BURMA

BEYOND THE LAW

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This report was written by K S Venkateswaran, an expert on international human rights law and currently Lecturer in Law at the University of Ulster at Jordanstown in Northern Ireland. ARTICLE 19 wishes also to record its thanks to Zunetta Liddell, of Human Rights Watch/Asia, who provided invaluable comments on the text, and to Maureen Aung-Thwin of the Open Society Institute, New York, for her unfailing support for this project.

ACRONYMS

BBC	British Broadcasting Corporation
BSPP	Burma Socialist Programme Party
EPA	Emergency Provisions Act
ICCPR	International Covenant on Civil and Political Rights
ICRC	International Committee of the Red Cross
ILO	International Labour Organization
IPU	Inter-Parliamentary Union
KIO	Kachin Independence Organization
KNPP	Karen Nationalities Progressive Party
KNU	Karen National Union
MP	Member of Parliament
NCCC	National Convention Convening Committee
NCGUB	National Coalition Government Union of Burma
NLD	National League for Democracy
NMSP	New Mon State Party
POW	prisoner of war
PSB	Press Scrutiny Board
SLORC	State Law and Order Restoration Council
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
USDA	Union Solidarity and Development Association

VOA	Voice of America

FOREWORD

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In the eight years since it seized power and launched a bloody crack-down on the country's democracy movement, Burma's ruling State Law and Order Restoration Council (SLORC) has issued a stream of laws, orders and decrees in an attempt to legitimize its authority and keep its democratic opposition in check. It has also made recourse to earlier legislation, much of it stemming from the colonial period when Burma was under British administration, to justify its use of forced labour and other practices inimical to basic human rights.

Yet, as this report shows, the SLORC's attachment to legal form is no more than a thin façade. Beneath it, an examination of the regime's practice since 1988 reveals a fundamental failure on the part of the SLORC authorities to abide by basic principles of legality, including internationally-recognized international human rights and humanitarian law standards. Moreover, much uncertainty remains — not only internationally but within Burma among those who are directly affected — as to which laws are currently in force. For example, the SLORC's official representative assured the United Nations (UN) General Assembly in 1994 that 68 laws existed to protect human rights, yet no details of these have ever been forthcoming. Even the constitutional position is in doubt: official statements have suggested that neither the 1947 nor the 1974 Constitution are any longer in force, but have not indicated with what, if anything, they have been replaced.

The picture that emerges is one of a regime which seeks to use the notion of law to buttress its own political pre-eminence, just as when it seized power its leaders announced that their main purpose was to restore law and order. But this is a myth. The SLORC maintains its position through force, not through the rule of law. It has sought simply to subvert the rule of law for its own political ends. Its failure to respect the outcome of the May 1990 general election, contradicting earlier undertakings to do so, and its continuing refusal to abide by the democratic will of Burma's peoples, stands as the clearest proof of this.

This report is being published by ARTICLE 19, the International Centre Against Censorship, in association with the Burma Project of the Open Society Institute of New York, because we believe it to be an important contribution to international understanding of the legal status of the present regime in Burma and the legality, or lack of legality, of the provisions it has invoked when considered in the context of international law. It goes beyond the issue of freedom of expression, ARTICLE 19's primary concern, but, in doing so, provides for the first time, in a relatively comprehensive form, an analysis of current law and practice in Burma affecting

human rights. As such, it provides valuable access to information, much of which continues to be withheld from or unavailable to the peoples of Burma itself who, under the SLORC, remain subject to one of the world's most pervasive censorship regimes.

The report concludes with a series of recommendations. We urge the SLORC to implement them, and so help return Burma to the rule of law. We hope that the international community too, particularly Western governments and those of Burma's Asian neighbours, will support these demands. We urge them to lose no opportunity in their contacts with the SLORC to make clear their own commitment to rapid and fundamental political reform and to full protection of freedom of expression and other human rights in Burma.

INTRODUCTION

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Burma has had a chequered history since its independence from British rule in 1948. A country which has remained isolated from the rest of the world for much of the past half century, it has been plagued by political instability, economic mismanagement, military intervention and raging ethnic tensions. Though there have been a few fitful signs recently of possible reconciliation and reform, the intentions of the military-led SLORC, which has ruled Burma since 1988, remain as difficult to decipher as ever.

One of the greatest casualties amidst these developments has been the rule of law which, although widely quoted by the government, has all but ceased to exist in Burma. Not only have successive military rulers shown consistent disregard for legal norms in the manner in which they have come to control the levers of power, but they have, over the years, promulgated a plethora of laws and decrees which are of doubtful legality under both international and Burmese domestic law. This report attempts to examine the extent of the incompatibility of many of those laws with international human rights standards.

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1 INACCESSIBILITY AND VAGUENESS OF LAWS

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The manifest unfairness of many Burmese laws and the arbitrary manner in which they are applied is often compounded by the inaccessibility and vagueness of some of the statutory instruments. As the UN Special Rapporteur to Myanmar pointed out in his 1993 report:

> "One of the fundamental legal principles is that any law should be: accessible to those to whom it would be applied and to those encharged with upholding the law and those protecting the rights of persons accused of breaking the law; clear and unequivocal; and equitably applied, i.e. applied without discrimination."

The inaccessibility of the laws not only makes any meaningful study of the country's legal system difficult, but also compounds the problems that litigants within Burma, especially defendants in criminal trials, are regularly subjected to in the preparation of their cases. A further complication is introduced by the inconsistencies that are apparent in the status of certain laws. For example, even as SLORC spokesmen have proclaimed that both the 1947 and 1974 Constitutions have been abolished, they have often sought to rely on one or the other of these documents to justify pre-independence legislation such as the Village Act of 1908. In November 1994, the Permanent Representative of Myanmar to the UN in New York, Mr Win Mra, stated in a letter to the UN Secretary-General that "there are 68 internal laws and acts in Myanmar for protection of human rights." Despite repeated requests, ARTICLE 19 and other human rights organizations have not been able to obtain a list of these enactments.

In July 1991 the SLORC announced the formation of a nine-member Law Scrutiny Central Board with powers to recommend the nullification, amendment or replacement of any existing law which was "found to be non-beneficial to the state and the people and not in conformity with the prevailing conditions". This body, chaired by the Attorney-General, was also mandated to study in draft form any new law proposed by any ministry for conformity with "prevailing conditions". In March 1996 it was reported that, based on the recommendations of the Board, the SLORC had repealed 151 laws which were found "not to be in conformity with the present situation". Another 35 `old' laws and 78 `subsidiary' laws were also said to have been repealed and replaced by new laws. The Board is reportedly still involved in scrutinizing laws presented to it by the various ministries. ARTICLE 19's request to the Burmese authorities for details of the laws repealed/replaced has gone unanswered to date.

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2 CONSTITUTIONAL BACKGROUND

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Burma has traditionally been a land of remarkable ethnic diversity. Scores of cultures have put down their roots in this richly endowed part of south-east Asia, so that over 20 major ethnic groups, and an even greater number of dialects and languages, have been known to co-exist for decades. To cope with the historic tensions resulting from this rich mix of cultures, the British, who ruled Burma between 1824 and 1948, devised and implemented a system of administration which divided the country into two units: `Ministerial Burma', containing the Burman majority, and the `Frontier Areas', encompassing the lands inhabited by the ethnic minorities. The former

enjoyed a limited form of parliamentary home rule, while the latter continued to be governed by traditional rulers and chiefs. At independence, a quasi-federal Constitution was drawn up which, uniquely, granted two states in the union — the Karenni and the Shan — the right of secession after a ten-year period, but allowed the Prime Minister to interfere in local affairs. In a further anomaly, although the Constitution guaranteed several human rights and an independent judiciary, it severely restricted the citizen's right to own and hold property and declared the State the exclusive owner of all land.

Independence on 4 January 1948 was followed by violent conflict in which the communists, the Karens and several other ethnic and political groups eventually took up arms to challenge the authority of the central government. Although these insurgencies were eventually reduced and a semblance of central order restored under the leadership of Prime Minister U Nu, growing factionalism between members of the ruling party led to another serious crisis. In 1958, this resulted in the administration being handed over to the army, headed by General Ne Win, for a 16-month period. General elections restored civilian rule in 1960, but with a further upsurge in what army leaders claimed were secessionist pressures and the continuing inability of politicians to cope with a deteriorating situation, the stage was set for a military coup, which took place on 2 March 1962 under the leadership of General Ne Win.

