which the state is separated, politically insulated and isolated from its citizens.

The consequence of state-society dysfunction is, as the past decades have shown, economic decay, atrophy of political institutions, corruption of the military, paralysis of the state and its problem-solving capacity, breakdown of infrastructure, and greater impoverishment of the people. The military's resistance to societal demands for political participation has resulted in political deadlock. The pressing need in Burma today is to resolve this problem of state-society dysfunction.

In a democratic federation, the state would have to be responsive to the priorities, needs, and problems of citizens, and most importantly, be committed to the Rule of Law. In this way, the problem of state-society dysfunction in Burma will be solved and national reconciliation achieved.

The ethnic dimension of state-society dysfunction in Burma has two interrelated facets. One is political, and the other has to do with the restoration of ethnic harmony. The political facet concerns the constitutional problem of how the relationship between the ethnic and territorial constituent components of the Union is to be arranged. Or, in other words, whether Burma should be a unitary or federal state. Ethnic hatred such as in former Yugoslavia, that makes it difficult to achieve national reconciliation after years of brutal military rule and widespread atrocities, does not exist in Burma. There is still an understanding among political leaders that the problem of 'ethnic conflict' is political and constitutional rather than ethnic. The leaders of the various ethnic nationalities in Burma have participated in the struggle for democracy together with ethnic Burmese on the basis of the principle of equality, national self-determination, and the shared goals of democracy and federalism.

The years of shared struggle for democracy, especially after 1988, have induced closer interaction between the ethnic Burmese and the other ethnic nationalities. As a result, a number of building blocks and even consensus have been put into place for building a peaceful, democratic, federal Burma, and for the resolution of the country's multi-faceted problems through a dialogue process. The unity achieved among the opposition may be owed to a great extent to the emergence of Daw Aung San Suu Kyi on to the political stage in 1988. She has over time projected an image of a leader who is staunchly democratic, intelligent, humane and fair-minded, and who empathizes with the plight of the ethnic nationalities and their aspiration for equality, self-determination, human dignity and human rights.

However, other things are seldom equal. Intervening variables over which political actors in Burma have no control,⁸ always have the potential to put an end to any sort of dialogue in Burma, thus putting any national reconciliation efforts or hopes on the shelf for an indefinite time.⁹ Even if dialogue continues, the military's opposition to federalism (notwithstanding the generals' lip-service to the Panglong Spirit, equality, and brotherhood) remains a big hurdle.

The main reason for the military's objection to federalism may be that federalism would bring decentralization of both power and power structures. In a federal union, power would no longer be concentrated in the centre, nor can it be monopolized by one element of the state. Power would rest in different levels of government and be made accessible to democratically empowered local communities. Thus, in a democratic federation, the state (or rather, governments at both federal, state, and local level) would necessarily have to be responsive to the priorities, needs, and problems of citizens within the broader society, and most importantly, be committed to the Rule of Law. In this way, the problem of state-society dysfunction in Burma, the main root of the country's problems, will be solved and national reconciliation achieved.

Nevertheless, given the military regime's staunch opposition to democratic federalism, there may have to be a paradigm shift in looking at how the military can be persuaded to give up its monopolistic grip on the state in Burma and its (failed) fascistic nation-building vision. The politics of transition and national reconciliation are complex and require an equal measure of firmness and flexibility.

Endnotes

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1. The term 'ethnic non-Burman' is here used to denote the Mon, Kachin, Rakhine, Shan, etc. segments of the population in Burma, and to differentiate them from the Burmans (i.e. the speakers of Burmese) or ethnic Burmese. This practice is however not in common usage because many scholars use the term 'Burmese' to denote all citizens of Burma, and 'Burman' to refer to the Burmese-speaking ethnic segment—like 'British' and 'English'. This is however problematic because the term 'Burmese' refers to the language of the Burman and denote things Burman, such as Burmese food, Burmese dress, and so on. The term 'Burmese' does not come anywhere near the term 'British'.
2. Regarding self-administration, the pre-colonial period is problematic. The people as a collectivity had no say however (and whatsoever) in the management of affairs that affected their lives. At least under colonial rule, the administrators were held accountable for their actions.
3. "Report of the Frontier Areas Committee of Enquiry, 1947". Rangoon, 1947. Part I, pp. 16-18.
4. Curiously, the term 'race' is commonly used in Burma when speaking of ethnic or national groups. There is no specific Burmese word for race, nation, or ethnic group. All are *Lu Myo* or humankind. In Burmese, *Tarok Lu Myo* means Chinese, or ethnic Chinese. Why *Lu Myo* has been translated as 'race' is something that needs looking into. It is probably the result of the wide use of the term 'race' by the British in colonial times, when scholarship on ethnicity and race was not yet developed. In those days, even up to the early 20th century, no distinction was yet made between races, ethnic groups, tribes, etc.
5. The British annexation of Burma was undertaken in three stages. During the First Anglo-Burmese War of 1824-1826, the British annexed Arakan and lower Tenasserim. Lower Burma was annexed during the Second Anglo-Burmese War (1852-1853). In the Third Anglo-Burmese War (1885-1886), the capital city of Mandalay was captured and King Thibaw sent into exile in India.
6. AFPFL stands for Anti-Fascist People's Freedom League, the vanguard of the Burmese nationalist movement, formed during the Second World War by U Aung San and U Than Tun.
7. This is the 'national unity' mantra of the military in Burma, employed to justify military dictatorship, military monopoly on power, as well as military terror tactics in the non-Burman ethnic areas: arbitrary killing, rape, forcible relocation of villages, pillage, plunder, extortion, and so on.
8. Such as, for example, the current increased Thai concern with the Wa and their methamphetamine production on the Thai-Shan State border, combined with renewed interest at least of the U.S. military in the Thai war on drugs. The renewed fighting on the border between the Shan army and the Burmese junta's troops has the potential of escalating into a larger Thai-Burmese border war.
9. The border dispute with Thailand has probably strengthened the hands of the junta's Secretary No. 1, General Khin Nyunt, vis-à-vis other military factions and his rivals, such as General Maung Aye and his followers. There is no external enemy, either real, imagined, or manufactured, to rally the troops. Having firmed up his position within the military, the possibility that Khin Nyunt might terminate the talks with Daw Aung San Suu Kyi cannot be ruled out.

Secession and Self-Determination in the Context of Burma's Transition

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The word 'secession' has originated from the concept of 'self-determination'. Apart from its historical context, 'self-determination' can also be seen in its plain meaning. The Oxford Dictionary defines 'self-determination' as, "The right of a nation or people to decide what form of government it will have or whether it will be independent of another country or not". The second part of this definition is easy to understand. A nation or people has the right to be independent of another country when under subjugation of that country. But sometimes it is difficult to determine whether a nation striving for self-determination *is* actually a nation. In this regard, the classic case is that of India.

At the time the British colonialists led their war of conquest, India was a fragmented country although under one Mogul monarchy. The Mogul rulers themselves were foreigners and they tried to consolidate their rule by divide-and-rule policies, coupled with some reforms from time to time. The question arises whether there were any movements striving for the right of self-determination under the Mogul rule. At that time, the right of self-determination was symbolized by the strivings of the princes holding prior suzerainty over their own people. That kind of self-determination did not result in the improvement of the conditions of the people—it was merely the transfer of subjugation from one ruler to another. Nevertheless, it was seen as self-determination. When India was further consolidated under British rule and emerged as a nation, the movement for the right of self-determination transformed the existing concept of self-determination to its true meaning. It conformed to international standards that the people of India had a right to end foreign rule and determine their own form of government.

The Concept of 'Nation'

The concept of 'nation', in the first part of the definition of self-determination, may be a problematic issue itself. The Oxford Dictionary defines 'nation' as a "large community of people, usually sharing a common history, language, etc., and living in a particular territory under one government". In India, a two-nations concept was applied in the colonial days. This concept was entirely based on religions, namely Hinduism and Islam. It had nothing to do with ethnicity. It was claimed by the Muslim leaders that Islam was the binding force for constituting an Islamic nation. Under the British, India was partitioned and the regions with a Muslim majority constituted themselves into a union named Pakistan. A new country was born out of the claim for right of self-determination. The irony was that the largest wing of Pakistan (East Bengal, with a Muslim majority for the whole of Pakistan) itself seceded from Pakistan two decades later and established a sovereign country named Bangladesh. This is actually the *only* example of successful unilateral secession since 1945 (even though its emergence could hardly be called unilateral), but also established the fallacy that religion can be the basis of a nation or state. In the case of Bangladesh, language became the motive for the emergence of the new state, although ethnicity was a latent force. Obviously the definition of 'nation' often proves to be misleading. Although political scientists have come to their own formula so as to define what a 'nation' is, it is not that important for the purpose of the issue addressed in this article. The ethnic minorities in Burma do not claim to be a nation. The general definition given above is enough cogent. It might instead be interesting to confine the discussion to 'people'.

The Concept of 'People'

If we want to define the word 'people', the Oxford Dictionary is again helpful and gives several definitions: (a) "All the persons belonging to a nation, race, tribe or community"; (b) "Those persons who live in a particular place or have a particular nationality"; and (c) "The citizens of a country, especially those with the right to vote". The question that arises here is whether a 'people' can have the right to self-determination. Of course, they have the right to decide their form of government. The dilemma begins when certain groups claim a right to form their own government which is different from the one which others may form or have formed. Groups of people living in the same territory can have no right to form separate governments for themselves. They will have to participate with all others in the process of forming the government in respect of the entire territory and submit to the government formed by majority decision. This does, of course, not deny their right of dis-

sent and their right to pressurize the government of the majority toward reforms. However, it is well-settled in law that minority groups have no right to form their own governments in the areas they predominantly inhabit. In this context the term 'nation-state' is used to denote a territorial political unit under the *official control* of a national or ethnic group which in such case is usually the majority of the population. 'Official control' is emphasized because constitutionally and according to International Law, nation-states and their territories are considered to belong to national or ethnic groups. That is why nation-states are, as a rule, named after the dominant or majority group; thus Germany is the land of the Germans, Turkey the land of the Turks, etc. If this were not so, there would be total fragmentation and increased animosity. More importantly, there would be no economic progress or development—civil war and instability would be the common fate of all. This does not mean that the minority has to submit to arbitrary decisions made by the majority. The right of the minority in this context would be to protect its political, cultural and other rights. Self-determination would certainly mean the right to determine the form of government. Inherent in this is the right to have a charter of rights and to have institutions safeguarding these rights. The majority, however, cannot be thrown out either on real or imaginary grounds of discrimination or denial of self-government. A working arrangement to live in coexistence has to be evolved and that is a federal arrangement, a federal constitution.

Federal Constitutions and Self-Determination

What is this federal constitution? Is it a device to perpetuate fraud on the minorities? Or will it provide the right of secession to the minorities in the event they so desire because of consistent oppression or discrimination by the majority? It has even been said that "Federalism does not mean anything to the non-Burman groups unless the right to self-determination, including the right to secession, is part of it".¹ This statement needs a serious scrutiny. Clubbing the two concepts of federation and secession, which are contradictory in terms, is inaccurate. No federal constitution contains a provision of secession. On the contrary, a federation does not permit separation. Federal unions have been formed after voluntarily relinquishing the separate existence of units. It is therefore unimaginable to think in terms of separation within the framework of a federation. The classic case is that of the United States of America. When the southern states had joined the federation of the USA and thereafter refused to abide by the federal decision to abolish slavery, they threatened to secede from the Union and declared themselves seceded states. Although the issue apparently was slavery, in reality it was an issue of secession. Abraham Lincoln succinctly said that "The Union is One and Indivisible". He saw the United States as an indestructible whole. It is wrong to assert that a federation is meaningless without secession. In the parameter of federation, secession has no legitimacy.

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Unilateral Secession of Colonial Territories

Secession is the attempt by some region in a political system to become independent of the rest of the state and rule itself as an autonomous nation. Chapters 11 and 12 of the Charter of the United Nations made specific provision for territories of colonial type, i.e. dependent territories geographically distinct from the territory of the parent state. None of the Articles of Chapter 11 and 12 actually use the phrase "right to self-determination". However, the concern of the United Nations was evidently the progress to self-government of the peoples of dependent territories. The territories concerned fell into two classes: trust territories and non-self-governing territories.

The *trust territories* included in particular the territories formerly covered by the system of mandates under the League of Nations, as provided for in Article 22 of the Covenant of the League. Mandated territories were taken from Germany and the Ottoman Empire (Turkey) after the First World War. The administration of those territories was conferred on the victorious states. Those mandated territories which had not achieved independence were to be brought under the International Trusteeship System by separate agreements under Article 77 of the Covenant.² Although this Article envisaged that certain additional territories might be brought under the Trusteeship System by agreement, in fact this only happened in the case of Somalia (Italian Somaliland).

The *non-self-governing territories* were dealt with in Chapter 11 of the Covenant. According to Article 73, these were "territories whose peoples have not yet attained a full measure of self-government". Initially these territories were identified by a voluntary listing process by the states responsible for their administration: Australia, Belgium, France, Great Britain, the Netherlands, New Zealand, and the United States. Problems however arose when Spain and Portugal, which only became United Nations members in 1955, refused to bring any of their colonial territories within the system. In response to this, the General Assembly of the United Nations specified criteria for non-self-governing territories. Apart from the Spanish and Portuguese colonies, only Southern Rhodesia and certain French territories (of which the most recent was New Caledonia) belonged to this category.³

The subsequent development of international law in regard to non-self-governing territories, as enshrined in the Charter of the United Nations, made the principle of self-determination applicable to all of them. The concept of the trust was confirmed and expanded to all "territories whose peoples have not attained a full measure of self-government" (Article 73). Thus it clearly embraced territories under a colonial regime. Important in this regard is the Declaration on the Granting of Independence to Colonial Countries and Peoples,⁴ embracing all peoples and territories which "have not yet attained independence". However, the principle of self-determination which was made ap-

plicable to non-self-governing territories, did not involve automatic rights of unilateral secession for the people of those territories. In the vast majority of cases, the progress to self-government or independence was consensual and achieved peacefully. It occurred with the agreement of the state responsible for the administration of the territory, in accordance with law and pursuant to arrangements between the government of that state and local leaders. These arrangements dealt with the modalities of transfer of power. The United Nations did not advocate or support unilateral rights of secession for non-self-governing territories, except where self-determination was opposed by the colonial power, for instance in the Portuguese African colonies—Angola, Mozambique and Guinea-Bissau.

A few colonial territories have opted for a formal association arrangement with the former colonial power, under which they achieved some form of separate status falling short of independence. They did not become United Nations members in their own right. This applied to, for example, Puerto Rico (United States) and the Cook Islands (New Zealand). More recently similar arrangements were made with different parts of the United States Strategic Trust Territory of the Pacific Islands (Micronesia, Marshall Islands and Palau) which have been geographically regarded as independent. Other former colonial territories have been integrated in a state following an act of self-determination, including the Cocos/Keeling Islands (Australia), Greenland (Denmark), and the Northern Mariana Islands (United States). The people of some other territories, such as Bermuda, have voted to remain dependent and continue to fall within Chapter 11 of the Charter of the United Nations.

Unilateral Secession of Non-Colonial Territories

Outside the colonial context, the United Nations are extremely reluctant to admit a seceding entity to membership against the wishes of the government of the state from which it has purported to secede. Where the parent state agrees to allow a territory to separate and become independent, the terms on which separation is agreed between the parties concerned will be respected. If independence is achieved under such an agreement, rapid admission to the United Nations will follow.⁵ Unilateral secession achieved in any other way has attracted no international support or recognition since 1945.