General Ne Win set up a Revolutionary Council which ruled by decree. An hierarchy of Security Administrative Councils, manned by military, police and civil service personnel, replaced the existing administrative structure. The Constitution continued in force, albeit subject to any of its provisions being superseded by decree, and the existing courts were replaced by new ones. The Revolutionary Council launched its own political party, the Burma Socialist Programme Party (BSPP), whose membership was drawn largely from the ranks of the military. Acting under the slogan, "the Burmese Way to Socialism", it embarked on a programme of large-scale nationalization of agriculture, industry and trade, using armed force to overcome any resistance that was encountered. The ultimate result was the breakdown of trade with the outside world, runaway inflation, a rampant black market, and a near-collapse of the national economy.

In 1971, the BSPP transformed itself into a civilian government, though with the same military rulers, many of whom had retired from the armed forces. A new Constitution was adopted in 1974 which centralized powers even further and entrenched the position of the BSPP as the only legal political party in the country. Although the Constitution provided in theory for a federal structure — with Ministerial Burma being divided into seven divisions and a similar number of states created for the major ethnic minorities — little real autonomy was given to the divisions and states. Such rights and freedoms as were granted were circumscribed by an overriding duty on the part of citizens to refrain from undermining: (a) the sovereignty and security of the state; (b) the essence of the socialist system; (c) the unity and solidarity of the national races; (d) peace and tranquillity; and (e) public morality. Military service was made compulsory and socialism was proclaimed as the official ideology of the state.

The 1974 Constitution created a unicameral legislative body called the *Pyithu Hluttaw* (People's Assembly), elected directly by the people for a four-year term

under which were two administrative organs: the Council of State, headed by the national President, and the Council of Ministers. The Council of State was empowered, among other things, to convene sessions of the *Pyithu Hluttaw*; to interpret and promulgate laws enacted by the *Pyithu Hluttaw*; to enter into, ratify or amend international treaties; to appoint or dismiss deputy ministers and heads of public service bodies, and to grant pardons and amnesties. It was also empowered to initiate military action in the event of "aggression against the State" and to declare a state of emergency or martial law "if an emergency affecting the defence and security of the State should arise" — though in both cases the Council was under a duty to seek the approval of the *Pyithu Hluttaw* at the earliest possible opportunity. The terms of office of the Council of State and the Council of Ministers were made coterminous with that of the *Pyithu Hluttaw*.

A hierarchy of judicial bodies, headed by the Council of People's Justices, was made responsible for administering justice, along with administrative tribunals and military courts, the latter in the case of service personnel. The judges were to be elected by legislative bodies at the appropriate levels and were to hold office for the term of the respective electing body. The judicial system was enjoined to "protect and safeguard the Socialist system".

General Ne Win became President under the new dispensation and, despite formally resigning that office in 1981, continued to exercise considerable powers as Chairman and head of the BSPP. This second period of *de facto* military rule years saw increasing tensions and widespread disenchantment among the population. A variety of ethnic and communist insurgencies continued in the rural countryside as did political repression, while the economy steadily declined, leading to growing shortages of essential commodities. Public disenchantment contributed to the growth of a popular movement for democracy and, in March 1988, the police and the military clamped down on protesting university students in Rangoon, leading to dozens of civilian deaths. The student protests continued, and, on 21 June, the government imposed a dusk-to-dawn curfew and a 60-day ban on public gatherings in Rangoon.

These hard-line tactics failed to quell the protests. Ne Win was forced to resign as head of the BSPP in July 1988 and he was replaced by another former general, Sein Lwin, who was also forced to step down within 18 days of assuming the position, in the face of continuing popular unrest. On 3 August, the authorities imposed martial law in Rangoon and on 12 August installed a former civilian lawyer, Dr Maung Maung, to head the government amid promises of elections and reforms. His pleas, however, were equally unsuccessful in mollifying the demonstrators as they did not believe his promises would be fulfilled by the military. Very soon, members of the navy and air force joined the ranks of the civilian protestors. A political vacuum and situation of potential anarchy ensued, which provided the armed forces with the claimed opportunity for yet another intervention by Ne Win loyalists, this time led by General Saw Maung, the Chief of Staff and Minister of Defence. He reasserted military rule on 18 September 1988, established a martial law regime under the name of the State Law and Order Restoration Council (SLORC), suspended the 1974 Constitution, and used overwhelming force to put down the protests, reportedly killing over a thousand unarmed demonstrators in the process. The stage was thus set for the third major phase of military rule.

General Saw Maung was quick to assure the people that the sole aim of his intervention was to restore law and order, improve the economic condition of the people and organize multi-party elections as soon as possible, and that it was not his intention to "cling to State power for long." However, elections were not held until May 1990, and then with numerous obstacles in the way of the leading opposition party, the National League for Democracy (NLD), led by Daw Aung San Suu Kyi. As well as banning all public gatherings of more than five persons, the SLORC sought to discredit and intimidate Suu Kyi and other NLD leaders as the election campaign progressed. Indeed, on 20 July 1989, it placed Suu Kyi under house arrest and disqualified her from contesting the elections.

In spite of these tactics, the NLD achieved a stunning victory in the elections, which were held on 27 May 1990, winning 392 of the 485 seats contested. The SLORC-backed National Unity Party (the former Burma Socialist Programme Party) gained a mere 10 seats. Following this set-back at the polls, the SLORC rapidly backtracked on its promises to return the country to civilian rule: it refused to allow a new *Pyithu Hluttaw* to convene, and claimed that the elections had merely been for a constituent assembly. These pronouncements were accompanied by large-scale arrests of opposition activists. Some of the Members of Parliament-elect who evaded arrest went abroad or into areas controlled by armed ethnic minority opposition forces and formed what they called a government-in-exile, the National Coalition Government of the Union of Burma (NCGUB), in December 1990.

The SLORC stepped up its military campaign against armed ethnic minority opposition groups in the following months, especially along Burma's borders with Thailand and China. In September 1991, a spokesman for the SLORC was reported as declaring the regime's intention to stay in power for another five to 10 years, despite international criticism of the country's worsening human rights situation. Then, suddenly, in April 1992, there began appearing signs of a reversal of this hard-line policy with an unexpected decision to cease all offensive military operations against certain ethnic groups and to release some political prisoners. General Saw Maung was replaced as SLORC Chairman by his deputy, General Than Shwe. Since this time, the regime has entered into cease-fire agreements or been in direct talks with some 17 armed opposition groups, though it has also been involved in renewed fighting with the armed opposition Karen National Union (KNU).

On the political side as well, there were some more positive signs of change. As well as acceding to the four Geneva Conventions of 1949 and the Convention on the Rights of the Child, the SLORC allowed both the UN Independent Expert and the Special Rapporteur appointed by the UN Commission on Human Rights to visit the country. In January 1993 it convened a `National Convention', albeit one consisting of 702 hand-picked delegates, to draft the principles for a new Constitution. This was followed by two widely publicized meetings between General Than Shwe and Lieutenant-General Khin Nyunt and Aung San Suu Kyi, the still house-arrested NLD leader, in September and October 1994. She was then released from house arrest on 10 July 1995. All these actions were welcomed by the international community, but with guarded optimism. Human rights monitors, meanwhile, have cautioned the outside world against any complacency, given the continuing abuses. Such doubts were further reinforced in May 1996 when the security forces arrested over 250 MPs-

elect and other NLD members in an attempt to prevent the NLD from holding its first full conference since the 1990 election.

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3 THE LEGITIMACY OF THE *COUP D'ÉTAT* OF 18 SEPTEMBER 1988

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Both the 1947 and 1974 Constitutions of Burma recognized the need for special measures to be taken in the event of a real and grave emergency arising which threatened the defence and security of the country. Under the 1947 Constitution, the President (usually acting on the advice of the Union cabinet) had the power to declare a state of emergency whenever "the security of the Union is threatened, whether by war or internal disturbance" or whenever "a grave economic emergency affecting the Union" arose. Similarly, under the 1974 Constitution, the Council of State was empowered to declare a state of emergency or promulgate martial law "if an emergency affecting the defence and security of the State should arise." In both cases, the decision had to be submitted to the legislature (parliament and national assembly, respectively) for approval at the earliest opportunity. The proclamation of emergency or martial law under the 1974 Constitution could apply either to the whole country or to specified areas only. Assuming that the situation in September 1988 was such that it threatened the defence and security of the nation, the proper course of action would have been for the Council of State to declare a state of emergency or martial law, preferably confined to those areas where that threat was most palpable, for example, in Rangoon. The military's actions in arrogating to itself the power ostensibly to restore law and order and in unilaterally taking over control of the state apparatus are, therefore, clearly unlawful.

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4 THE SLORC'S REFUSAL TO TRANSFER POWER

4.1 THE POSITION UNDER INTERNATIONAL LAW

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The refusal of the SLORC to abide by the results of the 1990 elections and to transfer power to a legally constituted civilian government raises serious questions under international law. It is a well recognized principle of the law of nations that the authority of any government to govern derives from the will of the people, as expressed in periodic and genuine elections. This principle is enshrined in the Universal Declaration of Human Rights (UDHR) itself, which has now passed into customary international law. As noted above, the SLORC has expressly recognized

the binding nature of the Universal Declaration and it is therefore clearly duty bound to abide by this principle.

Despite the unfairness of the SLORC's policies, which placed the opposition political parties in Burma at a severe disadvantage in the electoral process, the results of the May 1990 elections, as a reflection of the genuine and freely expressed will of the Burmese peoples, are beyond any doubt. It therefore remains incumbent upon the SLORC to implement the results of the elections fully and expeditiously. The SLORC's assertion that international initiatives urging such implementation amount to undue interference in Burma's internal affairs is specious, given the well-established position in law that whenever a matter which involves breaches of international legal obligations is raised before a competent organ, it ceases to be an issue of purely domestic concern.

The UN itself has followed this principle repeatedly over the years. Seized with the situation created by the Franco-led fascist government in Spain, for example, the General Assembly called for suitable measures to be taken "if, within a reasonable time, there is not established a government which derives its authority from the consent of the governed ..." Equally forceful condemnations have been issued *vis-à-vis* colonial or racist governments in other parts of the world from time to time — for example, in South Africa and in relation to the Israeli-Occupied Territories.

As a result of such considerations, the SLORC's refusal to give effect to the results of the 1990 election has been criticized by a number of international bodies, including the UN, the European Parliament and the Inter-Parliamentary Union (IPU).

4.2 THE POSITION UNDER BURMESE DOMESTIC LAW

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The legitimacy of the SLORC's accession to government on 18 September 1988 apart, its continued refusal to hand over power to a duly elected civilian administration is no less questionable under Burmese domestic law. General Saw Maung had proclaimed in his public broadcast of 23 September 1988 his commitment to hold multi-party elections and to return the country to civilian rule as soon as possible. This promise was reiterated in a press conference held in Rangoon on 9 June 1989, where a spokesman for the SLORC gave the following assurance: "We would like to tell the political parties not to worry about power. We will transfer power as soon as possible to the emerging government ..." Such a government, he noted, would be "a government that would emerge in accordance with the law after the elections."

That the NLD, which had won a decisive majority in the elections, clearly met the above criterion is not in doubt. Despite the grave handicaps that it had been placed under during the run-up to the election, the party had complied with all the requirements of the legislation promulgated by the SLORC itself, including a new Election Law enacted in May 1989. That law unequivocally stated that a new *Hluttaw* (parliament) "shall be formed with the *Hluttaw* representatives who have been elected in accordance with this Law from the *Hluttaw* constituencies." The elections had been

conducted by an Election Commission appointed by the SLORC itself; no allegations of impropriety were made against the NLD, nor was the authenticity of the results questioned. In the circumstances, the NLD was clearly entitled to form a government and to be given the reins of power.

The SLORC's justification for refusing to honour its pre-election pledge, namely that neither the 1947 Constitution nor the 1974 Constitution of Burma would be conducive to the emergence of a strong government, was an obvious afterthought, and one which was irrelevant. No stipulation about the suitability of existing constitutional arrangements for any emerging government had been made prior to the elections. Rather, the following explicit assurance was given by the SLORC itself at its pre-election press conference: "The elected representatives can choose one of the [two] constitutions to form a government, and we will transfer power to the government formed by them." The SLORC's assurance went further:

> "If they [i.e. the elected representatives] did not like the two existing constitutions, they can draw [up] a new constitution. *Neither the Defence Forces nor the State Law and Order Restoration Council will draw up a new constitution*." (emphasis added).

The SLORC's subsequent insistence that the elections were intended merely to convene a constituent assembly for drafting a new Constitution is therefore untenable. Not only was no such intention made manifest at any time before the elections, but there was no immediate demand for a new Constitution from any of the political parties. Some of the parties had, no doubt, expressed their preference for a new Constitution in their election manifestos, but as the SLORC itself recognized, the priority was to hold the elections as soon as possible and "the drafting of a Constitution should be discussed and decided by elected representatives in the [emerging] assembly."

In the circumstances, the continued refusal of the SLORC to transfer power to the duly elected civilian representatives cannot be justified under Burmese domestic law. It is difficult to resist the conclusion arrived at by the International Commission of Jurists (ICJ), among others, that the SLORC's insistence on a new constitution was an attempt not only to delay the transfer of power, but also "to impose a constitution satisfactory to the military authorities, rather than one drawn up by the new National Assembly and submitted to the people for approval." Even assuming, for the sake of argument, that a new Constitution was indeed needed, it is not without significance that the SLORC has, to date, done little in the six years since it first mooted the idea to put one in place.

5 THE MARTIAL LAW MEASURES AND THEIR COMPATIBILITY WITH INTERNATIONAL LAW

5.1 SOME GENERAL CONSIDERATIONS

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It is increasingly accepted in international law that, while governments are entitled to restrict or suspend certain fundamental rights during a public emergency which threatens the security of the state, any such restriction or suspension has to conform strictly to certain principles. These include the principle of proclamation/notification, the principle of exceptional threat, the principle of proportionality, the principle of non-discrimination and the principle of inalienability of certain fundamental rights.

Regardless of the question as to whether there existed circumstances on or around 18 September 1988 which justified the Burmese military's seizure of power, it is worth examining whether the SLORC's subsequent actions are in conformity with the above-mentioned principles.

A detailed analysis of the compatibility with international human rights law of individual measures adopted by the SLORC will be undertaken in Section 5.2 below and the present discussion will therefore be restricted to an examination of some general matters. This publication's focus on the SLORC measures should not, incidentally, be construed as an exoneration of the measures adopted by earlier Burmese governments.

The Principle of Proclamation

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The International Covenant on Civil and Political Rights (ICCPR) expressly requires every state of emergency to be officially proclaimed. The rationale behind this requirement is to encourage respect for procedural formality and to reduce the number of *de facto* emergency situations. The *coup d'état* of 18 September 1988 was followed immediately by two announcements and two orders, all signed by General Saw Maung, as follows:

Announcement No. 1 of 1988, which stated that "in order to effect a timely halt to the deteriorating conditions on all sides all over the country and for the sake of the interests of the people, the Defence Forces have assumed all power in the state ... so as to carry out the following tasks immediately: (a) to restore law, order, peace and tranquillity; (b) to provide security and to facilitate transport and communications; (c) ... to do the utmost to ease the people's food, clothing and shelter needs ...; [and] (d) to stage democratic multi-party general elections after fulfilling all the above-stated responsibilities." The announcement went on to clarify that the existing Election Commission would continue to be responsible for holding the promised elections and it urged all interested parties and organizations to begin preparing for the elections.

Announcement No. 2 of 1988, which declared that the People's Assembly, the State Council, the Council of Ministers, the Council of People's Justices, the Council of People's Attorneys, the Council of People's Inspectors and all state, divisional, township, ward and village people's councils were abolished with immediate effect. It also declared that all deputy ministers were suspended from their duties forthwith.

Order No. 1 of 1988, which announced the formation of the SLORC and listed its 19 members.

Order No. 2 of 1988, which required people, "in order to ensure law and order, and peace and tranquillity ...", to refrain from doing any of the following: (a) to travel in the streets between 8 p.m. and 4 a.m.; (b) to gather, walk, march in procession, chant slogans, deliver speeches, agitate or create disturbances in the streets in groups of more than five; (c) to open "strike centres"; (d) to block roads or demonstrate *en masse*; or (e) to interfere with or obstruct people carrying out security duties.

It is noteworthy that none of these orders or announcements specifically refers to the imposition of martial law, nor do they relate any of the SLORC's actions to any constitutional provision. To that extent, therefore, it can be said that there was inadequate compliance with the principle of proclamation.

Furthermore, some uncertainty has arisen about the exact status of martial law, following misleading and/or insufficient information put out by SLORC spokesmen from time to time. The SLORC delegate to the Third Committee of the UN General Assembly, for instance, categorically asserted in a speech on 25 November 1992 that an improvement in the `general situation' in Burma had enabled the government, among other things, to "revoke martial law countrywide"; however, the then UN Special Rapporteur to Burma, Professor Yozo Yokota, in his report dated 17 February 1993, continued to call on the government to lift the "ongoing state of emergency" and ensure that "martial law in the form of SLORC Orders and other emergency legislation should cease to be the basis of law."

It stands to reason that if martial law has indeed been revoked throughout the country, as claimed by the SLORC spokesman, then all the orders, decrees and notifications issued by the martial law regime should also stand automatically revoked. Clarification from the SLORC on this vital point is long overdue.