There have been numerous cases of attempted or threatened unilateral secession of non-colonial territories since 1945, such as Biafra (Nigeria), Katanga (Congo), Kashmir and East Punjab (India), Karen and Shan states (Burma), Cyprus (Turkey), Chechnya (Russian Federation), and Kurdistan (Iraq/Turkey). In all these cases one common feature can be observed: where the government of the state in question has maintained its opposition to the secession, such attempts have gained no international recognition. This has been

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true even when other humanitarian aspects of the situations have caused international concern and also action. For example, the situation of the Kurds in northern Iraq has been a matter of international concern, triggering action by the Security Council under Chapter 7 of the Charter of the United Nations, and by individual states by way of both civil and military intervention. But these operations have been explicitly carried out on the basis of the territorial integrity of Iraq—despite continued Iraqi repression of the Kurds and the stringent United Nations response to most other aspects of Iraqi policy.⁶

It is precisely because of the threat represented by unilateral secession to many states, and the potential for instability, that states are insistent on the principle of territorial integrity. Inclusion of a provision of right of secession in a federal constitution is, apart from being ultra vires of the constitution, a potential seed to cause its destruction. Such a provision keeps alive the idea and symbolism of separation. Even where a region has a strong sense of local identity or of shared interests conflicting with the rest of society, secession seldom succeeds. Hardly anywhere is the idea of secession seen as legitimate. In international practice there is no recognition of a unilateral right to secede based on a majority vote of the population of a sub-division or territory, whether or not that population constitutes one or more 'peoples' in the ordinary sense of the word. In international law, self-determination for peoples or groups within an independent state is achieved by participation in the political system of the state, on the basis of respect for its territorial integrity. Even in the context of separate colonial territories, unilateral secession was an exception. Self-determination was in the first instance a matter for the colonial government to implement. Only if it was blocked by that government did the United Nations support unilateral secession. The Baltic states form an exception altogether: they were strictly not 'new' but re-emerged in the 1990s after their illegal annexation in 1940.

It has always been possible for a group to separate from a state and achieve independence by gaining exclusive control over its territory (if necessary, by winning a war of independence). The Spanish American colonies did so in the early 19th century. Secession of this kind was a process, which could take many years and which might, or might not, lead to a successful outcome. This could either be seen as an expression of inherent rights to be free from oppression, or as an act of treason. But, however described, unilateral secession did not involve the exercise of any right conferred by international law. International law has always favoured the territorial integrity of states.

Indivisibility: A Synonym for Territorial Integrity

This pattern is reflected in the so-called 'safeguard' clause in the United Nations General Assembly Resolution 2625, the Friendly Relations Declaration

of 1970.⁷ In accordance with this clause, a state whose government represents the whole people on a basis of equality complies with the principle of self-determination in respect of all of its people, and is entitled to the protection of its territorial integrity. The people of such a state exercise the right of self-determination through their equal participation in its system of government.

The fundamental laws of many other federations and unitary countries in the world contain express provisions guaranteeing the survival of the state. If we are to declare that a federation is indivisible, we must be sure we understand why that is so, both legally and constitutionally. The principle of indivisibility was enshrined, for instance, in Canada's constitution in 1867. It was preserved and confirmed in the advisory opinion of the secession referendum in 1998—the people of Canada agreed that if Canada was indivisible in 1868, then Canada remains indivisible today.

Canada's constitution was not drafted in ignorance. When the Canadian federation was being designed, the neighbouring United States were emerging from a civil war. In 1861, President Abraham Lincoln interpreted the American Constitution as binding him with the duty to maintain the American nation. Some southern states had tried to secede from the union but eventually that would not last very long. Yet history teaches us that the American people did not abandon their sovereignty and that Lincoln fulfilled his constitutional obligations. Of course, this dramatic episode in American history did not escape the attention of Canada. 'Indivisibility' is a synonym for 'territorial integrity', an attribute belonging only to sovereign states. Because Canada is a sovereign state, it has the right to international recognition of its territorial integrity. In order to maintain Canada's sovereign status, the Government of Canada has the inescapable duty to preserve Canada's territory from any threat, whether internal or external.

The right to territorial integrity is also recognized by the international community in a number of international instruments, such as the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, and the Charter of the United Nations. By comparison with the acceptance of self-determination leading to the independence of colonial territories (so-called 'external self-determination'), the practice regarding unilateral secession of non-colonial territories is clear. The principle of territorial integrity has been significant: since 1945 no state which has been created by unilateral secession has been admitted to the United Nations against the declared wishes of the government of the predecessor state.⁸

In the case of Burma, the problem of secession has been compounded. This right of secession was incorporated in the 1947 Constitution when the country was established as a sovereign state, the Union of Burma. At the time the Constitution entered into force, three ethnic minorities were given the right to secede from the Union after ten years. This was clearly a historical legacy, apart from the question as to why the issue was not settled otherwise, accord-

The principle of territorial integrity has been significant—since 1945 no state which has been created by unilateral secession has been admitted to the United Nations against the declared wishes of the government of the predecessor state.

ing to international standards. The 1947 Panglong Conference has been made the rock bottom of the ethnic right to separation. At that time, only three ethnic nationalities signed the Panglong Agreement—when the 1947 Constitution was framed, giving the right to secession, only three ethnic states existed. Later, four additional states were formed, making a total of seven ethnic states. But the right to secession given in the Constitution was not an automatic right: it was subject to a constitutional legal process.⁹ In spite of forty years of armed struggle and the grip of secession fever, at no point in time have the ethnic nationalities unilaterally operated as sovereign states. Although the fiat of the Rangoon government might not have reached them, by and large the Burma Army (predominantly composed of Burmans) reigned the countryside. After prolonged armed struggle, sixteen armed ethnic groups entered into cease-fire agreements with the Burma Army. The 'official control' in the entire country continued to remain with the central authorities. The overall situation in respect of secession is nebulous and has failed to dent the geographical unity of Burma.

It is not suggested that armed struggle has failed or that armed struggle is destined to fail in a movement for self-determination. What is argued is that armed struggle is the last recourse. By and large the movement has to be sustained on the principles of peaceful negotiation. There are examples galore. In South Africa, the anti-apartheid movement (after prolonged armed struggle) switched over to peaceful negotiations within a week. So is the case in the conflict between Palestine and Israel: negotiations continue to be at the top of the agenda. Even in the case of Burma, the anti-fascist armed struggle against the Japanese invaders was not continued against the British colonialists, although they came back to reoccupy the country. The freedom struggle entered into a new phase of negotiation with the British rulers. The consummation of the negotiations was the complete independence of Burma, in other words, secession from the British Empire. The issue of secession has to be seen in its specific context, shorn of its emotional and false consciousness in order to avoid the quandary of secession.

Federation with the Right of Secession: A Legal Fallacy

The 1947 Panglong Conference has been made the rock bottom of the ethnic right to separation. But the right to secession given in the Constitution was not an automatic right: it was subject to a constitutional legal process.

Some people maintain that, since the 1947 Constitution had a provision for secession, the new constitution should contain a similar provision. But did it help the ethnic nationalities to achieve secession, whatever it meant, or was for whatever reason its realization prevented? The 1947 circumstances and conditions were peculiar to time and place, and are likely to have no overwhelming relevance to present events. At that time, neighbouring India was swept away by the secession movement which eventually led to the creation of a new state, carved out of British India. The entire anti-colonial movement stood at the threshold of disintegration. U Aung San, the architect of Burma's

independence, envisaged this danger in Burma. Hence, a constitution was put into place which could present unity against the excuse not to transfer power. In the bargain some unfederal elements were incorporated in the constitution. These unfederal elements were a check and balance against immediate secession. They were designed so that in the first decade mutual trust could be built up—the provision of secession remained dormant and non-effective. It was a fair exchange between majority and minority ethnics.

In today's context, if the minority ethnics demanded the right of secession together with maximum autonomy for their respective states, it would be unfair. It would be a case of having one's cake and eating it too. The ethnic leaders have to make up their minds whether they want to live in harmony with the ethnic majority, and if so, let there be bargaining on the issues of autonomy. The threat of secession can neither be legally sustainable, nor can it be used as a bargaining chip. To imagine negotiations from the viewpoint of independent states willing to form a federal union, is a legal fallacy. Attempts to frame state constitutions, however well-motivated these may be, cannot give any legitimacy to the state constitutions being drafted by the ethnic leaders. There is a need for understanding the state powers which they want for themselves within the framework of a future federal constitution. It could be a blueprint of power-sharing without any hidden agendas, provided it also addresses the core issue of federal authority.

Federalism, Constitution and Reconciliation

Reconciliation in Burma, dignified and honourable, has to be reflected in the constitution. The constitution must be lawful, morally sound, and intellectually consistent. History has bequeathed to us a paradigm which we have to refine according to our own needs and characteristics. We have to learn the lessons of history. We cannot escape history. The way to reconciliation in Burma has been outlined in federalism. Federalism has been generally described as a form of government in which power is constitutionally divided between different authorities in such a way that each exercises responsibility for a particular set of functions and maintains its own institutions to discharge those functions. In a federal system, each authority therefore has sovereignty within its own spheres of responsibilities, because the powers it exercises are not delegated to it by some other authority. The precise balance of power between the central and state authorities in federal systems varies between federations and, over time, also within a particular system. In the United States of America, for example, powers not originally granted to the federal government (such as the power to impose a federal income tax) have been acquired by constitutional amendment. Less formal methods to alter the balance between federation and state have been court interpretations of the proper spheres of activity of federal and state authorities, as was done over reappor-

tionment of congressional seats and criminal procedures in the United States in the 1960s.¹⁰

It is most important that there has to be one country, although systems may vary. Given this commitment, the need then would be to design the framework of governance. If such a framework is based on sound principles with mechanisms for redress in the event of violations, there need not be any apprehension for domination or discrimination. These mechanisms, together with increased democratic consciousness, will enable proper rectification of deviations.

Claims have been put forward that in the case of Burma, representation in the government should be based on the equality of ethnic nationalities, irrespective of the strength of their population. This would mean that the basic principles of democracy and equality are eroded. The essence of democracy—one person, one vote—would be upturned. Because democracy for the minority cannot be at the expense of the democracy for the majority. Both have to respect each other's rights and design mechanisms to safeguard an inclusive democracy. This is not an impossible task, provided there is the will to do it. A new kind of federalism to meet Burma's peculiar needs has to be evolved. All countries with federal constitutions have had to evolve their own versions.

Globalization and the rapid and impressive developments in technology, transportation and telecommunications have transformed many countries. Information has become a most important element in today's world. Even non-industrial societies are gradually being transformed into information societies. National borders are becoming meaningless or porous. Nevertheless, ethno-cultural and religious groups are increasingly asserting to have distinct territorial boundaries to separate themselves from the larger national units to which they belong. This can only be resolved by meticulous application of the Rule of Law in all spheres of political, economic, and social activities of the people. To the extent these new ideas can flow, the new generations of the ethnic groups in Burma will be freed from prejudice and mistrust. Trust begets trust. The leaders of all nationalities know about the struggles of minorities in other parts of the world and the global trends favouring democracy. They know the need for accelerating the process of democratization, to start respecting the human rights of every citizen.

What is needed is to halt the purposeless debate on secession and start with a revision of visions, based on sound evaluation of the past. The best alternative is not separation but genuine reconciliation.

Secession: A No-Win Situation

Today the scenario exists in an entirely different context. The movement for the right of secession, after three generations of meandering, has entered into a blind alley. It is a no-win situation. The debate on the subject of secession has been going on for four generations. The measures of armed struggle and

its brutal suppression have added an inter-ethnic dimension to it. Tension and conflict have increasingly become more compelling issues. What is needed is to halt the purposeless debate on secession and start with a revision of visions, based on sound evaluation of the past. Such a process usually starts with feelings of war fatigue. In need of a new direction, a new road-map has to be drawn—which is, in legal terms, the constitution. The constitution is the real wall between chaos and civilized progress. But can it guarantee the ethnic groups their right to self-determination? And if not, what then? The alternative to a constitution is armed struggle. Of course, the ethnic nationalities could continue their struggle for decades, but that would only become for eternity (as is the case with India and Pakistan). Imagine that, for example, a sovereign Shan State comes into existence. It would have to coexist with its neighbour, the Burman State. The two states would not be able to live in harmony after having broken away from each other in feud and bloodshed. The conflict would aggravate and even lead to wars, as has happened with India and the seceded state of Pakistan.

In such a situation, the best alternative is not separation but reconciliation. This reconciliation must not be a fraud. It has to be genuine and based on the tested principles accepted by the international community. Even if people might think that the transition would be endangered, the path to reconciliation is the only option. This, together with the invisible (and invincible) power of the Rule of Law, will result in a radical transformation of the country. A new Burma would emerge. But these developments cannot affect the established rules and practices with respect to self-determination and the territorial integrity of states. International law and the United Nations lend no support to the view that peoples within independent states have a unilateral right to secede. However, the hidden bright spot in the otherwise dismal situation is that the people will be free from military dictatorship, and also free to create a government that does work. But more important than the government is the basic wealth of the land, and the intelligence, diligence and patience of its people.

Endnotes

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

1. Khin Maung Win, "Federalism and Burma". *Legal Issues on Burma Journal*, No. 9, August 2001, p. 60.
2. However, the International Court of Justice held that there was no automatic transfer of mandated territories to the trusteeship system. See: "Status of South West Africa Advisory Opinion". The Hague: Interna-

- tional Court of Justice Reports 1950, p. 128.
3. On Portuguese territories, see Paragraph 1 of the United Nations General Assembly Resolution No. 1542 (XV) of 15 December 1960. Paragraph 5 of this Resolution deals with Spanish territories. On Southern Rhodesia, see General Assembly Resolution No. 1747 (XVI) of 28 June 1962. On New Caledonia, see General Assembly Resolution No. 41/41A of 2 December 1986.
 4. Declaration on the Granting of Independence to Colonial Countries and Peoples; United Nations General Assembly Resolution No. 1541 (XV) of 14 December 1960.
 5. On United Nations admission practice, see: R. Higgins, "The Development of International Law Through the Political Organs of the United Nations". Oxford: Oxford University Press, 1963, pp. 11-57; and also, J. Crawford, "The Creation of States in International Law". Oxford: Clarendon Press, 1979, pp. 132-137.
 6. See: Security Council Resolutions No. 686 of 2 March 1991; No. 687 of 3 April 1991; No. 688 of 5 April 1991; and No. 949 of 15 October 1994. Each of these Resolutions explicitly affirms Iraq's territorial integrity.
 7. Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations; United Nations General Assembly Resolution No. 2625 (XXV) of 24 October 1970. Paragraph 7, "The Principle of Equal Rights and Self-Determination of Peoples".
 8. Bangladesh, although it applied for UN admission in 1972 (S/10759), was not admitted until 1974, subsequent to its recognition by Pakistan.
 9. "The Constitution of the Union of Burma", 24 September 1947, effective 4 January 1948. According to Chapter 10, Article 204, "The President shall (...) order a plebiscite to be taken for the purpose of ascertaining the will of the people of the State concerned". And Article 206 stipulated that, "(...) All matters relating to the exercise of the right of secession shall be regulated by law"—which means, regulated by parliament. This changes unilateral into bilateral secession.
 10. David Robertson, "Dictionary of Politics". London: Penguin, 1993, pp. 184-185.

Law and Money Laundering in Burma

*Peter Gutter**

Money laundering is the most significant economic phenomenon of organized crime. Containing the influence of organized crime requires the elimination of its livelihood, which in Burma is mainly the illicit drug trade. Under the rule of the military junta, Burma has become the world's biggest producer of heroin and methamphetamines. Burma's drug lords are now major investors in the country's economy and have considerable cash reserves at their disposal. In many countries nowadays, tighter banking controls make it difficult for criminals to launder money for use in the legitimate economy. However, banking control in Burma is not very tight, legislation is ineffective, and the military junta is clearly benefiting from the drug trade. The Organization for Economic Cooperation and Development has added Burma to its blacklist of countries deemed uncooperative in fighting money laundering.¹ As a result of this, the Burmese junta is currently in the process of drafting an "Illicit Proceeds and Property Control Law".

Burma: Narco-State?

Money laundering in Burma is closely linked to the drug trade. Organized crime in Burma generates huge sums of money by drug transactions and corruption. By its very nature, money laundering occurs outside the normal range of economic statistics, making the scale of the problem hard to estimate. Nevertheless, all estimates mention billions of illegal dollars in Burma's money laundering system. Of course the Burmese junta has never released any official figures and seems to deliberately ignore the problem. Burma lacks a basic set of anti-money laundering provisions. It has not yet criminalized money laundering for crimes other than drug trafficking. There are no anti-

money laundering provisions in the Central Bank Regulations for financial institutions. Other serious deficiencies concern the absence of a legal requirement to maintain records and to report suspicious or unusual transactions. There are also significant obstacles to international cooperation by judicial authorities.²

Burma has sharply increased its illegal drug exports since the junta's cease-fire agreements with ethnic insurgents in 1989. Since then, United States drug enforcement agencies have been estimating Burmese opium production at 2,000-2,600 tons per year.³ In comparison, production ranged between 200 and 400 tons annually in the 1970s.⁴ This has sent a flood of narco-dollars into the country. All economic activities in Burma have become instruments of drug money laundering.⁵ Burma's national company Myanmar Oil and Gas Enterprise (MOGE), for example, has been a main channel for laundering the revenues of heroin produced and exported by the Burmese army. Despite the fact that MOGE has no assets besides the limited installments of its foreign partners and makes no profit, and that the Burmese state has never had the capacity to allocate any currency credit to MOGE, the Singapore bank accounts of this company see transfers of hundreds of millions of dollars.⁶ According to the United States Embassy in Rangoon, at least 50% of Burma's economy is unaccounted for and extralegal: the earnings from heroin now exceed those from all of Burma's legal exports and criminalize Burma's economy.⁷ The International Monetary Fund cited large expenditures unaccounted for by the Burmese junta.⁸ In the 1990s, the junta purchased arms valued at billions of dollars—at least ten times more than the country's official foreign exchange reserves.

The Burmese government has long been involved in the drug trade.⁹ According to the Australian Parliament Committee of Foreign Affairs, Defense and Trade, Burma's narcotics trade is nowadays even protected at the highest level of the government. Investments in infrastructure and hotels come from opiate-producing organizations. Barriers between the opiates sector and the legal economy have weakened. Drug money is welcomed by Burma's state-controlled banks. Current Burmese banking regulations are notably pliant,¹⁰ permitting any amount of foreign exchange to be deposited upon payment of a 30% tax (or less if certified by the junta as "investment for national development"). The National Bank in Rangoon even provides money-laundering services openly, turning drug proceeds into 'clean money' for a 40% charge. Occasionally official arrangements in the state-controlled press promote specials at a reduced rate of 25%, no questions asked.¹¹

However, the junta has discovered that drug enforcement issues can be an important tool to gain international approval, and claims that it is "serious about fighting drugs". The Burmese government's formal drug-enforcement efforts are led by the Central Committee for Drug Abuse Control (CCDAC), created in 1975, which is comprised of personnel from various security services, including the police, customs, military intelligence, and the army. The CCDAC,

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headed by Colonel Kyaw Thein, has 18 drug-enforcement task forces around the country, most located in major cities and along key transit routes near Burma's borders with China, India and Thailand. The CCDAC is under the control of the Directorate of Defense Services Intelligence (DDSI). The United States Drug Enforcement Administration (DEA) says that the CCDAC "continues to suffer from a lack of adequate resources to support its law-enforcement mission",¹² but the junta does not hesitate to make boastful statements about it, such as, "It is high time the international community became acquainted with the excellent work that is being carried out in Myanmar against the illicit production and trafficking of heroin".¹³ Burmese officials make a big show of seizing drugs, but according to Kyauk Ye, a Chinese opium grower formerly based in Burma, the junta "seizes heroin and opium, as has been shown on TV and in newspapers. They later re-sell [these drugs] in the domestic market, and then they re-seize the drugs and re-sell them again. That's how they make such a profit".¹⁴ While Burmese production under the junta is measured in tons, the unconfirmed seizure figures constantly trumpeted by the junta are measured in grams. According to DEA agents in Rangoon, Burmese officials attempting to look 'tough on drugs' even staged the burning of a fake heroin refinery. It would be grossly naïve to assume that the junta is actually really serious about fighting drugs.¹⁵

Whether Burma is a 'narco-state' probably remains a matter of opinion, but fact is, however, that drug lords are now involved in running industries, banks and airlines, in joint ventures with the government. The junta is increasingly dependent on narco-dollars to keep its struggling economy afloat. According to Thai government officials, "Burma is the only government in the world to benefit from narcotics".¹⁶ This makes the countering of money laundering in Burma ever more difficult.

Before looking at the relevant laws, it is useful to have some idea of the devastating impact of money laundering on Burma's economy and society.

Why is Money Laundering Bad for Burma?

Interpol defines money laundering as "Any act or attempted act to conceal or disguise the identity of illegally obtained proceeds so that they appear to have originated from legitimate sources".¹⁷ In other words, money laundering is criminal finance.

The possible social and political costs of money laundering, if left unchecked or dealt with ineffectively, are serious. Apart from being an imminent threat to the nation-state,¹⁸ organized crime can infiltrate financial institutions, acquire control of large sectors of the economy through investment, or offer bribes to public officials and the government. Money laundering is bad for the

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Rule of Law¹⁹ and has negative macroeconomic consequences, such as inexplicable changes in money demand, prudential risks to bank soundness, contamination effects on legal financial transactions, and increased volatility of international capital flows and exchange rates due to unanticipated cross-border money transfers. The siphoning away of billions of dollars a year from normal economic growth leads to serious trouble for a developing country like Burma.

In Burma's unstable economy, the kyat is rapidly losing its value to hard currencies such as the US dollar. Foreign currencies are now the preferred means of transaction, but the enormous dollar holdings of Burmese drug traffickers represent a major problem. For the Central Bank, the basis on which to assess the demand and supply for the kyat (an important factor in setting interest rates) is distorted. The increase in the level of foreign money creates a source of monetary expansion that reduces control of the money supply.²⁰ By lending hard currency to domestic borrowers, the repayment in kyats makes it easy for criminal organizations to launder drug money. Cash holdings smuggled into the economy have a high premium because of the rapidly depreciating kyat. Direct-lending options have become attractive in Burma due to the increasing international enforcement of money laundering laws. Informal and illegal credit markets have become very influential. There are many unmet credit needs among companies, so unofficial means of financing proliferate.²¹

The integrity of banking and financial services depends on high legal, professional and ethical standards. Under the Burmese junta, however, there are no such standards so there is no financial integrity either. Funds from criminal activity can easily be processed through Burmese institutions, either because its employees and directors are corrupt or because the institution itself turns a blind eye to the criminal nature of such funds. Hence, Burma's financial institutions have become part of the criminal network itself.²²

The corrupt junta strongly controls banking activities and dictates prices, wages and exchange rates. There are no free commercial interest rates to reflect the true cost of money. If banking were left free to develop in response to the demand for its services, it would produce better results.²³ But heavy state intervention is still common in Burma. And because the country's financial market is inefficient, transaction costs can rise to levels untenable in a competitive market. So, criminal money lenders in Burma enjoy four distinct advantages over the 'legal' banking system. First, because their transaction costs are much lower, criminal lenders do not carry backlogs of non-performing loans which burden the banks.²⁴ Second, criminal lenders can freely discriminate among borrowers, i.e. they may impose different lending rates in order to extract the maximum amount of interest from each borrower. Third, criminal lenders can play borrowers off against each other in order to extract personal information on borrowers' creditworthiness. Fourth, criminal lenders can use violence to ensure repayment.²⁵

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Whereas the junta can regulate the use of hard currency borrowings (to finance essential imports), criminal financing flows along hidden channels beyond government control. Spending behaviour becomes influenced not only by the official money supply but also by adding informal credit. In turn, the demand for money in the official banking system reflects only part of Burma's domestic economic activity. Interest rates become much less useful for estimating money demand and the government ends up with less accurate information on which to base fiscal and monetary policies.

In situations of reduced money growth, hard currency can strengthen reserves, ease the hardship associated with expenditure-reducing policies, and moderate foreign debt. In this light, the junta welcomes drug money as a potentially stabilizing force. It is a source of capital without being conditionally attached.²⁶ However, now that it is known that Burma has opened its doors to drug traffickers' cash and organized crime, the country cannot attract the kind of solid long-term foreign investment that seeks stable conditions, good governance and which helps sustain development. There is a pressing need to counter money laundering in Burma.

The Financial Institutions of Myanmar Law

The Financial Institutions of Myanmar Law of 1990²⁷ was promulgated "to streamline Myanmar's monetary policy and extend banking services". It provides for the establishment of financial institutions, whether state-owned or private, "to perform financial activities with the permission of the Central Bank". The law defines a 'financial institution' as an "enterprise [established in Burma] whose corporate purpose is intermediation on the money or capital markets through the collection of financial resources from third parties for investment on their own account in credit operations, credit and public debt instruments, securities, or other authorized financial activities".

Actually under this law, financial institutions can do anything as long as they have permission from the Central Bank, i.e. from the military. The law is vague enough to allow criminal organizations to perform financial operations. Although Articles 6 to 8 clearly define the activities of financial institutions, Article 9 says that the Central Bank may permit a financial institution to engage in more activities. Article 29 says that financial institutions shall acquire and keep the legal documents for credit operations, but under Article 30(b) financial institutions may get permission from the Central Bank for an exemption to documentation. Article 38 prohibits financial institutions from "(a) entering into contracts or agreements or adopting practices of any kind which would secure them a position of dominance on the money, financial or exchange markets; (b) engaging in manipulative practices in order to obtain an unfair advantage for themselves or for third parties". But the law does not say

who is going to determine what 'dominance' or 'unfair advantage' is, or how it is measured.

Chapter 7 is supposed to regulate the auditing, reporting and supervision by the Central Bank, but it does not describe these activities in detail. Chapter 10, Article 74 says, "The financial institutions (...) and [their] personnel who violate (...) this Law shall be subject to [either of?] the following administrative penalties: (a) warnings; (b) orders including those restricting the operations of financial institutions; (c) fines; (d) temporary or permanent termination from duties in the financial institution; (e) cancellation of the licence to operate". Under Article 81, if personnel or auditors of financial institutions disclose information obtained in the performance of financial activities, they shall on conviction be punished with a fine which may extend to 10,000 kyats or with imprisonment which may extend to two years, or with both. Under Article 82, if anyone carries out the activities of the financial institution without a licence granted by the Central Bank, the penalty can be a fine which may extend to 50,000 kyats or imprisonment of up to five years, or both. But Article 88 says that "in taking legal action under Articles 81 and 82, the prior permission of the Central Bank shall be obtained". This places (the officials of) the Central Bank above the law.

The Central Bank of Myanmar Law

Under the Central Bank of Myanmar Law of 1990,²⁸ the Central Bank can "operate with relative independence and exercise supervisory and regulatory authority over a wide range of financial institutions, both State and private-owned". In particular, the law empowers the Central Bank to set reserve requirements, maximum discount rates, maximum and minimum interest rates on loans and deposits, asset and liability ratios and minimum cash margins, "applicable uniformly to all financial institutions without discrimination". The law includes provisions governing the control of foreign exchange transactions and inspection of financial institutions, but leaves it completely up to the Bank how to do this. Article 91 authorizes the junta to permit the Central Bank to engage in any operation relating to the financial sector. Article 93 is particularly vulnerable to abuse, stipulating that in taking legal actions against the Central Bank, prior sanction of the Central Bank must be obtained—never mind the Rule of Law.

The Foreign Exchange Regulation Act

Under the Foreign Exchange Regulation Act of 1947,²⁹ 'foreign exchange' in-

cludes “all documents evidencing or creating any right to deposits, credits or balances in any foreign country or to payment in foreign currency, whether such documents are in the form of currency notes, bank notes, postal orders, money orders, cheques, drafts, traveler’s cheques, letters of credit, bills of exchange, promissory notes or otherwise”. The Act does not say anything regarding the possible sources of foreign exchange, or about reporting suspicious or unusual transactions. Although the Act contains some articles that could be useful against money laundering, it confers such wide powers on the (military) Controller of Foreign Exchange that it becomes vulnerable to abuse. For example, the Act does not say anything about the accountability of the Controller.

The Money Lenders Act

The Money Lenders Act of 1945³⁰ regulates the registration of “persons who carry on the business of advancing loans (...) including their legal representatives and successors-in-interest whether by inheritance, assignment or otherwise”. Article 16 stipulates that money lenders are not allowed to use violence or intimidation to ensure repayment, but otherwise the Act is not really useful in the fight against criminal finance. The Act does not provide for adequate screening measures, so criminal lenders can participate like anyone else. Nothing is said about an inspection mechanism or about the sources of money. Another deficiency is the absence of a legal requirement to report suspicious or unusual transactions.

The Bankers’ Books Acts

Although the Bankers’ Books Evidence Act of 1891³¹ and the Bankers’ Books (Inspection) Act of 1947³² empower law enforcement agencies to inspect any “ledgers, day books, cash books, account books and all other books used in the ordinary business of a bank”, the actual aim of the Acts was not so much the countering of money laundering as allowing banks to provide the Court with certified copies of transactions—courts found it impractical to be presented with piles of bankers’ books. The Acts could be useful tools against money laundering if only Burmese banks and police were not so corrupt. The 1891 Act says that the Court “may order that law enforcement officials may inspect and take copies of any entries in a banker’s book for any of the purposes of legal proceedings”. The 1947 Act added to this that such inspection may not be carried out by officers below the rank of District Superintendent of Police. However, the junta abolished this Act in 1992. The grounds for repeal

were given as “incompatibility with market economy”, “long disuse” and “no anticipated need in the future”.

The Narcotic Drugs and Psychotropic Substances Law

In 1993, the Burmese junta enacted the Narcotic Drugs and Psychotropic Substances Law.³³ Although more or less in technical conformity with the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, to date this law remains unused as Burmese police and judicial officials have not enforced it. The law contains some useful legal tools for addressing money laundering, the seizure of drug-related assets, and the prosecution of drug conspiracy cases. However, Burmese drug officials claim they lack sufficient expertise to deal with money laundering and financial crimes.³⁴

Although money laundering is not explicitly mentioned in the aims for the law, Article 3(d) mentions “more effective penalties (...) in respect of offences relating to narcotic drugs and psychotropic substances”. Article 6(i) provides for the seizure of “immoveable property involved in an offence under this Law, money, property and benefits derived from the transfer and conversion of property involved in the offence”. Unfortunately this law does not criminalize money laundering for crimes other than drug trafficking. Article 6(k) stipulates that “responsible persons of the relevant bank and financial institutions [shall] allow relevant persons authorized to search, seize and inspect financial records relating to an offence under this Law, to make copies thereof and to seize the same as exhibits”. Chapter 7, Article 13 deals with actions taken under this law in respect of “(a) search and seizure of narcotic drug, psychotropic substance, money, property and implements involved in an offense and arrest of the offender; (b) search and seizure of money, property and benefits derived from transfer, conversion and transformation of property involved in an offense; (c) inspection and making copies of financial records kept at the bank and financial institutions”. Under Article 14, “responsible persons from the bank and financial institutions shall (...) in respect of money and property involved in an offense under this Law, (a) permit the inspection of financial records and making copies thereof and seizure of the exhibits; (b) pending the conclusion of a case in which action is being taken, take custody of the financial records, money and property involved in the offense, in accordance with the stipulations, without returning or transferring the same to anyone”.

According to Chapter 8, Article 16(f), “Whoever is guilty of any of the following acts shall on conviction be punished with imprisonment for a term which may extend from a minimum of five years to a maximum of ten years and may also be liable to a fine: (...) misappropriating, causing to disappear, destroying, removing or transferring any property which has been seized or at-

Although the Narcotic Drugs and Psychotropic Substances Law contains some useful legal tools for addressing money laundering, to date this law remains unused as Burmese police and judicial officials have not enforced it.

tached under this Law". Article 17, meting out the same penalties as Article 16, stipulates that "a responsible person from the bank or financial institutions, who is guilty of any of the following acts in respect of money, property and benefits involved in an offense under this Law shall on conviction be punished: (...) (a) transferring of accounts, causing to disappear, altering and amending relevant financial records so that action may be taken against the offender; (b) refusing to allow a person authorized to search and seize (...) to inspect the relevant financial records, make copies thereof and seize the exhibits; (c) returning and transferring without the permission of (...) the relevant Court financial records relating to the offense and money property and benefits seized as exhibits". Article 18 is meant to ensure the accountability of law enforcement personnel, as it metes out imprisonment for "asking and accepting any money and property as gratification either for himself or for another person".