The Principle of Notification

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All the major international treaties on human rights require states parties to notify other states parties of any derogations that they make from their treaty obligations as a result of the invocation of emergency powers. Strictly speaking, the SLORC is not bound by this requirement as Burma has not acceded to the ICCPR nor to many of the other relevant human rights treaties.

However, given the comity of nations and given the SLORC's own repeated insistence that it places a high premium on good relations with the UN, it would have redounded to the credit of the government if prompt and detailed accounts were given of the various measures taken under martial law.

The Principle of Exceptional Threat

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It is well-recognized that for a state of emergency or martial law to be validly imposed, there must be an exceptional threat to the very existence of the nation. This presupposes the existence of an ongoing or imminent crisis situation, of a kind that would not lend itself to containment by ordinary measures, and one which affects the entire population or the entire population in a given area, and which poses a danger to the lives of the organized community constituting the state, that is, to the physical integrity of the population or to the territorial integrity of the state or to the functioning of the organs of the state.

Judged by these criteria, and independently of the legality of the *coup d'état* itself, it is a debatable question as to whether the imposition of martial law by the SLORC was justified. Given the complexity of crisis situations generally, it is seldom possible for an outside agency to make an accurate and unimpeachable assessment of the gravity of a particular situation, and even international human rights bodies have usually allowed governments some discretion — called "margin of appreciation" — in arriving at that judgment. In this particular case, the SLORC has argued that the escalating spiral of anarchy in Rangoon and elsewhere brought about by a cocktail of popular unrest, rumours and rising crime, coupled with a weak government which was proving itself increasingly incapable of restoring law and order, did meet the definition of `exceptional threat' and called for strong action. However, a more plausible argument can be made that the situation, grave though it was, did not require the imposition of martial law and the suspension of basic human rights for the restoration of order throughout the country. Certainly, this is the view of many Burmese citizens. Indeed, many opposition groups have also claimed that the disturbing political conditions that prevailed in August-September 1988 were deliberately heightened by the security forces who, they allege, freed many criminal prisoners, secretly instigated the ransacking of warehouses, and orchestrated a campaign of random violence and acts of provocation in the streets.

Significantly, none of Burma's armed opposition groups made any attempt to take advantage of the political breakdown in the cities, and thus there was no challenge to the territorial integrity of the State.

The Principle of Proportionality

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This principle requires that, however justified the imposition of a state of emergency or martial law may be, any measures adopted must be proportionate to the danger

sought to be avoided or abated. It implies that a government may only take action of such severity as is strictly required by the exigencies of the situation, and furthermore that any such action is limited to the territorial area immediately at risk. It also requires the government to ensure that the exceptional measures are not continued for longer than is strictly necessary.

Many of the measures taken by the SLORC since its assumption of power clearly fail these tests. A detailed analysis of those measures follows, but on a broader level, there can be little doubt that the scrapping of the Constitution, the abolition of the fundamental organs of state, the wholesale transfer of legislative, administrative and judicial powers to an unelected body, the indiscriminate detention of thousands of people without trial, the wanton disregard of the will of the people as manifested in a general election, and the prolonged suspension of basic freedoms such as freedom of speech, freedom of assembly and freedom of association, are grossly disproportionate to any legitimate danger that may have faced the country in September 1988. Moreover, even assuming that some of those measures were justified at the time they were introduced, their continuance for months — and in some cases for years — clearly offends against the principle of proportionality.

The Principle of Non-discrimination

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The ICCPR, among other human rights treaties, requires that any measures of derogation adopted by a state in an emergency situation do not involve discrimination based solely on grounds of race, colour, sex, language, religion or social origin. It is clear from several well-documented reports, including those issued by the UN Special Rapporteur, that many of the laws and practices adopted by the SLORC have involved — and continue to involve — large-scale discrimination, especially against the Muslims of Arakan State, the Karen, Shan, Mon and other ethnic minority groups. In his 1993 report, Professor Yokota had this to say:

> "According to the information received and carefully reviewed by the Special Rapporteur, ... the Muslim Rakhine are one of the many ethnic minorities in [Burma] who have not been adequately granted civil, political, social, economic and cultural rights commensurate with those people considered `Burmese' ... They, like other ethnic minorities along the Thai-[Burmese] border, have been at high risk of being internally displaced by the army and taken for use as forced porters or forced labourers. These practices carried out by the [Burmese] authorities, and most frequently the army, have given rise to the alleged grave violations of the physical integrity rights."

The 1982 Citizenship Law (enacted by an earlier military regime, but adopted and used by the SLORC) legalizes discrimination by introducing three classes of citizenship where only one existed previously. This law has been seen to have been applied unfavourably to racial and ethnic minorities, particularly the Muslims inhabiting the Arakan State.

The Principle of Inalienability of Certain Fundamental Rights

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All the leading international human rights treaties require that governments do not, under any circumstances, derogate from certain `core' rights which are considered so basic that they should be respected even during the gravest emergency. The ICCPR lists seven such rights: the right to life; the prohibition of torture; the prohibition of slavery; the prohibition of imprisonment for non-payment of civil debt; the prohibition of retroactive penal measures; the right to recognition of legal personality; and freedom of conscience and religion.

There is considerable evidence that many of the above-mentioned rights have been abridged or denied to the Burmese peoples as a result of the SLORC's policies and actions. The 1993 report of the Special Rapporteur, for example, refers to cases of summary execution of people suspected by the army of providing food and shelter to insurgents in conflict zones; deaths in custody; systematic torture of students, politicians, writers and others detained for political reasons; and portering and other forms of forced labour for the military. Such abuses have also been reported by non-governmental human rights monitors.

The principle of inalienability or non-derogability has been increasingly viewed by international human rights experts as one deserving of a wider application than merely to governments of states which have ratified the relevant treaties. As the UN expert, Mrs Questiaux, argued in her report,

> "[T]he idea of a bare minimum [of rights], from which no derogation is possible, is present in a sufficient number of instruments to justify our approaching the matter by reference to a general principle of law recognised in practice by the international community, which could, moreover, regard it as a peremptory norm of international law... It therefore seems to us that the peremptory nature of the principle of non-derogation should be binding on every State, whether or not it is a party [to any of the conventions] and irrespective of the gravity of the circumstances [giving rise to the emergency situation]..."

As can be seen from the above discussion, independently of the legality of the *coup d'état* of 18 September 1988, the actions of the SLORC following its accession to power are clearly incompatible with the rules of international law governing the exercise of emergency powers.

5.2 THE MARTIAL LAW MEASURES: A DETAILED ANALYSIS

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The Burmese peoples have had a long tradition of adherence to legal formality. As well as the legislation inherited from the British, a complex web of post-independence statutes and, more recently, martial law decrees, orders and regulations govern almost every aspect of the country's civil and political life. Despite this attachment to legal formalism, successive military governments have often impeded access to vital information, especially in matters touching on the politically sensitive issue of human rights, so that the precise state of the law on such matters is often difficult to ascertain.

Even defendants in criminal cases, and their lawyers, have often been denied access to many of the laws. As the UN Special Rapporteur noted in his 1993 report:

> "Various SLORC Orders ... have been inaccessible to those to whom they would have applied, they have been vague, randomly interpreted and arbitrarily applied. Government authorities themselves, in explaining the law to the Special Rapporteur, proffered contradictory interpretations. Lawyers and elected representatives told the Special Rapporteur that they did not have any idea which laws and orders were applied, how they were applied or to whom they applied."

The following analysis will focus on those laws which have been known to be used regularly by the SLORC. Prominent among these are: the Emergency Measures Act, 1950; the State Protection Law, 1975; the Unlawful Associations Act, 1908; the Public Order (Preservation) Act, 1947; the Printers and Publishers Registration Law, 1962; and a plethora of martial law orders promulgated since 1988. For the sake of convenience, the laws will be grouped together thematically wherever possible. A later section will discuss the constitutional proposals that have emerged from the SLORC-convened National Convention.

5.2.1 The Right to Life

(a) Legal deprivation of life

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Burmese law permits the imposition of the death penalty, but no executions have been carried out since 1988. In January 1993, the SLORC issued an Order commuting all death sentences passed between 18 September 1988 and 31 December 1992 to life imprisonment. According to information received by the UN Special Rapporteur in 1995, another governmental order of November 1992 apparently commuted all death sentences to life imprisonment after that date.

However, a previous SLORC Order of July 1989, which conferred judicial power on army commanders, allowed the then newly-established military tribunals, which were given jurisdiction to try civilians as well as military personnel, to impose the death penalty in all cases involving defiance of SLORC Orders. That Order raised a number of serious concerns about the fairness of the judicial process which are discussed in Section 5.2.5 below. It was, however, repealed in September 1992.