Article 19 deals explicitly with money laundering: "Whoever is guilty of any of the following acts shall on conviction be punished with imprisonment for a term which may extend from a minimum of ten years to a maximum of an unlimited (!) period: (c) concealing and causing to disappear money, property and benefits derived from the commission of any offense contained in this Law, so that action may not be taken; (d) transferring and converting money, property and benefits involved in an offense, so that it may appear to have been acquired from a legitimate source". Chapter 8, Article 24(a), says that "the Court shall (...) pass an order for the confiscation (...) of money involved in the offence". The law provides some useful legal tools against money laundering. It remains unusual, however, that according to Article 15, "a drug who fails to register at the place described by the Ministry of Heal (...) shall be punished" [sic].

Recommendations for Burma's New Money Laundering Law

In pre-empting the emergence of large-scale financial activities by organized crime, control efforts should focus on both the supply and demand sides of the transactions in which criminal organizations are involved. The Financial Action Task Force on Money Laundering (FATF), an intergovernmental body within the Organization for Economic Cooperation and Development, made useful recommendations that have been established as the international standard for effective anti-money laundering measures.³⁵ These measures cover the criminal justice system and law enforcement, the financial system, and international cooperation. Of course, countries have diverse legal and financial systems and may not be able to take identical measures. Therefore this paper gives some specific guidelines to be implemented according to the current circumstances in Burma. According to the FATF, the Burmese junta is currently in the process of drafting an "Illicit Proceeds and Property Control Law". The

following measures should be part of that Law in order to make it effective. These measures are not necessarily difficult, provided there is the political will to act. Moreover, the measures do not compromise the freedom to engage in legal transactions, and do not threaten Burma's economic development. The following measures are essential for the creation of effective anti-money laundering legislation in Burma:

(1) The new law should give a clear overview of crimes that serve as a basis for money laundering prosecution. It should, at least, include fraud, official bribery, misappropriation of public funds, tax evasion, violation of currency exchange regulations, drug trafficking, gambling ventures, prostitution, human trafficking, arms smuggle, and crimes of violence.

(2) There should be transparency in financial records. This gives a clearer picture of the status of financing for any given company. It would also discourage companies to borrow from illegal or informal sources.

(3) The law should make bulk cash smuggling (smuggling of more than \$10,000) into or out of Burma a crime and provide for confiscation of the smuggled money.³⁶

(4) The law should require persons who have or purchase drug dollars to prove that they had no reason to know that the dollars were derived from unlawful activity.³⁷

(5) Corporations and financial institutions themselves (not only their employees) should be subject to criminal liability. However, financial institutions should be protected by law from criminal or civil liability for any disclosure of information if they report 'suspicious transactions' in good faith to the authorities, even if they did not know precisely what the underlying criminal activity was, and regardless of whether illegal activity actually took place.

(6) Financial institutions should not be allowed to warn their customers when information relating to them is being reported to the authorities.³⁸

(7) The new legislation should require financial institutions, accountants, lawyers, security dealers and investment counselors to file reports with the government where they encounter a 'suspicious transaction' or participate in a cross-border transfer of money. Some signs of a 'suspicious transaction' may be (a) an unusual transfer or pattern of trading; (b) a transaction that has no apparent commercial benefit; (c) a transaction completely in cash; (d) a situation where a client asks the accountant, lawyer or dealer to do something, but only gives a vague reason for it. Suppose a client, without an apparent source of funds, asks a lawyer to arrange for a trust to be set up in Thailand to hold a large amount of money, and the client does not tell the lawyer why he wants the trust set up or where he got the money. The lawyer's suspicions should be aroused and the transaction should be reported under the new money launder-

ing law.³⁹ Included in the type of transfer that will require reporting would be traveler's cheques, money orders, securities and personal and certified cheques. Some people might think the new law would not apply to them if they simply avoid handling money on behalf of the client. However, it is not as simple as that. If someone knows that the client is importing or exporting a large sum of money, they may be found to have encountered a 'suspicious transaction' and be required to report it.⁴⁰ Other people might see this provision as an invasion of privacy and thus against lawyers' professional ethics. However, criminal finance has become such a serious problem in Burma that it would be much more unethical to protect the privacy of money launderers.

(8) Courts should be allowed to exercise jurisdiction over any (foreign) bank or other financial institution conducting transactions violating the money laundering law in Burma. Courts should be given greater access to foreign business records that may be used to trace criminal finance in the exchange system.⁴¹

(9) Financial institutions should not keep anonymous accounts or accounts in obviously fictitious names. There should be a 'Know Your Customer' policy. Financial institutions should be required by law to identify and record the identity of their clients when establishing business relations or conducting transactions, in particular the opening of accounts, renting of safe deposit boxes, and performing large cash transactions.⁴² Inherently, there are two major problems in 'Know Your Customer' policies, which should be addressed by the new money laundering law. First, once the initial identification of the customer has been accomplished, it is usually assumed by the financial institution that it is the identified customer who continues to perform transactions on the account. This assumption is probably a valid one for traditional bank accounts, but the increased use of the Internet poses a problem, as there is no human intervention that might help to detect suspicious or unusual activity. Information on access to the account would not necessarily be detectable.⁴³ Second, account managers may be responsible for too many accounts and therefore less able to monitor activities of individual account holders.⁴⁴

(10) Financial institutions should maintain records on all transactions for at least five years. Such records must be sufficient to permit reconstruction of individual transactions (including the amounts and types of currency involved) in case evidence is required for the prosecution of criminal behaviour. In addition, financial institutions should keep records on customer identification (e.g. photocopies of passports), account files and business correspondence for at least five years after the account is closed.⁴⁵

(11) Financial institutions should develop programmes against money laundering. These programmes should, at least, include (a) the development of internal procedures and policies; (b) adequate screening procedures to ensure high standards when hiring new staff; (c) ongoing employee training programmes; (d) an audit function to test the system.

Until the junta stops its involvement in the drug trade, the revenues accruing to crime will continue to grow, making the threat of criminal finance a greater hindrance to necessary economic reform.

(12) To make barriers against criminal financing means that it is necessary to provide companies and individuals with other viable options to restructure financially. Without an adequate state financing programme, applying tight financial policies will lead to resistance to restructuring. But it also means that the current bankruptcy legislation⁴⁶ must be improved. Burma's outdated and incomplete legislation may lead debt-ridden companies to ignore the need for financial restructuring. Companies might instead be encouraged to run up large deficits in the expectation that corrupt financial institutions or criminal organizations will provide the necessary funds. A clear bankruptcy law will make the risk of failure explicit.

Apart from these recommendations for Burma's new money laundering law, its enforcement would be enhanced if information exchange were improved. The international community lags far behind criminal organizations in the establishment of ties for trade and finance. The exchange of information on criminal trends and in particular cross-border financing should become a major anti-crime effort. International authorities, such as Interpol⁴⁷ and the World Customs Organization,⁴⁸ should be given responsibility for gathering and disseminating information to the Central Bank of Burma about the latest developments in money laundering. The Central Bank could do the same on its network, because the greater the contradiction between global operation and national regulation of financial markets, the more difficult will be the detection of money laundering.⁴⁹ Also, drug control should become more internationalized.⁵⁰

International crime earns substantially from the drug trade, in which the Burmese junta is actively involved. International drug control efforts should put more pressure on the junta to stop this involvement. Until it does, the revenues accruing to crime will continue to grow, making the threat of criminal finance a greater hindrance to necessary economic reform. The need for regional (ASEAN) efforts in particular represents a realistic alternative.⁵¹ It is important to bring together the governments in the region, as Southeast Asia is experiencing an expansion in drug-trafficking and related crimes.⁵² Burma has signed the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (the Vienna Convention),⁵³ and it should take immediate steps to ratify and fully implement this Convention.

The junta has finally started drafting a counter-money laundering law. This should be seen with guarded optimism given the junta's poor understanding of economic principles and its notorious contempt for law.

Conclusion

Those who look into the issue of money laundering and narcotics production under the current Burmese junta find a very troubling picture. In the interests of its own survival, the junta has created a narco-state where money laundering is accepted—legislation and law enforcement are still insufficient. Money laundering, however, leads to serious problems. It criminalizes Burma's econ-

omy. It leads to inflation. It is bad for business, investment, development, and Rule of Law. More pressure should be put on the junta in order to tackle the drugs problem, which has become not only a health or legal issue but also an economic and political one. Interestingly, the junta has discovered that anti-narcotics programmes can be a tool for gaining international recognition, and now that the Organization for Economic Cooperation and Development has added Burma to its money laundering blacklist, the junta has finally started drafting a counter-money laundering law. This should be seen with guarded optimism given the junta's poor understanding of economic principles and its notorious contempt for law. However, the law itself might push the process somehow into the right direction. Although it will take time, it might make the junta realize that the costs of indifference to money laundering as a market-exploiting crime can far outweigh the costs of introducing market-friendly safeguards.

Endnotes

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1. "Crimes Against the Economy?" *The Irrawaddy*, Vol. 9, No. 5, June 2001, p. 5.
2. "FATF Review to Identify Non-Cooperative Countries or Territories: Increasing the Worldwide Effectiveness of Anti-Money Laundering Measures". Chapter 2, Section 3, "Jurisdictions Which Have Not Made Adequate Progress in Addressing the Serious Deficiencies Identified by the FATF: Myanmar". Paris: Financial Action Task Force on Money Laundering, June 2000, p. 15.
3. U.S. Department of Justice, Drug Enforcement Administration, "The Price Dynamics of Southeast Asian Heroin". Report No. DEA-01004. Arlington, Virginia: DEA Intelligence Division, February 2001, p. 3.
4. Alfred W. McCoy, "The Politics of Heroin in Southeast Asia". New York: Harper & Row, 1972, pp. 331-343, 379.
5. Aung Zaw, "Drugs, Generals and Neighbors". *The Irrawaddy*, Vol. 9, No. 5, June 2001, p. 16.
6. François Casanier, "Heroin Profits Laundered in Oil and Tourism". Reuters/Burma News Network, 5 November 1996; and, "The SLORC Laundry?" *Burma Alert*, Vol. 7, No. 11, November 1996, p. 6.
7. "Country Commercial Guide FY 1999: Burma". Chapter 2, "Economic Trends and Outlook". Report prepared by the United States Embassy, Rangoon, September 1998, pp. 5-17.
8. International Monetary Fund, "Myanmar: Recent Economic Developments". IMF Staff Country Report No. 99/134. Washington, D.C., November 1999, pp. 17, 59-60.
9. In the 1960s and 1970s, for a nominal fee of six dollars per kilo of opium,

- merchants were guaranteed safe conduct by the Burmese government and protection from bandits and rebels. See: Alfred W. McCoy, p. 338.
10. "Investing in Myanmar". Chapter 5, "Financial Structure and Exchange Arrangements". Rangoon: Union of Myanmar Foreign Investment Commission, May 1999, pp. 21-27.
 11. Anthony Davis and Bruce Hawke, "Business is Blooming: Is Myanmar Asia's First Narco-State?" *Asiaweek*, Vol. 24, No. 3, 23 January 1998, pp. 46-52.
 12. "Narcotics Control Reports: Burma". Washington, D.C.: Bureau for International Narcotics and Law Enforcement Affairs, March 2001, p. 19.
 13. "Myanmar to Host the Fourth International Heroin Conference with Pride". Myanmar Information Committee, Yangon. Information Sheet No. A-0813(I), 22 February 1999.
 14. Aung Zaw, p. 19.
 15. "Burma: The Country That Won't Kick the Habit". *Jane's Intelligence Review*, Vol. 10, March 1998, pp. 26-31.
 16. "Burma Drug Threat Angers Thailand". *Far Eastern Economic Review*, 1 June 2000, p. 26.
 17. "Funds Derived From Criminal Activities". Lyon: ICPO-Interpol, 1995, pp. 2-4.
 18. Louise I. Shelley, "Transnational Organized Crime: An Imminent Threat to the Nation-State?" *Journal of International Affairs*, Vol. 48, Winter 1995, pp. 463-489.
 19. Margaret E. Beare, "Corruption and Organized Crime". *Crime, Law & Social Change*, Vol. 28, 1997, pp. 155-172.
 20. Robert Eisner, "The Misunderstood Economy". Boston: Harvard Business School Press, 1994, p. 159.
 21. U Tun Wai, "Interest Rates Outside the Organized Money Markets of Underdeveloped Countries". In: "Leading Issues in Economic Development", edited by Gerald M. Meier. Oxford and New York: Oxford University Press, 6th Edition, 1995, pp. 199-202.
 22. Dennis Bernstein and Leslie Kean, "People of the Opiate: Burma's Dictatorship of Drugs". *The Nation*, Vol. 263, No. 20, December 1996, pp. 11-18.
 23. R. Cameron (ed.), "Banking and Economic Development: Some Lessons of History". New York: Columbia University Press, 1979, pp. 19-25.
 24. Andrew R. Dick, "When Does Organized Crime Pay? A Transaction Cost Analysis". *International Review of Law and Economics*, Vol. 15, January 1995, pp. 25-45.
 25. P. Arlacchi, "Mafia Business". London: Verso, 1986, p. 89.
 26. Bertil Lintner, "Narcopolitics in Burma". *Current History*, Vol. 95, No. 602, December 1996, pp. 432-437.
 27. The Financial Institutions of Myanmar Law of 1990 (State Law and Order Restoration Council Law No. 16/90) was enacted on 4 July 1990. In addition, in exercise of the powers conferred under Section 91 of this Law, the Ministry of Planning and Finance issued the Rules Relating to the Financial Institutions of Myanmar Law through Notification No. 32/91, dated 9 April 1991, followed by the Central Bank of Myanmar's Regulations for Financial Institutions on 28 May 1992. SLORC Law No. 16/90 was amended by the Law Amending the Financial Institutions of Myanmar Law (SLORC Law No. 7/94), enacted on 21 June 1994.

28. The Central Bank of Myanmar Law of 1990 (SLORC Law No. 15/90) was enacted on 2 July 1990, and repealed the Union Bank of Burma Act of 1952 and the Bank Law (Pyithu Hluttaw Law No. 9) of 1975. In addition, in exercise of the powers conferred by Section 102 of this Law, the Ministry of Planning and Finance issued the Central Bank of Myanmar Rules through Notification No. 31/91, dated 9 April 1991.
29. The Foreign Exchange Regulation Act of 1947, "The Burma Code", Published under the Authority of the Government of the Union of Burma (1955), Vol. III, pp. 18-35.
30. The Money Lenders Act of 1945, "The Burma Code", Vol. X, pp. 303-312.
31. The Bankers' Books Evidence Act of 1891, "The Burma Code", Vol. XII, pp. 469-470.
32. The Bankers' Books (Inspection) Act of 1947 (repealed by SLORC Law No. 1/92), "The Burma Code", Vol. II, pp. 235-236.
33. The Narcotic Drugs and Psychotropic Substances Law of 1993 (SLORC Law No. 1/93) was enacted on 27 January 1993, and repealed the Narcotics and Dangerous Drugs Law of 1974. In addition, the Narcotic Drugs and Psychotropic Substances Rules were issued under SLORC Notification No. 1/95, dated 17 July 1995.
34. U.S. Department of State, "1999 Narcotics Report on the Asia-Pacific Region". Washington, D.C., 1 March 2000, p. 31.
35. Financial Action Task Force, "The Forty Recommendations". Paris: FATF Secretariat, Organization for Economic Cooperation and Development, 1997, pp. 3-21.
36. Bruce Zagaris, et al., "Asset Forfeiture and International Law". *Emory International Law Review*, Vol. 5, 1991, p. 445.
37. Marc B. Stahl, "Asset Forfeiture, Burdens of Proof and the War on Drugs". *Criminal Law and Criminology*, Summer 1992, pp. 274-337.
38. This may also come under, or be referred to, the Burma Official Secrets Act of 1923, "The Burma Code", Vol. II, pp. 182-189.
39. "Trusts, Other Non-Corporate Vehicles and Money Laundering". In: "FATF-XII Report on Money Laundering Typologies, 2000-2001". Paris: Organization for Economic Cooperation and Development, February 2001, p. 8.
40. "Economic and Financial Crime: Cooperation Between the Police and the Banking and Financial Institutions and Associations". Resolution No. AGN/55/RES/18 of the ICPO-Interpol General Assembly, 55th Session, Belgrade, 6-13 October 1986.
41. "Money Laundering: Investigations and International Police Cooperation". Resolution No. AGN/66/RES/17 of the ICPO-Interpol General Assembly, 66th Session, New Delhi, 15-21 October 1997.
42. "Money Laundering: Legislation". Resolution No. AGN/66/RES/15, Article 8. ICPO-Interpol General Assembly, 66th Session, New Delhi, 15-21 October 1997.
43. Fletcher N. Baldwin, "Money Laundering and Wire Transfers: When the New Regulations Take Effect Will They Help?" *Dickinson Journal of International Law*, Vol. 14, Spring 1996, pp. 413-454.
44. For further discussion of this issue, see: "FATF-XI Report on Money Laundering Typologies, 1999-2000". Paris: Organization for Economic Cooperation and Development, February 2000.
45. "Money Laundering: Legislation". Resolution No. AGN/66/RES/15, Article 6. ICPO-Interpol General Assembly, 66th Session, New Delhi, 15-21

- October 1997.
46. The Burma Insolvency Act of 1920, "The Burma Code", Vol. XI, pp. 335-365.
 47. Burma has been a member state of Interpol since 1 January 1954. Source: International Criminal Police Organization, Interpol General Secretariat, Lyon.
 48. Burma became a member of the World Customs Organization on 25 March 1991 and also became a contracting party to the International Convention on the Harmonized Commodities Description and Coding System on 21 November 1994. This Convention entered into force in Burma on 1 January 1995. Source: Customs Cooperation Council, Brussels.
 49. "Measures to Deal Firmly and Effectively with the System of Illegal International Financial Transactions". Resolution No. AGN/60/RES/4 of the ICPO-Interpol General Assembly, 60th Session, Punta del Este, 4-8 November 1991.
 50. Juan G. Ronderos, "Transnational Drugs Law Enforcement". *Journal of Contemporary Criminal Justice*, Vol. 14, No. 4, 1998, pp. 384-397.
 51. Rebecca Miller, "Drug Trends and Law Enforcement Initiatives in South East Asia". *Journal of International Security*, Vol. 11, No. 2, February 2001, pp. 48-50.
 52. Alan Dupont, "Transnational Crime, Drugs, and Security in East Asia". *Asian Survey*, Vol. 39, No. 3, May-June 1999, pp. 433-455.
 53. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (also called the Vienna Convention), done in Vienna on 20 December 1988, entered into force on 11 November 1990, signed (but not accepted or ratified) by Burma on 11 June 1991. This Convention is reinforcing and supplementing the measures provided in the 1961 Single Convention on Narcotic Drugs (done in New York on 30 March 1961, signed by Burma on 30 March 1961, ratified by Burma on 29 July 1963, entered into force on 13 December 1964, amended in Geneva on 25 March 1972) and the 1971 Convention on Psychotropic Substances, concluded in Vienna on 21 February 1971, entered into force on 16 August 1976, acceded (but not ratified) by Burma on 21 September 1995. Source: Secretariat of the International Narcotics Control Board, Vienna.

Burmese Migrant Workers in Thailand: Policy and Protection

*Darunee Paisanpanichkul**

It is estimated that the overall number of Burmese migrants in Thailand is somewhere in between 800,000 and one million. Cross-border migration into Thailand has steadily increased in recent years. Since the 1960s, hundreds of thousands of Thais have gone to work abroad. Refugees from Burma, Laos and Cambodia have since filled this labour shortage in Thailand. However, many of them are undocumented, illegal workers and thus constitute the most vulnerable section of the work force. As illegal non-citizens, they are least protected by a national legal system. The Thai Cabinet recently announced a new policy on migrant workers.

Thai Policy on Migrant Workers from Burma

On 28 August 2001, the Cabinet under Prime Minister Thaksin Shinawatra promulgated a resolution allowing Thai companies to employ foreigners again. Included in the resolution are displaced people and illegal migrants from Burma, Laos and Cambodia, i.e. those who have at least registered for the permanent legal status of 'Migrant Worker'. Over the past ten years, Thailand has promulgated various Cabinet resolutions on a management policy of migrant workers. This is seen as a developing vision of Thai government.

A Thai Cabinet resolution from September 1996 announced a policy for the registration of undocumented migrant workers.¹ This included a directive to permit Burmese, Laotian and Cambodian workers to remain in Thailand as labourers in the authorized sectors, namely "agriculture, fisheries, fishery-

related activities (cleaning seafood, and work at piers and shrimp farms), construction, mining, porter of goods in harbours, domestic work, salt fields, timber mills, brick making, production (fish sauce, shrimp paste, squid drying, filleting fish, tobacco and salty fish production, drying tapioca, storage of agricultural goods in silos) and other production activities as approved by the Ministry". As a result of this, in Ranong province, Burmese labour currently comprises 70 percent of the area's 143,000 fishermen, according to Thailand's Department of Fisheries.

In 1998, Thai government policy on migrant workers changed drastically due to the economic crisis. In January 1998, Thailand's unemployment rate was around 1.8 million. In an attempt to counter the crisis, the Cabinet announced plans to deport at least 300,000 undocumented migrant workers within a six-month period and then fill the vacancies with unskilled Thai workers. According to the Immigration Police Bureau Commissioner, by March 1998 a reported 70,000 undocumented workers had "voluntarily returned to Burma".

On 2 March 1998, the Thai Minister of Labour issued a directive which announced that undocumented foreign workers in specific sectors would be repatriated by 1 May 1998 or face eight years imprisonment and fines up to 110,000 baht. The directive said those arrested on charges of illegally entering the country or violating the Immigration Act were liable to five years imprisonment and a fine of 500,000 baht, while those violating the Foreign Workers Work Act would be subjected to three years imprisonment and a fine of 60,000 baht. However, the directive allowed migrants to continue working in the fishing industry in 13 border provinces, and in other sectors such as transport, timber, textile, chemical, agriculture, commerce, and the service sector. The Minister also detailed plans to force the total one million Burmese workers to return to Burma by the end of 1999, as the Ministry would not renew work permits for registered workers this time. These somewhat conflicting measures forced migrant workers even further underground and made them more vulnerable to abuse by Thai employers and authorities. To date, Thailand has not fully implemented any of these policies, which remain unclear and confusing.²

Migration into Thailand

Somewhat conflicting measures forced many migrant workers underground and made them more vulnerable to abuse by Thai employers and authorities.

The five major Thai government bodies concerned with immigration are the Ministry of the Interior, the Ministry of Foreign Affairs, the Ministry of Labour, the National Security Council, and the Army. There is some overlapping between the activities of these bodies, usually caused by a lack of coordination. The Ministry of the Interior is the most important body regarding migration, because the Immigration Office falls under its jurisdiction.

Most migrants enter Thailand on a tourist visa which prohibits employment. For migrants with sponsorship from an established Thai organization, a non-immigrant visa is available that allows a person to apply for a work permit. For migrants entering Thailand from neighbouring countries, e.g. Lao citizens, Thai immigration authorities often issue a visa called a border pass. This pass allows migrants to stay in Thailand for one day (not overnight) and requires the migrants to remain in the vicinity of the point where they entered the country. It does not permit employment. Substantial gaps exist between the Thai immigration laws and what actually occurs in reality.

Thai immigration laws include the Immigration Act of 1950 (amended in 1979 and 1992); the Alien Registration Acts of 1950, 1952 and 1954; the Nationality Act of 1965 (amended in 1992); the Alien Employment Act of 1978; the 1979 Law on the Categories of Work Not Permitted for Aliens; and the 1979 and 1985 Laws on Forms of Employment and Activities in Which Aliens Can Engage.

In principle, an illegal alien is a person not having Thai citizenship who enters the Kingdom of Thailand while violating section 12 of the Immigration Act of 1979. This section stipulates that "No alien of the following characteristics shall be allowed entry into the Kingdom:

- (1) not in possession of passport or other passport substitute document and that which is still valid or in possession of passport or other passport substitute document, but visa has not been stamped or seen by the Thai Embassy or Consulate in foreign countries or from the Ministry of Foreign Affairs with the exception of the special case that no visa is required for certain category of alien;
- (2) not in possession of a means of subsistence which normally entails for entering the Kingdom;
- (3) entering the Kingdom for the purpose of being worker or seeking manual labour job without the use of special knowledge or technical skills or seeking other employment contravening the law governing the employment of alien;
- (4) having unsound mind or afflicted with any one of the diseases prescribed in the Ministerial Regulations;
- (5) have not been inoculated against small pox or vaccinated or complied with the medical requirements for prevention of communicable disease according to the law governing such disease and resisting the demand for medical examination by immigration medical officer;
- (6) having been sentenced to imprisonment by the decision of Thai Court or by legal order the judgment of the court of foreign government with the exception of petty offense or offense committed by neckless or those offenses exempted in the Ministerial Regulations;
- (7) having behaved in the manner that is believed to be detrimental to the society or cause disturbances to peace and security of the public or threat to national security or being fugitive wanted by a foreign government;
- (8) having behaved in the manner that is believed to have engaged in prostitution, girl or child;

As a result of a Thai Cabinet resolution from September 1996, Burmese labour currently comprises 70 percent of the 143,000 fishermen in Ranong province.

- (9) being a penniless person or having no guarantee as prescribed by the Minister pursuant to section 14;
- (10) being a person unauthorized to enter the Kingdom by the Minister pursuant to section 16;
- (11) having been a person deported by Thai Government or foreign government or a person whose resident permit has been once revoked in the Kingdom or in foreign country or having been expelled by the competent officer at the expense of the Thai Government except the special exemption granted by the Minister" [sic].

So, under section 12, illegal aliens will be repatriated to their country. However, the Thai government may use the exception under section 17 of the Immigration Act to allow temporary employment. Section 17 stipulates that under special circumstances, the Ministry, with permission from the Cabinet, may authorize entry into the Kingdom subject to any condition or exempt any alien from compliance with this Act.

Section 17 of the Immigration Act can be seen as a first flexible policy. It was promulgated by resolution of the Thai Cabinet on 17 March 1992. It allows migrant workers to work for two years in nine provinces. These provinces are Chiang Rai, Chiang Mai, Mae Hong Son, Tak, Kanchanaburi, Ratchaburi, Prachubkirikun, Chumporn, and Ranong. It also stipulates that the migrant workers have to apply for a work permit which costs 1,000 baht, and that they have to pay a 5,000 baht fee for a 'repatriation-cost insurance'.

The result of implementing section 17, however, was non-successful because eventually only 706 foreign workers were registered. The possible reason for this was that the rate of bail was too high. Meantime, Thai companies continued to employ illegal workers while bribing the police. The influx of refugees expanded to central Thailand. The Thai private sector claimed that the government had expanded the restricted areas while decreasing the repatriation-cost insurance.

Thai Cabinet Resolutions on Migrant Labour

The resolution of the Cabinet meeting of 25 June 1996 extended the period of flexible policy. Illegal migrant workers would be allowed to work for two years in 43 specified provinces and in 36 types of work. The Cabinet aimed to consider the influx of immigrants in new ways. At the same time it prohibited new entries. The resolution put more emphasis on the type of work and the approved area than on whether migrant workers had a legal status or not. Especially important was that the authorities needed the employers' responsibility for the workers. Thai employers were required to register their undocumented migrant employees between September and November 1996. No new

applicants were accepted during this period and registration was only available to those migrants who had entered Thailand before 25 June 1996. In order to register, employers had to follow a complicated three-phase process. First, all migrants had to pass a health check at the local hospital. Workers were either classified as 'pass', 'requiring treatment', or 'fail'. Those falling within the last category would not be permitted to work, and under the new legislation would be required to leave the country. Second, a fee of one thousand baht had to be paid to the Immigration Office. Immigration officers recorded a detailed personal history of each migrant, and then the migrants would receive a 'Temporary Residence Permit for Immigrations Awaiting Deportation' (also known as a *Taw Maw 69*). Both the employer and the workers were required to report to the Immigration Office every three months. Third, a work permit had to be issued by the Department of Employment. An additional one thousand baht had to be paid for this work permit, after which the registration would be complete. Both the employer and the workers needed to extend this permit after one year. However, most employers preferred to pay bribes to local police rather than undergo the complicated procedure.³

The resolution following the Cabinet meetings of 28 April and 8 May 1998 reduced migrant employment to one year, but geographical areas were extended from 43 to 54 provinces (13 border provinces, 22 provinces with fishing industry areas, and 19 provinces lacking Thai labour). The fees for extension of registration and repatriation-cost insurance remained 1,000 baht, but the health check went up from 500 to 700 baht.

The resolution of the Cabinet meeting of 4 August 1999 again allowed for one-year employment, but this time geographical areas were limited to 37 provinces. The number of registrations was limited to 86,895 but after negotiations with Thai entrepreneurs this became 106,000. The fee for registration and repatriation-cost insurance was still 1,000 baht, but employees had to pay an additional 1,000 baht for a health insurance. The resolution of the Cabinet meeting of 29 August 2000 kept the provisions of the previous resolution in place, except for the number of registrations which was fixed at 106,684.

The resolution of the Cabinet meeting of 28 August 2001 allowed illegal migrant workers who entered Thailand before this date to stay, although they would have to register. The fee for repatriation-cost insurance remained the same, but an additional 900 baht would be required for a six-month work permit and 150 baht for an identity card. The health insurance fee went up to 1,200 baht. No restrictions were given regarding numbers of migrants, geographical areas and types of work. This resolution has since been widely criticized. Many Thai workers maintain that the government should not give employment away so easily.

Protection of Migrant Workers

Both Thai workers and migrant workers who have permanent legal status because of their registration, are protected under the 1997 Constitution of the Kingdom of Thailand and the Labour Protection Act of 1998. Chapter 8 of the Constitution recognizes that in criminal procedures, the rights of *any* person shall be protected. The main elements are to be found under sections 237, 238, 241, 242, and 244 to 246.

Section 237 stipulates that in a criminal case, it is not permitted to arrest and detain any person unless there is a court order or evidence that a person has committed an offence. The person who is arrested must be promptly informed of the charges and particulars of the arrest, and must be given the opportunity to inform relatives and friends. A person who is still being confined must be brought before a court within 48 hours, calculated from the time at which the person arrested was taken to the office of the Interrogation Officer. The court has to consider whether or not there is a lawful cause to detain the person arrested unless there are circumstances beyond control, or other necessary reasons as provided for by law. Arrest or detention warrants may be issued only when (a) there is reasonable evidence that the person has committed a crime which carries penalties prescribed by law, or (b) there is reasonable evidence that the person has committed a crime and there is reasonable cause to believe that this person will flee or meddle with evidence, or cause other dangers.

Section 238 says that in criminal cases, “searches of private property are not permitted unless there is a court order or a cause, provided by law, to search without the need for a court order”.

Section 241 says that in a criminal case, the accused or defendant has the right “to receive a fast, continuous and fair interrogation or hearing of the case”. At the interrogation stage, the accused has the right to have a lawyer or any other trusted person present to listen during the interview sessions. A distressed party or a defendant in a criminal case has the right to examine or obtain an extract of the statements given by him at the interrogation stage, or the documents accompanying the statements given by him after the public prosecutor has filed the case in court. If the public prosecutor has issued an absolute order not to institute legal proceedings, the distressed party, the accused, or persons with vested interests have the right to be informed of a summary of the evidence together with the opinions of the interrogation officer and the public prosecutor in the matter of the orders issued on the case.

Section 242 says that the accused or defendant in a criminal case has the right to receive assistance from the State, in the form of the provision of a lawyer. In case a detainee is unable to afford or find a lawyer, the State must provide one.