(b) Extra-legal deprivation of life

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In the past eight years, hundreds of deaths are reported to have occurred either as a result of unlawful and extrajudicial executions in the context of armed conflict or following torture or other forms of ill-treatment, including denial of medical assistance to prisoners, by security personnel in different parts of the country. Some of the victims were people who were detained under such laws as the 1950 Emergency Provisions Act, the 1908 Unlawful Associations Act, and the 1975 State Protection Act, or who had been compulsorily conscripted under the 1908 Village Act and the 1907 Towns Act, which raise serious concerns about arbitrary detention and forced labour respectively, and which are discussed in Sections 5.2.2 and 5.2.8 below.

Particularly shocking were the reported deaths in mid-1988 of pro-democracy activists demonstrating against the military in Rangoon and other parts of the country. Non-governmental sources have estimated the number of fatalities to be in the region of 3,000, with eyewitness reports suggesting that, in one incident alone, some 327 people were shot dead by the military in one small town, Sagaing, on 8 August 1988. The SLORC, however, has played down such incidents, maintaining that altogether countrywide no more than 15 demonstrators and another 516 "looters" had lost their lives. It has repeatedly refused to carry out an independent inquiry into these shootings or to account for the grossly disproportionate use of force by government troops which led to high numbers of civilian casualties.

5.2.2 Arbitrary Arrest and Detention

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Several Burmese laws and SLORC orders are known to permit arbitrary arrest and detention. Some of these laws predate the *coup d'état* of 18 September 1988, while others have been amended by the SLORC to make them harsher. The arbitrariness arises from both substantive and procedural aspects of the law.

Among the foremost in this category is the misleadingly-titled Emergency Provisions Act, 1950 (EPA). This law is not, as might be supposed, concerned with the regulation of a state of emergency; rather, it is a widely-worded law which can be, and has been, used to suppress dissent, even in the absence of a proclaimed state of emergency. Under the Act, anyone who, among other things, "violates or infringes upon the integrity, health, conduct and respect of State military organisations and government employees towards the ... government", or "causes or intends to spread false news about the government", or "causes or intends to disrupt the morality or the behaviour of a group of people or the general public" is liable to imprisonment for up to seven years. The EPA also makes it an offence, punishable with death or life imprisonment, to "intend to or cause sabotage or hinder the successful functioning of the State military organisations and criminal investigative organisations."

The Act has been used extensively against a wide range of people, including members of opposition political parties, Buddhist, Christian and Muslim clerics, university and high school students, professionals and trades unionists. In July 1991, for instance, at least 7 students from the Monywa State High School in northern Burma were reportedly charged with "causing or intending to disrupt the morality or the behaviour of a group of people or the general public" after they attempted to organize a public demonstration to commemorate Martyr's Day, when Burma's independence hero, Aung San, was assassinated. As recently as 20 February 1995, several students were arrested after they reportedly sang the pro-democracy anthem, *Kaba ma kye bu* ("The world won't forgive" — a pun on the national anthem). Two months later, nine of those arrested were sentenced to seven years' imprisonment under Section 5(J) of the EPA. The UN Special Rapporteur, in his 1995 report, cites the case of at least three people (two politicians and one writer), who had been convicted and given the maximum punishment under the EPA; he also refers to reported cases of death in custody of people held under the EPA.

Following the release of Aung San Suu Kyi, the EPA was also used against four entertainers, U Par Par Lay, U Lu Zaw, U Htwe and U Aung Soe, who had put up a performance in Suu Kyi's house on Independence Day 1996. Charged with "inciting the audience to unseemly behaviour" and "harming state security by word and action", under Sections 5(e) and 109, they were each sentenced to 7 years' imprisonment after a summary trial held within the prison premises at which neither any defence lawyer nor key witnesses were allowed to be present.

The EPA violates one of the fundamental tenets of civilized jurisprudence, namely that no one shall, in the exercise of their rights and freedoms, be subjected to greater limitations than are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. This principle is enshrined in Article 29(2) of the Universal Declaration of Human Rights (UDHR) and in Article 5(1) of the ICCPR.

International standards also require that every person subjected to arrest is informed, at the time of arrest, of the reasons for arrest, and, promptly thereafter, of any charges that may be laid against him/her. The arrested person is entitled to be brought promptly before a judge or other judicial authority and tried within a reasonable time or released. A detainee is also entitled to be considered for conditional release pending trial, and to have the lawfulness or otherwise of their arrest or detention reviewed by a court of law without delay. Furthermore, the detainee has an enforceable right to compensation should the arrest or detention be shown to be unlawful. Many of these requirements have been reinforced by the UN Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment and other internationally-accepted human rights instruments.

The UN Human Rights Committee has been at pains to stress the importance of these guarantees. It has noted, for example, that the requirement to bring every arrested or detained person `promptly' before a judicial authority means that delays, if any, in the production of detainees before the courts shall not exceed "a few days". The Committee has also emphasized that "pre-trial detention should be an exception and as short as possible." Yet, it is clear from the evidence that has emerged over the

past few years that the SLORC has, in carrying out arrests and detentions under the EPA, consistently acted in contravention of these provisions.

The Act also contravenes the provisions of Burmese domestic law. It is inconsistent with the guarantees of individual freedom enshrined in both the 1947 and 1974 Constitutions of Burma. The government has, of course, argued that those guarantees do not apply any longer in view of the SLORC's abrogation of existing constitutional arrangements — an argument that is highly questionable, given the lack of legitimacy of the martial law regime. In any case, there is certainly no excuse for the government to disregard the provisions of the Burmese Code of Criminal Procedure in its application of the EPA, as it has consistently been doing, given that, on the government's own admission, the guarantees contained in that Code remain applicable in all cases of detention carried out under a SLORC Order or emergency regulation.

Most of the criticisms levelled against the EPA above also apply to another draconian law that has been used selectively by the martial law regime to carry out indiscriminate and arbitrary arrests and detentions of political dissidents: the Law to Safeguard the State from the Danger of Destructive Elements, also called the State Protection Law of 1975. This law, which was amended in August 1991, allows the government to declare a state of emergency in a part or the whole of the country "with a view to protect state sovereignty and security and public law and order from danger [sic]" and to restrict any fundamental rights of the citizens in specified regions or all over the country. The state of emergency, to be declared by the State Council and subject to approval by the People's Assembly within 60 days, can be extended indefinitely by the latter body. If the necessary approval is not forthcoming, the declaration by the State Council ceases to have effect forthwith, although any action taken previously would continue to be valid.

The law also allows the government to impose wide-ranging restrictions on individuals: anyone who is suspected of having committed, or who is committing, or who is about to commit any act which endangers the sovereignty and security of the state or public peace and tranquillity, can be ordered by the Council of Ministers to be imprisoned for up to five years without trial. The government is also empowered to issue restriction orders under which a person may be confined to a specified area or have his/her freedom of movement otherwise constrained, or be prohibited from possessing or using specified articles. An original provision in the law, allowing those subjected to detention or restriction orders to appeal to the civilian judiciary, was removed in 1991.

The State Protection Law has been applied extensively to suppress peaceful political dissent. The Act was used to detain Aung San Suu Kyi under house arrest between July 1989 and July 1995 and a former Prime Minister, U Nu, between December 1989 and April 1992.

The law is inconsistent with a number of principles enshrined in international human rights instruments. Not only does it define punishable acts in a vague and over-broad manner, it also violates most of the guarantees on personal liberty contained in Article 9 of the ICCPR. As the Human Rights Committee has emphasized, those guarantees apply as much to preventive detention, that is, detention

for reasons of public security, as to detention following a criminal charge. Preventive detention, said the Committee, "must not be arbitrary, and must be based on grounds and procedures established by law; information about the reasons must be given and court control of the detention must be available as well as compensation in the case of a breach." None of these requirements have been met either by the terms of the State Protection Law or in its application in practice to individual cases.

The State Protection Law also violates another important tenet of international human rights law. The arbitrary increase of the maximum permissible term of imprisonment — from three to five years — brought about by an August 1991 amendment to the law clearly contravened the well-recognized prohibition against retroactive enhancement of punishments. This amendment was, for instance, used to justify the continued detention of Aung San Suu Kyi beyond July 1992 when, under the terms of the law as it stood at the time of her initial detention, she was entitled to be released. It is a measure of the importance attached to the principle of non-retroactivity in international law that it has been made non-derogable even during times of emergency.

A third law which has been used by the SLORC to arbitrarily arrest and detain political opponents is the Unlawful Associations Act 1908. This law allows the government to imprison for up to five years anyone who has been a member of, or contributes to, or receives or solicits any contribution towards any association "(a) which encourages or aids persons to commit acts of violence or intimidation or of which the members habitually commit such acts; or (b) which has been declared unlawful by the President of the Union." Anyone managing or assisting in the management of an unlawful association, or who promotes or assists in promoting a meeting of such an association, can be subjected to similar punishment.