Sections 244 and 245 entitle witnesses and distressed parties in criminal cases to receive protection, appropriate treatment and whatever remuneration that is necessary and appropriate from the State.

Section 246 provides for compensation if the judgment in a criminal case states that the defendant has committed no offence. This person has the right to receive such compensation and expenses as may appropriate as well as the return of all the rights which had been lost as a result of the case.

At the same time workers are protected under the Labour Protection Act of 1998. The main elements include Working Hours (section 23), Rest Periods and Holidays (sections 24, 25 and 27 to 29), Leaves (sections 32 to 34), and Wages (sections 53 to 55 and 61 to 63).⁴ Interestingly, Thai law sees employment in three levels, namely 'employee', 'boss', and 'employer'. In this context it is not entirely clear whether the 'boss' is a middleman or a foreman.

Section 23 of the Labour Protection Act stipulates that one working day must not exceed 8 hours. One week must not exceed 48 hours. If jobs are particularly dirty, difficult and dangerous (the so-called '3-D jobs') the section stipulates that a working day must not exceed 7 hours and one working week must not exceed 42 hours.

Section 27 of the Labour Protection Act is about rest periods. Adequate rest of not less than one hour per day must be provided or at least after the employee has been working for not more than five consecutive hours. The boss and the employee may agree in advance that a rest period be less than one hour, but a working day must not have less than one hour of rest. The boss may not provide a rest period in case the employee performs work where the nature of the work requires it to be performed continuously. In such case the consent of the employee has to be obtained, or otherwise the work is emergency work (and has to be paid accordingly). Regarding overtime cases, if continued for not less than two hours of normal working hours, the boss must arrange [with the employer?] for the employee to have a rest period of not less than twenty minutes before the employee commences the overtime work.

Section 28 of the Labour Protection Act is governing holidays. One weekly holiday must be given, not less than one day per week. The interval between weekly holidays must not be less than six days. In case of work in hotels, transportation, forestry, agriculture, or other work as prescribed in ministerial regulations, the boss and the employee may agree in advance to accumulate the weekly holidays over a certain period and postpone them for taking as a longer holiday within the period of four consecutive weeks. In addition, traditional holidays (governed by section 29) must add up to not be less than thirteen days per year. This is inclusive of the National Labour Day as prescribed by the Minister in a notification. The boss shall consider fixing the traditional holidays from the government holidays for the year, religious or customary and traditional holidays of the locality. In case a boss is unable to provide

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holidays as prescribed in ministerial regulations, there must be agreement with the employee on another holiday in compensation, or the boss may pay the employee in lieu.

Sections 24 and 25 of the Labour Protection Act regulate overtime on working days and work on holidays. The boss is not allowed to order an employee to work overtime on a working day, unless the consent of the employee has been obtained on a case-by-case basis, or in such cases where the nature of the work requires the work to be performed continuously (e.g. if a break would cause damage to the work, or if it is emergency work, or other work as prescribed in ministerial regulations), the boss may order the employee to work overtime to such extent which is necessary. The boss is not allowed to order an employee to work on a holiday, except in cases as described above or in respect of the business of hotels, entertainment, transportation, food, medical facilities, or other business as prescribed in ministerial regulations. When combined, the amount of overtime and holiday working hours must not exceed the rate as prescribed in ministerial regulations (currently 36 hours per week).

Sections 32 to 34 of the Labour Protection Act regulate the various kinds of leave, such as leave for medical reasons. Section 32 stipulates that the employee must be enabled to take medical leave to the extent of actual illness. For medical leaves of three working days or more, the boss may ask the employee to provide an official medical certificate and an explanation. Days on which an employee is unable to work due to injury or illness arising from work, and maternity leave days under section 41 shall not be considered to be medical leave under section 32. Section 33 provides for leave in order to be sterilized, and section 34 regulates leave for essential errands.

Sections 53 to 55 and 61 to 63 of the Labour Protection Act are governing wages. The law says that wages shall be in Thai currency only, at rates not less than those of minimum wages. The minimum wage rates shall apply to bosses and employees, regardless of the boss and employees' nationality, religion or sex, "unless the employees are not protected under this law". Section 61 regulates overtime pay. This must not be less than one and a half times the hourly rate on a working day according to the number of hours worked, or according to the quantity of work, or the results of the work performed. Section 62 is about holiday pay. Employees on daily wages shall be paid not less than one time the hourly wage rate per working day, of course in accordance with the number of hours worked, or according to the quantity of work. Regarding employees on monthly wages, a payment of not less than twice the hourly wage rate on a working day shall be paid in accordance with the number of hours worked, or according to the quantity of work. Section 63 regulates holiday overtime pay, which must not be less than three times the hourly wage rate on a working day.

Thai Law not only recognizes the rights of migrant workers but also pre-

scribes their duties. The main elements include that those who work for a boss or employer, shall carry out all or part of that job according to contract. The worker is employed under the employer's control. If the worker commits any wrongdoing he may be liable for damages or compensation, and the contract may be repealed. However, in fact, the protection of migrant workers in Thailand is still a question. Even though the Thai government recognizes legal status, or a temporary status, of migrant workers, there is still the other influential factor, namely the agreement between employer and employee. This is a bargaining power, a truth of the capitalist world.

Thaksin's Management Policy on Migrant Workers

Sawai Prammanee, former permanent secretary of the Thai Labour Ministry, said that the August 2001 Cabinet resolution allows authorities to register an unlimited number of foreign workers, both in employment and self-employed, so they could be issued work permits. He agreed in principle with registration, which would enable authorities to know the exact number of foreign labourers in the country "and bring them under control". But he also said that he was afraid the registration period as declared by the resolution (from 28 August to 10 October 2001) would not be long enough for the estimated three million alien workers in the country to show up for registration. As a result, large numbers of illegal workers would remain in hiding. Moreover, most of the workers from Burma were without identification papers. This would make registration very difficult.⁵

However, others support the provisions of the new resolution. According to Pinyo Veerasuksawad from the Rak Thai (CARE) Foundation, it is a new face of the Thai government. It is the first time that Thaksin's government has accepted that illegal workers are a real problem. There are many migrant workers in Thailand but the previous administration allowed them to work only in certain industries located mainly in border provinces. As a result, large numbers of illegal workers would remain in hiding. This leads to many problems, such as contagious diseases.

Another important matter is that Thai employers take advantage of illegal migrant workers. "Pull them from the dark into the light", said Adisorn Kerdmongkol, from the Thai Action for Democracy in Burma (TADB), about the workers. In his view the new resolution aims at a registration campaign placing about 500,000 illegal alien workers under control. And it would make it difficult to take advantage of migrant workers. Adisorn proposed that, "We should distinguish the difference between legalized migrant labour and liberalized labour".⁶ The objective of registration is to facilitate control of migrant workers and to protect their rights. However, the new resolution provides no long-term strategy to deal with the problem of illegal immigrants. There is

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also a lack of support measures and punishment to prevent this influx. Sawai Prammanee said he was not confident the government could effectively control alien workers before and after registration, adding that it is still not clear whether those who are no longer employed and failed to register would actually be repatriated.

The warmer ties with Burma cultivated by Prime Minister Thaksin make the climate more conducive to dealing with the refugee issue. But the situation on the ground makes it clear that closer relations between Thailand and Burma do not necessarily amount to a solution to the refugee problem. Officials are increasingly turning their attention to the problems along the Burmese border now that there are only a few remaining Lao refugees in the Northeast.

Burmese Migrants and the Lessons from Laos

Thailand has learned from the Lao refugee influx. It took the country 15 years to reduce the number of Lao refugees from a peak of 40,000 to just the 34 still in Thailand. Thaksin is trying to convince this last group, living in Camp Ban Napho near Nakhon Phanom, that spending the rest of their lives there with limited freedom of movement is not a good idea. It is also impossible as the Ministry of the Interior is pushing for the permanent closure of this last camp for Indochina refugees. Laotians flocked to Thailand en masse, some swimming across the Mekong river, in the ten years after the Communists seized power in December 1975. Many refugees had fought with the anti-communist forces during Laos' long civil war and feared the retribution of the victors. In preparation for the move to return home the Burmese refugees, the Thai Ministry of the Interior has announced plans to close Camp Maneeloy in Ratchaburi at the end of this year.

However, Rangoon insists it will only take back those with proof of Burmese origin. That is only one instance of the indifference shown by the Burmese regime to its people. Rangoon refuses to accept that these people have escaped to Thailand because of the armed violence in Burma, fears of forced labour and ethnic killings. In the eyes of the Burmese generals, the refugees are part of the anti-government forces, or job seekers looking for better lives in another country. Placing a million unskilled, uneducated and un-moneyed people back on Burma's doorstep will cause severe headaches, not only for the Burmese regime, but also for Thailand and the rest of ASEAN.⁷ Burma's capacity to absorb the displaced workers is in doubt. Even though the Burmese regime has signed a cease-fire with the Karen National Union, this will not lead to the instant return of the refugees. These people have made it clear that they will not feel safe inside Burma. Although Prime Minister Thaksin has promised there will be no forced returns, it is sad that the very workers who made the Asian miracle happen have now become political deadweight.

If there is anything that constitutes an overall Thai policy on migration, the goal seems to focus less on preventing migration than on controlling the flows of migration.

Conclusion

The question frequently arises as to what is Thailand's "migrant workers policy". Technically, policy is a combination of the Thai law regarding migrants and the ways in which Thai authorities enforce the law. Policy refers to patterns in the Thai government's attitude towards migration, the reasons underlying the laws, and law enforcement. If there is anything that constitutes an overall Thai policy on migration, the goal seems to focus less on preventing migration than on controlling the flows of migration. So far, the efforts to control migration into Thailand have had little lasting success. Migrant labour is now a major part of the Thai labour force, well-entrenched, so that it will remain a key resource in the economy for many years. Migration into Thailand is a lasting and important part of the Thai economic system. However, the disparity in economic development in the region has grown with ASEAN's admission of Burma and Laos, so the migrant-worker problem begs regional, not national solutions. ASEAN would do well to include the long-neglected social dimension of migrant workers on its agenda. The problem with the Burmese refugees is enormous, yet many feel the Thai success with the Lao refugees as somehow encouraging a similar outcome along the country's western border.

Endnotes

* The author is a Legal Aid Coordinator with the Burma Lawyers' Council.

1. Sudthichitt Chintayananda, et al., "The Monitoring of the Registration of Immigrant Workers from Myanmar, Cambodia and Laos in Thailand". Bangkok: Asian Research Center for Migration, Institute of Asian Studies, Chulalongkorn University, May 1997, pp. 9-27.
2. "Thai Policy on Migrant Workers from Burma". In: "Human Rights Yearbook Burma, 1999-2000", National Coalition Government of the Union of Burma, Washington, D.C., August 2000, pp. 310-316.
3. Kritaya Achavanitkul, et al., "The Complexities and Confusion of Cross-Border Migration into Thailand" [in Thai]. Nakhon Pathom: Institute of Population and Social Research, Mahidol University, 1997.
4. "Labour Protection Act B.E. 2541 (A.D. 1998) with Royal Decree, Ministerial Regulations and Selected Notifications". Bangkok: Chandler and Thong-Ek Law Offices Ltd., 1999, pp. 10-14, 20-33.
5. Supamart Kasem, "Senate Wants Registration Plan Revised: Panel Chief Slams Policy As Damaging". *Bangkok Post*, 10 September 2001.
6. According to Adisorn Kerdmongkol, personal communication with the author, Chulalongkorn University, 5 October 2001.

7. Aaron Stern, "Thailand's Migration Situation and its Relations with Asia-Pacific Economic Cooperation Members and Other Countries in Southeast Asia". Bangkok: Asian Research Center for Migration, Institute of Asian Studies, Chulalongkorn University, January 1998.

Burmese Children in Thailand: Legal Aspects

*Nyo Nyo**

People from Burma have become the major group of displaced persons in Thailand. Most of them are currently being sheltered along the Thai-Burma border, particularly in the Thai provinces of Mae Hong Son, Tak, Kanchanaburi and Ranong. It is estimated that there are some 40,000 children from Burma under the age of 15 accompanying their parents. In addition, thousands of unaccompanied children are driven across the border by the desperate circumstances in Burma.¹

Policy on Burmese Children in Thailand

This paper highlights some legal aspects of children from Burma residing in Thailand, also in terms of the 1989 United Nations Convention on the Rights of the Child. Thailand ratified the Convention in 1992, but imposed reservations on Article 7 concerning nationality, and Articles 22 and 29(c) concerning refugee children. The Convention requires States parties to undertake all appropriate legislative, administrative, and other measures to implement it adequately. Regarding economic, social and cultural rights, states must “undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation”.

Successive Thai governments have not favoured the forced return of refugees. They have taken a humanitarian approach and granted them temporary refuge pending durable solutions. However, Thai policy concerning different groups of refugees varies according to each group. The Laotians and the Vietnamese are covered by a special arrangement under the Comprehensive Plan of Action adopted at the International Conference on Indo-Chinese Refugees

in Geneva in 1989. According to this Plan, those who are determined to be refugees under the criteria of the 1951 Geneva Convention are eligible for third-country resettlement, whereas those who are determined to be non-refugees will be repatriated to their countries of origin. Unaccompanied minors are also given special treatment under the Plan: they are carefully handled by a Special Committee on Unaccompanied Minors to avoid the normal refugee status determination procedure. Unfortunately there is no such agreement or arrangement for people from Burma, including their children, who fled internal armed conflicts. In most cases they have been given temporary refuge. They are still considered illegal immigrants. This is said to be the reason behind Thailand's reservations to three articles of the Convention on the Rights of the Child, namely article 7 concerning nationality, and articles 22 and 29(c) concerning refugee children. Despite these reservations, Thailand has already granted Thai nationality to tens of thousands of children of Vietnamese refugees who fled Vietnam in the 1950s, as stipulated by the Thai Nationality Act (version 2) of 1992. This policy, even though considered a suitable compromise for the Vietnamese refugees, has not yet been extended to Burmese children.

Burmese children in Thailand have become obvious targets for abuse and exploitation, as their illegal status makes it impossible for them to demand their rights.² They are generally classified as illegal immigrants in Thailand, and are subject to arrest, imprisonment and deportation at any time, with hardly any protection from international agencies. In the refugee camps along the Thai-Burma border, where over 100,000 people live, aid is tightly restricted to a bare subsistence level, by way of pressuring the refugees to go back to Burma. Children's access to education, health care and social services in the camps is also restricted. As a result, many refugees, including thousands of unaccompanied children, avoid the camps and instead go to the cities of Thailand where they often end up as low-paid or unpaid construction or sex workers.

Prime Minister Thaksin Shinawatra's government policy toward Burmese migrant workers is markedly different from that of the previous administrations, which tried to control the numbers of Burmese workers for reasons of national security. Over the last two years, Burmese workers were allowed to work only in 18 business sectors in 37 selected provinces. All this has changed due to the Thai Cabinet resolution of 28 August 2001, which allows unlimited numbers of Burmese to work in Thailand, in all sectors and in every province, at least as long as they register with the authorities. This resolution has resulted in 447,093 Burmese migrant workers being legally registered for a maximum period of six months, at the Ministry of Labour between 24 September and 25 October 2001. Out of this figure, the main areas of Burmese concentration such as Tak province, saw registration of 47,489 persons, and Ranong province 25,280 persons. This influx of Burmese workers will no doubt increase the number of children being born in Thailand, leading to an increase of Burmese stateless children. Moreover, Thailand has not ratified the 1951 United Nations Convention Relating to the Status of Refugees and the 1967 Protocol

Thai policy concerning different groups of refugees varies according to each group. The Laotians and Vietnamese are covered by the Conference on Indo-Chinese Refugees, but unfortunately there is no such agreement for people from Burma.

Relating to the Status of Refugees.

Definition of 'Child' in Thai Legislation

According to the definition in the Convention on the Rights of the Child, a child is a person under 18 years of age, "unless under the law applicable to the child, maturity is attained earlier". Although this definition is now universally accepted, in Thai law the word 'child' has a number of different interpretations. First, Revolutionary Party Announcement No. 294 of 1972 defines a child as a person below 18 years of age who has not attained maturity through marriage. Second, the National Youth Promotion and Coordination Act of 1978, a key law in the development of youth, defines 'youth' as a person not older than 25. Here the definition of 'youth' covers that of 'child'. Third, the Act Instituting the Juvenile and Family Courts and the Juvenile and Family Procedures of 1991 define the word 'child' as a person over 7 years old but below 14. It also defines 'youth' as a person who is over 14 years of age, but below 18.

In addition to the definitions in various laws, the official Thai dictionary—as published by the Royal Institute in 1982—defines 'child' as a person below the age of 14 years. And the Child and Youth Development Plan (under the Seventh National Economic and Social Development Plan, 1992-1996) divides children into two groups: those aged between 0 and 4, and those between 5 and 14 years of age, primarily for the convenience in addressing each group's particular needs and requirements. Those between 15 and 25 years of age are termed 'youth'.

Burmese Children and Thai Nationality

Articles 24 to 99 of the Thai Constitution of 1991 (amended in 1995), on rights and freedoms of Thai people including children, stipulate that every Thai citizen is equal under the law and is entitled to equal legal protection. Chapter 3 of the Constitution has provisions on political and religious freedom and also specifies labour protection and social freedom. The Constitution guarantees for Thai people equality and legal protection regardless of race, colour, sex, language, religion or other status. Thai children not registered at birth are said to be covered by the guarantee of protection and rights under the Nationality Acts of 1965, 1992 (version 2), and 1992 (version 3). Although the Thai Constitution covers only the rights of Thai people, "the rights of non-Thais are encompassed by general criminal and civil laws, which offer

protection to all persons irrespective of race and nationality". The Thai Constitution of 1997 also guarantees a broad range of rights, liberty and equality "to every Thai citizen". However, the Convention on the Rights of the Child, as applied to all children under the jurisdiction of the State party, stipulates that non-nationals shall enjoy the same civil rights and freedoms as nationals.

The status of refugees and the question of nationality are two separate issues, and it is important that every newborn child should have a nationality.³ The Thai government should consider new legislation to do something about the statelessness of children of non-Thai origin. The grant of Thai nationality is regulated by the Nationality Act of 1965 (amended in 1992). Originally, a child could acquire Thai nationality only through having a Thai father and/or by reason of birth in Thailand. This was changed by Announcement No. 337 of 1972, which revoked the right to nationality by reason of birth in Thailand. Previous nationality laws did not recognize the acquisition of Thai nationality through the mother. In 1992, this situation was rectified: Thai nationality is now conferred on anyone who has either a Thai father or mother. Thailand, however, is not prepared to grant Thai nationality to the children of illegal immigrants, and states that this is because of the difficult economic situation. The problem is that many Burmese children in Thailand do not know anything about Burma and cannot even speak Burmese. They have grown up in Thailand and speak the Thai language. Moreover, if these children ever go to Burma they will not be eligible for Burmese citizenship under the Burma Citizenship Act, due to birth in Thailand and due to their parent(s) illegally leaving Burma.

Depending on the bureaucratic process, Burmese children may now be permitted to obtain a birth certificate if they were born in Thailand. Since there is no clear government guideline on how Thai hospitals should deal with the birth of babies born to parents who have illegally entered Thailand, these hospitals simply do not record the births. In Ranong and Samut Sakhon, pregnant Burmese women are allowed to deliver their babies in hospitals.⁴ The babies are given health and medical support based on humanitarian principles. The hospitals, however, remove the birth records of these babies from the last page of the doctor's appointment books, to prevent the children from claiming Thai nationality in the future.⁵

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Policy on Education and Employment for Burmese Children

Articles 23(3), 28 and 29 of the Convention on the Rights of the Child spell out the right to equal educational opportunities. Primary level education is compulsory and any higher level is to be developed and made more accessible. There are, however, no legal provisions relevant to registration at birth of Thai children or children of Thai nationals. Although the Registration of In-

habitants Act applies to every Thai citizen, most people do not know about it. This causes many problems when it comes to birth registration in Thailand. In order to overcome this problem, the Regulation on Evidence of a Child's Birth for School Admission was issued by the Thai Ministry of Education on 10 February 1992. The regulation grants access to education for children without Thai nationality and children who do not possess civil registration documents.

The regulation allows schools to admit children without proper documentation by having their parents, legal guardians, or an accepted humanitarian aid agency fill in the necessary forms on their behalf. Even if there is nobody or no agency available, an official may fill in the forms using information from an interview with the child. These documents are evidence that can be submitted to the education authorities in the admission procedure. The Ministry of Education is said to have widely circulated the regulation to all parties concerned, from provincial governors to regional education officers throughout Thailand, so that they can inform the schools of the regulation.

Article 32 of the Convention on the Rights of the Child is about protecting children from economic exploitation and work that will interfere with the child's education or is otherwise harmful to the child's health and mental, physical, spiritual, moral or social development. The Thai Municipality Act of 1953 and also various Interior Ministry regulations deal with child labour. The regulations pertaining to children were contained in an Interior Ministry Announcement of 1990. This set the legal minimum age for child labour from 12 to 13, and included working conditions, working hours, and wages. The minimum age has since been increased to 15, to bring it in line with the school-leaving age, while the number of years of compulsory education has increased from six to nine years.

The Thai government has ratified two ILO conventions concerning children. First, ILO Convention No. 29 concerning Forced or Compulsory Labour, was ratified by Thailand on 28 February 1969. It requires employers to adhere to the Thai Interior Ministry Regulation of 18 April 1973 on labour protection, prohibiting the use of child labour against the will of the child, detaining or confining the child, or committing acts of violence against the child. Second, Thailand ratified ILO Convention No. 127 of 1967 on Maximum Weight, on 26 February 1988. Consequently, the Thai Ministry of the Interior issued a Regulation on 18 January 1990, article 3(4) of which prohibits children between 13 and 16 from lifting, carrying or hauling objects weighing over 10 kg.

Thai labour laws, also applicable to Burmese children, state that children between 13 and 18 must not work more than eight hours a day. Fourteen-year-olds are prohibited from working on public holidays, overtime, or from 22.00-06.00 hrs, "unless the child is acting in a play or movie or similar show". Recent regulations, issued by Interior Minister Purachai Piumsuboun, prohibit youth under 18 to be on the streets after 10 pm. Other Thai laws concerning

Introducing clear and fair legislation on nationality, education and employment is necessary. This would not only be beneficial to Burmese children but also to Thailand: these children may become skilled labour for Thailand's future.

minimum wages, safety, and social security for adult workers are said to apply equally to children. Thai law states that employers are prohibited from employing children under 18 for hazardous types of work, such as refining, blowing, moulding or rolling of metals or other materials; stamping metals; jobs involving extreme heat, cold, vibration, noise or light; jobs involving hazardous chemicals; jobs involving toxic micro-organisms such as viruses, bacteria or fungi; jobs involving toxic substances, explosives or inflammable substances (petrol stations are the one exception); jobs involving driving or controlling fork-lift trucks or cranes; jobs using electric or mechanical chainsaws; jobs to be carried out underground, underwater, in caves, tunnels or craters; and jobs involving radioactivity. Employers are further prohibited from employing children under 18 in abattoirs, casinos, gambling dens, dance-halls, restaurants, and massage parlours.

Conclusion

Due to current legislation, Burmese children in Thailand can neither get Burmese nor Thai nationality, let alone a decent education or the prospect of a job. Introducing clear and fair legislation on nationality, education and employment is necessary. This would not only be beneficial to Burmese children but also to Thailand: these children may become skilled labour for Thailand's future.

Endnotes

* The author is a researcher with the Burma Lawyers' Council in Bangkok.

1. Robert I. Rotberg (ed.), "Burma: Prospects for a Democratic Future". Washington, D.C.: The World Peace Foundation, 1998, pp. 261-262.
2. "Burma Human Rights Yearbook, 1999-2000". Washington, D.C.: National Coalition Government of the Union of Burma, August 2000, pp. 78-85.
3. Paul Weis, "Nationality and Statelessness in International Law". 2nd Edition. Alphen aan den Rijn: Sijthoff & Noordhoff, 1979, p. 162.
4. Amornthip Amaraphiban, "Needs Assessment for Migrant Children in Thailand: A Case Study of Burmese Children in Ranong". Bangkok: Institute of Asian Studies, Chulalongkorn University, 2000.
5. Poona Antaseeda, "Children of a Lesser Nation". *Bangkok Post*, 7 October 2001.

Burma's Democratic Transition: About Justice, Legitimacy, and Past Political Violence

*Daniel Rothenberg**

Burma is a nation in crisis. It faces severe economic stagnation, endemic poverty, and serious health and social welfare challenges, all within a context of significant international isolation. Burma's status as an international pariah represents a global response to a history of gross violations of human rights as well as the refusal of the State Peace and Development Council (SPDC), the ruling military regime, to recognize the National League of Democracy (NLD) party's overwhelming victory in the 1990 elections. It is difficult to imagine how Burma can respond to its current crisis without addressing its global political isolation, a process that will almost certainly require a political transition from authoritarian rule to a constitutionally-based electoral democracy. In this sense, the question facing Burma is not so much whether there needs to be a democratic transition, but rather how this transition will be managed and when it will take place.

Transition and the Legacy of Human Rights Violations

One of the most important and contentious issues of a possible Burmese political transition involves how to respond to the military regime's legacy of human rights violations. Among those interested in Burmese politics, this issue is often presented as a binary opposition of "prosecute and punish versus forgive and forget". This perspective creates an impasse with democracy and human rights activists claiming the first option and the SPDC assumed to advocate the second.

Understanding Burma's future as a choice between criminal prosecutions or a general amnesty fundamentally misreads contemporary ideas on transitional justice as well as the current demands of a world increasingly committed to the internationalization of justice. Such a position is likely to increase tension between the negotiating parties, delay a possible transition and ultimately produce results different from those intended by any of the parties. Conversely, a willingness on the part of the Burmese military to accept responsibility for past violations of basic human rights may well provide them with more long-term protection than a negotiated general amnesty. In order to move beyond this tension, strategies for enabling a political change in Burma should be evaluated in relation to their ability to confer legitimacy on the transitional process, particularly as regards a reckoning with the nation's legacy of gross violations of human rights.

Burma's Crisis and the Necessity of a Democratic Transition

To state that Burma is experiencing a crisis is not to suggest that the nation is facing challenges of a focused and temporary nature, but rather that the country's problems express a constant level of basic dysfunction as a result of decades of governmental mismanagement. Burma's crisis is, above all, a political problem in which the negative impact of authoritarian rule impacts every sector of society.

The SPDC is a highly repressive regime whose actions have broad economic, social and cultural consequences. Gross violations of human rights are common, including disappearances, extra-judicial killings, torture and rape, particularly in rural areas dominated by ethnic minorities. The regime detains and imprisons citizens at will, targeting virtually anyone involved in activities understood to be even remotely expressive of political dissent. The regime engages in widespread surveillance, censors all published material and prevents citizens from gaining legal access to outside information through television, the internet, newspapers or magazines. There is no independent judiciary in Burma and no meaningful Rule of Law.

Economically, Burma is in a very difficult situation. Despite exceptional natural wealth, the nation's per capita income is only 300 dollars per year. The nation's infrastructure is crumbling, living standards are poor and attempts to stimulate foreign investment have been largely unsuccessful.

Socially, Burma suffers from endemic poverty within a repressive system that offers residents precious few opportunities. The government's repressive policies have severely impacted the educational system, leaving the country with a serious lack of trained professionals necessary for sustained development. In addition, Burma is deeply divided along ethnic lines and faces several armed

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ethnic resistance movements.

Burma's crisis is profoundly exacerbated by the nation's international isolation such that it is difficult to imagine how the nation can address its political, economic and social crisis without reintegrating itself within the larger world system. By ending its isolation, Burma will gain access to foreign investment and international aid, including loans, financial assistance, training, infrastructure projects, and other mechanisms of encouraging national development. However, it is highly unlikely that Burma can move beyond its current pariah status without engaging in a democratic transition.

While it is probably too early to know whether the nation's transitional process has begun, over the past year there have been important negotiations between the SPDC and Daw Aung San Suu Kyi, the NLD Chairperson and recipient of the 1991 Nobel Peace Prize. While the subject of these negotiations remains secret, establishing communication, understanding, and some level of trust between the military regime and the democracy movement is certainly the first step towards the sort of negotiated political transition that will allow Burma to meaningfully address its crisis. For this reason, it is an especially important time for those interested in Burma's future to learn from the transitional experiences of other nations with a keen sensitivity to the contemporary global political climate.

Transitional Justice and State Legitimacy

From the 1970s through the 1990s, dozens of countries around the world shifted from authoritarian to democratic rule, defining such political change as a key element of late 20th century politics. Since authoritarian regimes are often characterized by systematic violations of fundamental human rights, democratic transitions often involve the special challenge of responding to past political violence, a process whose theoretical and practical considerations define the emerging interdisciplinary field of transitional justice.

The justice issues raised in transitional societies are of a special nature in that they are directly linked to larger societal processes of political change that define the character of the new regime. Authoritarian states' reliance on systemic political violence often calls into question their basic governmental legitimacy, playing an important role in domestic and international demands for democratization. Similarly, new democratic regimes have an obligation to address the moral, political and legal demands of victims as a means of distinguishing themselves from the past government and grounding their vision of democracy in a fundamental respect for basic rights and Rule of Law.

However, most transitions are negotiated processes involving parties advocat-

ing democratic rule as well as representatives of the authoritarian regime, who are often the same individuals (or members of the same organizations) responsible for political violence. As such, determining the most appropriate response to past violence is a complex challenge, particularly within those contexts where authoritarian leaders retain significant power during the transitional process. On the one hand, the new regime is compelled to respect the claims of victims of political violence through basic Rule of Law principles and as an expression of a commitment to protecting fundamental human rights. On the other hand, the new regime must ensure that the transitional process is stable, peaceful and long-lasting, which may require agreeing on limiting legal responsibility for past political violence. A successful, negotiated transition, then, typically involves balancing the demand for justice with the practical need to placate powerful representatives of the departing authoritarian regime.

When the literature on democratic transitions first emerged, discussions of these issues were often presented as a choice between “prosecute and punish versus forgive and forget”. However, it quickly became clear that this binary distinction was inadequate for documenting the complex experiences of different countries or accounting for the multiplicity of distinct strategies for dealing with the challenges of facing past political violence. To a large degree, the emergence of the field of transitional justice is the result of a growing recognition of the inherent complexity of facing past political violence and the need for more subtle, engaged and context-specific responses to these issues. It is now common to consider political transitions as involving an array of possible strategies and policy options including truth commissions, reparations, apologies, mechanisms of restorative justice, economic investment, monuments and memorialization, psycho-social healing, the opening of state security archives, and other means of facing past violence in order to build the foundations of a new democratic order.

Burma’s status as a pariah state is an expression of its fundamental illegitimacy within the international community. Claiming that a state is illegitimate involves an argument that the forces that control a particular nation wield their dominant political power in a manner that fails to meet the minimal conditions of responsible rule. Within the current global order, international human rights discourse sets basic standards of reasonable governance that play an essential role in determining state legitimacy. As such, those states that commit serious systematic human rights violations—such as the SPDC—are generally understood to be fundamentally illegitimate and therefore unacceptable as full members of the international community.

Although not always understood in this manner, democratic transitions and the related field of transitional justice are fundamentally concerned with the issue of state legitimacy. For a transition to be successful, both the process and resulting democratic state must be understood to be essentially legitimate, in both domestic and international spheres. As the ideas and mechanism of tran-

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sitional justice become more widespread, they become increasingly institutionalized as mechanisms of legitimizing a shift from authoritarian to democratic rule. In this way, transitional societies are obligated to use the language and policies of transitional justice as a means of ensuring that their nation's transition is accepted, particularly within the international community.