A number of organizations, including political parties, student unions, professional groups and religious associations, as well as armed opposition groups, have been declared unlawful under this Act. A list published in November 1989 named, among others, the Kachin Independence Organization (KIO), the New Mon State Party (NMSP), the Karenni National Progressive Party (KNPP), and the Karen National Union (KNU). Despite a formal *rapprochement* between the government and the first two groups which resulted in those groups being brought into "the legal fold" recently, their status as `unlawful associations' appears to remain unchanged, with villagers and supporters in their operational areas being arrested or harassed frequently. The arbitrary manner in which the Act is being applied is further illustrated by the fact that some eight other ethnic groups, which had also fallen foul of the law, were apparently legalized by a May 1991 decree.

The Unlawful Associations Act falls short of international human rights standards. By conferring wide and untrammelled powers on the executive to declare any association unlawful, it subjects the rights and freedoms of Burma's peoples to greater restrictions than is strictly necessary to meet the requirements of morality, public order and the general welfare. The Act's incompatibility with international standards is underlined by the arbitrary, indiscriminate and heavy-handed manner in which it has been applied in practice, usually to suppress peaceful dissent.

Parliamentarians and officials of political parties have been a particular target of arbitrary arrest and detention under the above laws, which are sometimes used in conjunction with other laws to increase sentences. Scores of elected members of the *Pyithu Hluttaw* have been imprisoned after trials which fell far short of internationally accepted standards. In some cases, the sentences passed have subsequently been increased: U Tin Oo, the chairman of the NLD, for example, was initially sentenced to three years' imprisonment, but in 1991 he was again tried for the same offence by a military tribunal in Insein jail which extended his sentence to 17 years. The Inter-Parliamentary Union has repeatedly expressed its concern over the treatment of Burmese parliamentarians and in October 1991 expressed a desire to send a fact-finding mission to the country — a request which the SLORC turned down on the specious ground that it was already co-operating with the UN Commission on Human Rights and therefore saw no reason for an on-site visit from the IPU.

Another law which has also been used to target parliamentarians is Section 122 (1) of the Penal Code, more commonly known as the "anti-treason law", under which anyone found guilty of "high treason" can be punished with death. Although death sentences are routinely commuted by the SLORC, several people have received exceptionally harsh sentences under this law in recent years. In early May 1991, for instance, some 25 MPs belonging to the NLD were sentenced to between 10 and 25 years' imprisonment after being charged with attempting to form a parallel government. All the sentences were reportedly handed down by military tribunals which lacked due process of law.

Some 2,000 political detainees have reportedly been released by the Burmese authorities since April 1992, but hundreds more are believed to be still in custody, and the practice of arbitrary arrests for the peaceful expression of opinions and ideas continues unabated. As recently as May 1996, for instance, over 300 members or supporters of the NLD, including 273 MPs-elect, were arrested and held for questioning, ostensibly on the grounds that they had adopted a "confrontational stance" *vis-à-vis* the SLORC, although most observers believe that the action was taken as a pre-emptive attempt to prevent the NLD from holding a meeting planned to coincide with the sixth anniversary of its victory at the 1990 elections.

5.2.3 Cruel and Inhuman Detention Conditions

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The harshness of the above laws is compounded by the cruel and inhuman manner in which those detained under them are treated by the authorities. Apart from being subjected to torture, including rape, and other forms of physical violence — a subject which is discussed separately — detainees are often made to sleep on cold cement floors, deprived of water, forced to eat substandard — sometimes spoiled — food, confined to small, unhygienic cells, and denied medical attention. Hundreds of prisoners are also reportedly subject to forced labour, in inhumane conditions. As the UN Special Rapporteur noted in his 1996 report, forced labour from prisons was recently used to build railway lines from Mong Nai to Nam Zarng, Mong Nai to

Mawkmai and Ho Nam Sai Khao to Shwe Nyong. In the course of such construction, at least three prisoners are reported to have died.

Such practices clearly violate the standards laid down in, for example, Article 10(1) of the ICCPR and the UN Standard Minimum Rules for the Treatment of Prisoners. Commenting on the importance of the former, the Human Rights Committee has stressed that people deprived of their liberty should not "be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons." This, said the Committee, is "a fundamental and universally applicable rule" whose application cannot be dependent on the material resources of a State. The SLORC's treatment of detainees also falls foul of the United Nations' Code of Conduct for Law Enforcement Officials, which imposes a number of obligations on police, military and other personnel, including the duty to respect and protect human dignity and to maintain and uphold the human rights of all persons.

5.2.4 Torture and Other Cruel, Inhuman or Degrading Treatment

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A substantial body of well-documented evidence has emerged over the years of torture, including rape, and other forms of severe physical violence being inflicted by the Burmese police, military, intelligence and other security personnel on persons held in detention and during interrogation of suspected dissidents. Many of the worst abuses have reportedly been committed by the Burmese armed forces in the fields and villages of the ethnic minority war-zones (see also Sections 5.2.7 and 5.2.8). Also accused of committing torture are military intelligence units 6, 7, 11 and 12. Places of detention where torture is reported to have occurred include Insein, Thayawaddy, Thayet and Mandalay prisons as well as the secret Directorate of Defence Services Intelligence interrogation centre at Ye Gyi Aing camp outside Rangoon. The UN Special Rapporteur lists a number of individual cases of severe torture, including rape, in his periodic reports, and similar credible accounts have also been publicized by organizations such as Amnesty International.

Among the methods reportedly used to inflict torture are: severe beatings with metal rods, chains, combat boots or rifle butts; burning with cigarettes; having iron or bamboo rods rolled up and down the shins until the skin is lacerated; application of electric shocks to body extremities; sleep, food and water deprivation; near-suffocation or drownings; and forced digging of "one's own grave".

By permitting torture to occur on such a large scale, the Burmese government is in serious contravention of a number of international human rights instruments. These include: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Declaration on Protection from Torture, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the Code of Conduct for Law Enforcement Officials. Significantly, on its accession to the Convention on the Rights of the Child,

one of the two reservations which the Burmese government entered related to Article 37, which required states parties to ensure that no child may be subject to torture or other cruel, inhuman or degrading treatment or punishment. That reservation has since been withdrawn.

The importance attached in international law to the prohibition of torture can be seen from the fact that it has been made non-derogable even during times of public emergency. This prohibition makes no exceptions. As the Human Rights Committee has explained, the obligation cast on governments to enforce this prohibition extends to all torture, "whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity," and "no justification or extenuating circumstances may be invoked to excuse a violation of [this prohibition] for any reasons, including those based on an order from a superior officer or public authority." The Committee has further emphasized that, to discourage the practice of torture, "it is important ... that the law must prohibit the use or admissibility in judicial proceedings of statements or confessions obtained through torture or other prohibited treatment" — an injunction which has not, by any means, been respected by the Burmese government.

5.2.5 Fair Trial Concerns

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The administration of justice has been one of the prime casualties of the military regime. Not only have the people charged under the various laws and military decrees been consistently denied fair trials and the due process of law, but the judicial system itself has been emasculated over the years. The process, which started as early as 1962 under the Ne Win regime, reached its apotheosis in 1988 when the SLORC abolished the last vestiges of a civilian judiciary and replaced it with a network of military tribunals. These tribunals lacked even the barest minimum attributes of independence from the executive, and followed procedures that are internationally regarded as a travesty of justice.

Until 17 July 1989, most defendants were charged and tried under the ordinary criminal laws, though such laws were often used for purposes which were far removed from those for which they were originally intended. Between July 1989 and September 1992, however, all executive and judicial powers under martial law were invested in three Command Commanders, one for each major military region of the country, who in turn were empowered to set up military tribunals to try offences.

The Command Commanders had wide discretion to refer cases for trial either to the ordinary courts or to the military tribunals, although cases concerning defiance of orders issued by the SLORC, by the government or by the Command Commanders were automatically to be tried by the tribunals. The tribunals could hand down punishments ranging from three years' imprisonment with hard labour to death, "no matter what the existing law provides." Cases could be disposed of summarily, at the discretion of the tribunals, whose decisions were final, although sentences of life imprisonment or death required approval by the Command Commanders. With the

SLORC expressly denouncing the existing Constitution in July 1990, the military tribunals were freed of all constitutional constraints, assuming that they had ever abided by any.

Neither the composition nor the procedures of the tribunals were calculated to inspire confidence among defendants. Each tribunal consisted of a lieutenant-colonel and two junior officers from either the army, navy or air force. The proceedings were not open to the public, and defendants were only rarely allowed to engage counsel to argue their case. Most of the trials were carried out in summary fashion, with scant regard being shown to the evidence adduced. Defendants were not presumed innocent until proven guilty, and very often sentences were announced without the relevant witnesses being examined. There was no effective right of appeal to an independent higher forum: such appeals as were permitted to be made to the military authorities were usually in the nature of mercy petitions. Instances of defendants being acquitted by military tribunals are virtually unknown.

It is estimated that several hundred people were tried and convicted by these tribunals before they were disbanded in September 1992; by the SLORC's own admission, some 24 people were sentenced to death in the first three months alone of their functioning. An overwhelming majority of those brought before the tribunals were students, members of the NLD or other political parties, Buddhist monks and other pro-democracy activists arrested since the 1988 seizure of power by SLORC. Such details as have emerged concerning the way the trials were conducted confirm the frequently-expressed fears of human rights monitors about the tribunals' lack of independence and impartiality.

Typically, trials before the tribunals were brief to the point of being perfunctory: the defendant, on being brought before the tribunal, would have the charges against him/her announced by one of the judges or by the public prosecutor, who would also read out any statement that the defendant may have made during interrogation. (Often such statements, including confessions, had allegedly been extracted under physical or psychological pressure, including torture.) The defendant would then be asked formally to plead guilty or not guilty. This would be followed swiftly by the tribunal announcing its verdict, almost invariably one of guilt.

Defendants were given little chance to speak during the trial, let alone present a proper defence. Even where they managed to make a statement, the judges paid no heed to it. In one case, a Rangoon University student, Soe Htat Khine, who was sentenced to five years' imprisonment following a summary trial for "engaging in illegal criminal activity," was punished with another five-year sentence for contempt of court when he asked the chairman of the tribunal why he had been convicted despite pleading not guilty.

The sentencing methods of the military tribunals were no less arbitrary. Not only could the tribunals completely disregard statutory stipulations concerning sentences, they could, and often did, hand down punishments that were disproportionately harsh in relation to the alleged offences. There were also numerous cases of children being sentenced to long prison terms for relatively minor offences. The unfairness of trials and sentencing procedures under the tribunals raised issues of heightened concern in cases where defendants were sentenced to death. The tribunals

were also known to hold trials and pass sentences *in absentia*, usually in cases involving high-profile critics of the regime who had succeeded in fleeing the country and who the government was keen to prevent from returning.

The constitution and functioning of the military tribunals violated several basic human rights standards under international law, including the right of every person to a fair and public hearing by an independent and impartial tribunal; the right to be presumed innocent until proven guilty; to have adequate time to prepare a defence; to representation by counsel of one's choice; to have an opportunity to examine witnesses and present witnesses on one's own behalf; to have judgment rendered publicly; not to be subjected to penalties heavier than those prescribed by law at the time the act leading to the conviction was committed; and to an effective appeal to a higher tribunal. While trials by a military tribunal are not *per se* unlawful, the Human Rights Committee has stressed that "the trying of civilians by such courts should be very exceptional and take place under conditions which generally afford the full guarantees stipulated in article 14 [of the ICCPR]" — something the SLORC-appointed tribunals manifestly failed to do. The validity of the trials conducted by these tribunals is also suspect if regard is had to the Basic Principles on the Independence of the Judiciary, endorsed unanimously by the UN General Assembly in 1985, which state *inter alia* that:

> "Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals."

Even the possible invocation of emergency powers, permitted under international law to meet situations threatening the life of a nation, would be of no avail to the SLORC, because it has not complied with the basic preconditions for invoking such powers. In any case, any derogation from normal law has to be confined to strict and narrow limits and cannot extend to a wholesale abrogation of rights in the way the creation of the military tribunals did. As the UN Special Rapporteur on States of Emergency has pointed out, no state may use its power of derogation from a right to "modify that right to the point of making it non-existent." So extensive was the derogation effected by the Burmese military tribunals that they have also been seen to have infringed international humanitarian law, one of whose principles prohibits "the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court affording all judicial guarantees which are recognised as indispensable by civilised peoples" even during wartime.

It is not only the law and practice concerning military tribunals that fall short of international human rights standards. The SLORC's treatment of the `ordinary' civilian legal system has been no less flawed. After abolishing the 1974 Constitution — and with it the then existing judicial system — immediately on coming to power on 26 September 1988 the SLORC promulgated a Judicial Law which sought to create a new hierarchy of civilian courts. Although the new law contained formal guarantees of independence for these courts, they were in practice subjected to tight control by the SLORC at all times. Judges enjoyed no tenure of office, and were under clear instructions to take their lead from their military masters in the discharge of their functions. This has ensured that, despite the abolition of military courts,

political prisoners still do not get a fair trial. As the International Commission of Jurists noted in its 1991 report, most cases are tried in a summary manner and verdicts are determined in advance of the trials: "In cases where they had received orders to convict, judges warned lawyers that an overzealous conduct of the case might prove detrimental to the interest and liberty of the lawyer."

As part of the process of subordination of the judiciary to the executive, the SLORC introduced another piece of legislation, the Period Fixing Law, which, citing "the recent state of affairs", ordered the closure of all courts in the country from 1 June 1988 until 31 March 1989. This had the effect, *inter alia*, of suspending or postponing the trials of hundreds of people detained in connection with the 1988 pro-democracy demonstrations. It was intended, in the opinion of one analyst, "to keep the lawyers and others who had participated in the 1988 demonstrations off-balance and, gradually, [to] place the entire legal system under SLORC control through intimidation, rather than [through] dismiss[al] of judges and others." The Period Fixing Law was thus a blatant violation of several international standards concerning fair trial and the administration of justice.

The civilian courts' near-total deference to the executive under the SLORC can be illustrated by the fact that judges who refused to fall in line faced swift dismissal: some 62 of them were reportedly deprived of office in 1989 after failing to comply with SLORC instructions to sentence political dissidents to prison terms longer than those permissible in law. So blatant has been the interference in the administration of justice that, in one case, the presiding judge is reported to have admitted to the family of a defendant that he had no power to determine the outcome of the case as he was obliged to take his instructions from officials of military intelligence. Information compiled by human rights monitors on individual cases tried by the civilian courts indicates persistent and large-scale infringement of the international norms on fair trial. In his 1996 report to the Commission on Human Rights, the UN Special Rapporteur concluded that the Burmese legal system did not respect the `due process of law'. He noted, among other things, that "there is no proportionality between offences committed and punishments applied, particularly in political cases..."

The intimidation of the judiciary has also, over the years, had an adverse impact on both the morale and professional standards of the Bar. There has been a precipitous fall in advocacy skills, following repeated assaults on the independence of lawyers, many of whom have been subjected to political persecution by successive military regimes, including the SLORC. So great has been the pressure that lawyers are reportedly very reluctant, for instance, to file habeas corpus petitions on behalf of clients, who have been illegally detained, for fear of their own safety. This constitutes a serious infringement of the internationally-recognized norms for the protection of lawyers from undue harassment, hindrance or improper interference in the discharge of their duties. Officially-inspired attacks on the Bar included an unprecedented speech in May 1996 by the Chief Justice of the Supreme Court, U Aung Toe, in which he characterized the country's lawyers as "corrupt, thieving and greedy."

5.2.6 Freedom of Expression

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Following on the practice of previous military administrations, the SLORC has clamped down heavily on the freedom of expression of Burma's peoples. Not only is there a wide and comprehensive censorship of the media, much of which is state-controlled, but any expression of views or opinions critical of the SLORC is usually visited with swift and condign punishment under one or more of the broadly-worded criminal laws.

The most recent — and arguably the most draconian — of such laws, promulgated on 7 June 1996, makes it an offence to instigate, protest, say, write or distribute anything which would "disrupt and deteriorate the stability of the state, communal peace and tranquillity, and the prevalence of law and order", or "affect and destroy the national consolidation", or "affect, destroy and belittle the tasks being implemented at the National Convention ... and cause misunderstanding among the people." The law also forbids anyone from drawing up or writing or distributing a Constitution for the country without legal authorization, and also makes any attempts at collaboration in any of the above-mentioned acts an offence. All offences are punishable with imprisonment, which may range from three months to 20 years, and possibly a fine. Organizations found guilty of any of the offences risk being banned or disbanded, and their properties confiscated.

This law has been seen by many observers as being targeted specifically at the NLD and its supporters to counter the growing support for the party and its leader Aung San Suu Kyi who, in May 1996, announced that she and her colleagues had decided to write a new democratic Constitution for the country in the face of the SLORC's continued refusal to hand over the reins of power to the duly elected representatives of the people. The law's sweeping provisions are clearly designed to stifle all dissent.