In this sense, Burma has much to gain from formally engaging with the ideas and policy options of transitional justice. To grasp the significance of these issues, it is important to consider that transitional justice—in both theory and practice—is structured by two basic principles: first, a recognition that each nation's transitional experience is unique and molded by distinct social, cultural and historical factors; and second, that there are basic moral understandings, legal principles and logistical issues common to all democratic transitions such that discussing these processes together is a useful means of developing appropriate policy responses. Burma can benefit directly from the experiences of other transitional societies in ways that allow all parties to move beyond the oversimplification of either/or policies and towards the development of strategies allowing the nation to face its past while respecting the particular demands of local culture and context.

By formally acknowledging the second principle—evoking the language of transitional justice, seeking to learn from the experiences of other nations and openly accepting basic international human rights standards—Burma may well increase the international community's willingness to respect the first principle: Burma's need to find its own solutions to its problems. That is, through engagement with ideas of transitional justice, Burma can ensure that a future transition is accepted at an international level while retaining a relatively high degree of autonomy as regards specific policy decisions.

The Internationalization of Justice: Two Perspectives

There is an emerging global consensus, parallel with the end of the Cold War, that there should be meaningful implications of failing to abide by basic principles of international human rights. Alongside the institutionalization of transitional justice strategies for legitimizing democratic transitions, there exists a growing number of punitive measures for nations whose transitions provide impunity for perpetrators of human rights violations in a manner widely understood to be illegitimate.

Over the last decade, there has been an increasing interest in the internationalization of justice for those responsible for gross violations of human rights. This trend is evidenced by the movement to establish an International Criminal Court, the creation of ad hoc international tribunals for Rwanda and ex-Yugoslavia and the increasing use of domestic courts to bring criminal and

By formally acknowledging the principle of transitional justice and openly accepting basic human rights standards, Burma may well increase the international community's willingness to respect Burma's need to find its own solutions to its problems.

civil cases against individuals accused of gross violations of human rights. All of these activities are linked to one of the most basic principles of international law, the idea that one cannot engage in an international criminal case without first allowing for the issue to be adequately processed within the domestic legal system of the nation in which the violations occurred. As such, the international cases arising out of democratic transitions typically express the measured determination of an essential failure within the transitional process. The increase in international prosecutions and the use of strategies of transitional justice to legitimize democratic change are both expressions of a global movement to pressure countries to engage in a formal reckoning with their legacy of political violence.

To help explain the interrelationship between these two global trends and their link to a future Burmese transition, it is useful to compare the arrest and detention of General Augusto Pinochet, the former autocratic leader of Chile's military dictatorship with the international community's response to South Africa's transitional experience.

The "Pinochet Precedent"

From late 1998 through early 2000, General Pinochet was detained in London pending possible extradition to Spain to face charges of terrorism, genocide and other gross violations of human rights. The case became one of the most widely discussed legal issues of the century's end, representing the first time that the domestic court of one nation was successively used to enforce internationally recognized human rights principles against a former head of state for crimes committed in a different country. While Pinochet was eventually released on medical grounds, the Spanish high court affirmed the legality of the case and the British high court ruled that the ex-dictator could be legally extradited, defining what is sometimes referred to as the "Pinochet precedent". The case is of great legal significance in that it affirmed the principle of universal jurisdiction for prosecuting alleged perpetrators of human rights violations, negated the legal protection of general amnesties provided to former perpetrators (in the Spanish cases) and denied the protection of sovereign and head-of-state immunity for former leaders (in the British cases).

The widespread international support for the case defines an emerging international commitment to legal action against the institutionalized impunity that has long protected former leaders of brutal regimes. To a large degree, the broad support for the case expresses a general criticism of the Chilean transition as illegitimate in its provision of broad amnesty to General Pinochet and the military government he controlled. In this way the "Pinochet precedent" represents an international wake-up call for authoritarian leaders, both in and out of power, who have engineered similar ways of domestic legal protection.

The TRC's Amnesty Process

The South African case presents a different situation in which the international community has largely supported a negotiated transition that provided perpetrators with a limited amnesty for their legal responsibility for gross violations of human rights. As a result of its apartheid policies, South Africa had long been an international pariah.

The transition from racially-based minority rule to a government based on popular democratic elections was a complex process involving lengthy negotiations, a new constitution, the first free and fair general elections in the nation's history, massive investment to address basic social needs, and significant legislative changes. The negotiation also utilized a special mechanism for dealing with the nation's pressing transitional justice issues, namely the Truth and Reconciliation Commission (TRC).

The mission of the TRC was to assist the nation in facing its legacy of gross violations of human rights. To do this, the Commission was divided into three committees: a human rights committee that gathered and analyzed data and testimony on political violence and held numerous public hearings; a reparations committee that considered how to provide victims with financial assistance; and an amnesty committee that allowed perpetrators to receive full civil and criminal protection for particular crimes so long as the acts were of a political nature and the perpetrators were willing to tell the full truth about the events in question. The idea of providing amnesty to perpetrators who confess was highly contentious and led to a case that was ultimately decided by the Constitutional Court in favour of the TRC.

Without going into the specifics of the many cases considered, it is worth noting that the international community has generally viewed the TRC and the South African transition as a prime example of a legitimate and appropriate negotiated process. Because of this, it is highly unlikely that a foreign nation would be willing or capable of prosecuting those South African perpetrators granted amnesty through the TRC process. First, a careful review of the legality of the domestic process would likely support the position that the nation adequately engaged in reasonable Rule of Law procedures, as regards those crimes for which particular perpetrators received amnesty. Almost every aspect of the policies enacted were carefully designed with broad domestic and international consultations and premised upon a basic commitment to Rule of Law, with an understanding of the special challenges of a democratic transition.

Second, criminally prosecuting an individual provided with amnesty through the TRC would represent a basic challenge to the legality of South Africa's transitional policies. If a court of one nation questioned the validity of a South African amnesty (as numerous European courts were willing to do in the Pi-

nochet case), the act would stand as a political judgment that the TRC and the larger transitional process were fundamentally illegitimate. Because the transitional process itself has generally been understood to have been highly legitimate, South African perpetrators whose amnesty petitions were approved by the TRC (though not those denied amnesty or those who never sought amnesty) are likely to benefit from a general protection against international prosecution.

For democratic transitions to be understood as legitimate within the current global world, they must appear to be genuinely engaged in a serious reckoning with past human rights violations. This is particularly true for nations such as Burma that are isolated and relatively weak in terms of their international status. To avoid the global consensus of illegitimacy regarding Chile's general amnesty (that led to subsequent international prosecutions) and to achieve the legitimacy of South Africa's partial amnesty (that will likely protect perpetrators from international prosecutions), Burma's future democratic transition will require a formal reckoning with responsibility for past human rights violations.

Conclusion

There are at least three key reasons why Burma's crisis may be most appropriately addressed by understanding the society as involved in a democratic transition, albeit in the early stages of the process.

First, as described above, the nation's pressing needs and its international isolation can only be resolved through a shift from authoritarian military rule to constitutionally based electoral democracy. Second, it is unlikely that a legitimate transition can take place in Burma without a formal reckoning with the legacy of past political violence, though it is clear that there are many different approaches to this issue. Third, understanding a society to be in transition focuses attention on the negotiated nature of political change allowing an array of different issues to be raised in a manner that is likely to serve the long-term stability of a future democratic state.

For democratic transitions to be understood as legitimate, they must appear to be genuinely engaged in a serious reckoning with past human rights violations.

By facing up to the violence of the past, Burma can strengthen the international legitimacy of its eventual democratic transition, thereby ensuring that the nation benefits from a variety of mechanisms of support and assistance. In addition, facing the past may prove to be the best long-term protection for members of the military regime willing to allow Burma to progress, while exiting gracefully from politics under negotiated conditions expressive of the nation's particular needs.

To gain international legitimacy for its future transition, Burma need not engage in full-scale prosecutions and may or may not choose some form of amnesty. However, Burma can only gain the international legitimacy necessary for a successful transition through a formal reckoning with its legacy of gross violations of human rights and the related questions of responsibility.

Endnote

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Transition, Talks, and Terrorism

*B.K. Sen**

The war against terrorism has become a dominant global issue. It now appears that it also has legal implications for Burma. Osama Bin Laden, in an exclusive interview with the BBC in October, stated that, "There are areas in all parts of the world where strong jihad forces are present, from Indonesia to Algeria, from Kabul to Chechnya, from Bosnia to Sudan, and from Burma to Kashmir".¹ And Stefan Smith, in an article for Thai newspaper *The Nation*, said that, "Taliban ranks were swelled by increasing numbers of foreign volunteers from countries as diverse as Pakistan, Algeria and Burma".² Hopefully all this is not true, but it must be said that the Burmese military junta has antagonized the Muslim minorities by its policies of discrimination, suppression, and religious persecution. Long repressive military rule has generated widespread discontent among the people. Muslim minorities constitute about fifteen percent of Burma's population. It is surprising that Bin Laden specifically mentioned Burma out of those countries where Islamic fundamentalists are known to exist. The shabby treatment of the ongoing talks in Burma has already resulted in frustration, adding to the volatile situation.

The junta's suppression of the people of Burma is another form of terrorism. The generals take full advantage of the 'global war against terrorism' and have imposed dusk to dawn curfews "to prevent violence between different religious communities".³ The junta exploits the situation and has chosen the path of violence against the Muslim minorities to divert the simmering discontent of the people. The junta is in search of a way to link its existing anti-Muslim agenda to the global fight against terrorism. This is becoming an unhealthy trend in many countries: in the name of combating terrorism, fundamental human rights are being violated. But the only way to fight terrorism is to go to the roots of conflict. The denial of the Rule of Law, and unequal distribution of wealth, are examples of such roots. Repressive regimes, or regimes under the influence of fundamentalists, should be replaced by regimes that are safeguarding the Rule of Law. The process of democratic transition needs to ac-

celerate. Democratic changes mean that fundamentalist and repressive forces have no breeding-grounds. Hence Burma's generals should come to a national reconciliation and a peaceful regime change. Reconciliation and Rule of Law are mightier than the sword.

Ongoing Talks in Burma: Protracted, Clouded and Toothless

The transition of power in Burma should have taken place soon after the 1990 elections. However, the landslide victory of the National League for Democracy was ignored by the junta. Nearly twelve years have passed, but the generals still refuse to recognize the legality of the situation. Talks have been dragging on for another fruitless year in order to come to an agreement. Even the two World Wars did not take that time to draw up peace treaties. The Law of Limitation restricts actions and claims to a stipulated time: the governing principle is that of 'justice delayed is justice denied'. The talks have become a show-case to hoodwink the international community. However, the more the generals delay, the more they will be charged with insincerity, resulting in a total erosion of their power base.

There are both political and legal issues confronting the parties in the talks. The legal issues include (1) Release of political prisoners; (2) Implementation of the 1990 election results; (3) Formation of an interim government and constitution; (4) Defining the role of the military; (5) Dealing with the past. This last aspect is basically an issue of Justice versus Rule of Law, but also has political content. Once the norms of amnesty, truth and reconciliation are agreed upon, there is no difficulty in shoring up legal mechanisms for it. Opposite views are inevitable, but it is also redeeming that the parties are not left in some wilderness. There are international covenants and precedents on all these issues, which can be assessed and applied critically in the conditions of the current situation.

Regarding the 1990 elections, the junta tries to hold on to power and says that twelve years have passed since the elections, that there have been demographic changes, and that therefore the will of the people as expressed in 1990 has ceased to be valid. Yet the election was fair and free and fulfilled all the criteria to form a legal government. The issue has increasingly become a ploy of the junta to hold on to power: there is no guarantee that the generals will not repeat the same trick when a new election is held. Anyway, to put the ball in the junta's court without prejudice, the victimized party should be allowed to put the conditions for a fresh election, such as the establishment of a caretaker government and the presence of impartial monitoring. Once political agreements are reached, law will have to come in to make the accords binding and enforceable. This would not necessarily be a problem as the parties have enough expertise on the matter.

Democratic changes mean that fundamentalist and repressive forces have no breeding-grounds. Hence Burma's generals should come to a national reconciliation and a peaceful regime change.

The UNPO and Burma

The Unrepresented Nations and Peoples Organization (UNPO) is an international organization created by nations and peoples around the world, who are not represented as such in the world's principal international organizations such as the United Nations. Founded in 1991, UNPO today consists of around fifty members representing over 100 million persons. UNPO offers an international forum for occupied nations, indigenous peoples, minorities, and even oppressed majorities struggling to regain their lost countries, to preserve their cultural identities, to protect their basic human and economic rights, and to safeguard the natural environment. From Burma, the Mon, Shan, Karenni and Chin have member organizations in the UNPO. If the objectives of these organizations include the end of unconstitutional rule in Burma and the restoration of a democratic government based on the principles of territorial integrity of a federal union, there could be no objections to their joining the UNPO. The organizations have the right to publicize their rights before the international community. Their critics' misgiving that there are attempts to create sovereign states will have to be taken seriously. In the name of self-determination, the sufferings of the people must not be prolonged or intensified. Hard-line policies do not bring good results in the long run. The path of reconciliation is the only way to sustainable development. However, the UNPO may not smooth this path, as aggrieved parties should resolve their conflicts within constitutional parameters of their respective countries.

Burmese Junta Violates UPU Constitution⁴

According to a Democratic Voice of Burma (DVB) news release, dated 7 December 2001, the Burmese junta bans letters posted with Norwegian stamps of Daw Aung San Suu Kyi. On 14 September 2001, the postal authorities in Norway, in cooperation with the Nobel Institute, issued new stamps with pictures of Nobel laureates including Daw Aung San Suu Kyi. On the same day, the Norway-based radio station DVB offered to give these stamps for free to the first 300 people who would write to the station. Within weeks, the DVB received dozens of letters from Burma and hundreds of letters from other countries with requests for the stamps of Daw Aung San Suu Kyi. Although DVB's listeners from Burma wrote they knew it is very risky to send letters to the station, they nevertheless took a chance because they were so eager to see the stamp. The DVB promptly replied to all the letters and included stamps of Daw Aung San Suu Kyi. However, none of the listeners who requested the stamp have received the letters sent by the DVB. The DVB contacted some of the listeners by phone. "No, I have not received your letter. I believe they [the military regime] do not want to give it to us", one of them told the DVB.

The path of reconciliation is the only way to sustainable development. However, the UNPO may not smooth this path, as aggrieved parties should resolve their conflicts within constitutional parameters of their respective countries.

Some other listeners have written letters several times, saying they have not received the stamp.

Normally it takes about one month for a letter from Europe to reach Burma. According to the Universal Postal Union (UPU), “No risk or mail violations were identified in Burma during a Quality of Service test conducted by the UPU in 1996”. The UPU added that the “postal staff in Burma are security checked and they need a police clearance before they are employed”. The UPU, based in Bern, Switzerland, is a specialized agency of the United Nations.

“What do you expect from this regime? I am not surprised”, said Mr. John Pedersen, head of the Postal sector of Union Network International. He added that, “It is a violation of the UPU Constitution”. Ms Juliana Nel, spokeswoman for the UPU, agrees with this. “If it is true, it is a violation of our Constitution”, she said. All members of the UPU have an obligation to deliver all private mail without delay. Moreover, postal authorities must maintain the confidentiality of mail, except when they suspect dangerous substances in it.

According to the Norwegian Post Stamp Bureau Director, Mr. Halvor Fast- ing, “It is very sad that the Burmese people cannot see the stamp of Daw Aung San Suu Kyi. It is strange that the Burmese authorities did not deliver the letters because they do not like the stamp, which is officially issued in Norway. It should not happen”.

Endnotes

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

1. On 29 September 2001, the BBC reproduced an exclusive interview with Bin Laden, conducted by the Pakistani newspaper *Ummat* a day earlier. It was again mentioned in Information Sheet No. B-1977, published by the Myanmar Information Committee, Yangon, on 4 October 2001.
2. Stefan Smith, “Taleban: Pakistan’s Foreign Policy Failure”. *The Nation*, 22 September 2001.
3. “Curfews After Clashes Over War Break Out”. *Bangkok Post*, 21 October 2001.
4. This information was kindly contributed by the Democratic Voice of Burma, 7 December 2001.