Historically, the main instrument of censorship is the Printers and Publishers Registration Law of 1962 under which all books, magazines, periodicals, songs and films are vetted by a Press Scrutiny Board (PSB) prior to publication or distribution. The Board has powers to restrict not only the contents of materials submitted for scrutiny, but also the number of copies that may be legally published and distributed. Its decisions may not be contested through the courts and are reviewable only by the Minister of Home Affairs, whose decision is final. Under the law, individual writers who are seen as critical of the government can be blacklisted. A breach of the law can lead to imprisonment for up to seven years and/or fines of up to 30,000 kyats (US$5,000). The law, which was introduced soon after the military coup of 1962, has been amended several times, usually to widen its scope and/or increase its severity, most recently in June 1989.

The law has been used to censor both works by indigenous writers and foreign publications. Often applied indiscriminately, it has produced some farcical results: for example, the PSB routinely excises the name of the South African President, Nelson Mandela, from articles and news reports following his public call in 1993 for the release of Aung San Suu Kyi. Several prominent figures have been sentenced to long prison terms under this law. They include the short-story writer and surgeon, Ma Thida, and an MP-elect from the NLD, U Kyi Myint.

Often, the law is used in conjunction with other laws such as the Emergency Provisions Act and the Unlawful Associations Act to punish political dissenters. In October 1993, for instance, Dr Aung Khin Sint, another MP-elect and medical writer, received a 20-year jail sentence for writing "illegal" letters and leaflets supporting the NLD and distributing them to delegates at the National Convention — at which he was himself a delegate — after being tried under the Printers and Publishers Registration Law, the Emergency Provisions Act and the Official Secrets Act. More recently, in February 1995, nine students, who sang a pro-democracy anthem during the funeral of the former Prime Minister, U Nu, were sentenced to seven years' imprisonment under the Emergency Provisions Act. In November 1995, another student, U Ye Htut, was also sentenced to seven years' imprisonment for "writing false and fabricated news about Myanmar since 1992, which could cause foreign countries to misunderstand the actual situation prevailing in the country."

The Official Secrets Act has been a source of considerable concern for the manner in which it has been used to curb dissent. The case of two septuagenarian NLD officials, U Chit Khaing and U Kyi Maung, is illustrative. They were sentenced to seven and 10 years' imprisonment respectively (later raised to 14 and 20 years) for handing over a letter addressed by the SLORC to the Central Committee of their party for translation to an employee of the British Embassy in Rangoon. This act was deemed to constitute the offence of "handing over classified state secret documents of national interest to unauthorised persons" under the Official Secrets Act, and accepted as such by the military tribunal hearing their case. The British Embassy employee to whom the letter was given for translation, a Burmese national named Daw Nita Yin Yin May, was sentenced to three years' imprisonment, also under the Official Secrets Act.

Even contacts with foreigners are discouraged. The then UN Special Rapporteur to Burma, Professor Yozo Yokota, refers in his 1995 report to an article which appeared in the *New Light of Myanmar*, according to which the receiving or passing of information or written material from and to foreigners could be considered illegal. "By prosecuting persons for such exchanges of information", observed Professor Yokota, "the Government of Myanmar effectively intimidates its citizens and discourages them from exercising their fundamental rights to freedom of expression."

The SLORC has also sometimes employed a provision in the Penal Code, Section 109, which makes it an offence to "spread false information injurious to the state", to silence political opponents. In the autumn of 1994, for instance, four people — U Khin Maung Swe, U Sein Hla Oo, both NLD MPs-elect; Daw San San Nwe, a leading writer; and her daughter, Ma Myat Mo Mo Tun — were sentenced to seven-year prison terms after being convicted under this provision and under the 1950 Emergency Provisions Act.

Political parties, too, are subject to strict censorship. For example, an October 1988 directive from the SLORC forbade them from making "personal attacks on any individual person or any political party" and from "organis[ing], agitat[ing], giv[ing] talks, spread[ing] false and malicious rumours and writ[ing] such materials with the intention of bringing about the disintegration of the *Tatmadaw* [armed forces]." In addition, during the 1990 election the NLD was forbidden from using duplicating

machines under the Printers and Publishers Registration Law, so that it had to rely on the cumbersome process of typing each copy of its campaign material. All speeches, writings and publications connected with the election were subjected to vetting by the authorities, and any matter deemed derogatory to the SLORC was threatened with punishment of up to three years' imprisonment and/or fines of up to 5,000 kyats. An omnibus Order, defining the narrow limits within which they could campaign, was passed by the SLORC in February 1990. This order required anyone wishing to campaign to obtain permission from the SLORC: at least seven days' notice was to be given of any intention to organize an assembly at which public speeches would be made, accompanied by detailed information about the proposed speakers. The SLORC could, at its discretion, grant or refuse permission; even where permission was granted, it could be revoked at any time "in consideration of security, the prevalence of law and order, and regional peace and tranquillity". Campaign materials were required to be submitted for advance scrutiny by the authorities if "there is any doubt as to whether [they] are in contravention of the prohibitions mentioned in this Order."

The SLORC also does not take kindly to foreign news and broadcast organizations providing an alternative source of information to Burma's peoples. Its treatment of the British Broadcasting Corporation (BBC) is illustrative of its approach in this regard. In September 1993, the government-controlled *New Light of Myanmar* newspaper commented: "The BBC's objectives as regards Myanmar are very clear: to instal British cronies in positions of power in Myanmar and through them to manipulate Myanmar political and economic life." As evidence of this attitude, in 1989 a Rangoon-based lawyer, U Nay Min, was sentenced to 14 years' hard labour (later reduced to 10 years) under the Emergency Provisions Act for allegedly "sending false rumours" to the BBC. Nay Min remains in detention today, and he is reported to be suffering ill-health as a result of inhuman conditions in jail.

Finally, in August 1995 the Burmese authorities began jamming Burmese language broadcasts by the BBC World Service and the Voice of America (VOA). The action followed the BBC's airing of an interview with Aung San Suu Kyi soon after her release from detention. The jamming of VOA broadcasts was, according to one US official, unintended and a "spill-over from the attempts to interfere with the BBC." A year later, BBC officials have told ARTICLE 19 that broadcasts are still being jammed.

The film, video and satellite television industries have also been regular targets of censorship and harassment by the SLORC. Over the past eight years, many prominent film-makers, writers and artists, including Maung Thawka (U Ba Thaw) and U Win Tin, chairman and vice-chairman of Burma's Writers' Association, U Aung Lwin, chairman of the Burma Film Society, and the popular comedian, Zargana, have been imprisoned for their support of the pro-democracy movement. Those involved in the making, copying or distribution of even amateur videos of NLD rallies and Western news reports on Burma have been threatened with prison terms of up to three years under the 1985 Video Law. The SLORC also initially clamped down on foreign satellite TV, declaring illegal all equipment and installations connected with it. However, it subsequently appeared to loosen its grip, largely in recognition of the power of modern technology which makes the proliferation of these media increasingly inevitable. Even so, significant controls still remain: as well as reserving

the right to grant or refuse a licence for satellite receivers at will, the regime has set the licence fees at an astronomical level — 12,000 kyats (US$2,000) — so that few individuals are able to afford to buy one.

Musicians have not been spared either. As well as proscribing many popular songs, the SLORC banned the fledgling Musicians Union and arrested several young performers at the Thingyan water-festival in April 1989. A new censorship board was set up to vet the "lyrics, rendition and musical arrangement of songs" and protect Burmese music against foreign influences which were, in the SLORC's opinion, "undermining national spirit and patriotism and making Myanmar culture extinct."

Many of the laws and practices cited above clearly deny the inhabitants of Burma the fundamental right to freedom of expression guaranteed under international law. Although in international law that right may be subject to restrictions, any restriction imposed must, in order to be valid, not only fall strictly within one of the categories recognized by the relevant international standards — for example, to protect the rights or reputations of others, to protect national security or public order or public health or morals — but must also be `necessary' in the context of the given society. Furthermore, the restriction must conform to the principle of proportionality, and not be excessively wide in scope or severity.

The importance attached by the international community to freedom of expression is underlined by numerous initiatives undertaken by the UN over the years. It is now widely recognized that this freedom, as well as being important in its own right, is also essential to the protection and promotion of other rights such as the right to a fair trial, the right to health, and so on. The UN and other international bodies have repeatedly called upon governments to release all persons who have been detained solely for exercising the right to freedom of expression without using or advocating violence. The SLORC has, besides consistently disregarding such calls, failed to offer a convincing justification for the sweeping curbs imposed by it on the freedom of expression of the peoples of Burma.

5.2.7 Forced Relocations

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Much concern has been expressed in recent years over the SLORC's policy of forcibly relocating large groups of people in different parts of the country. In general, such relocations have been carried out either as part of the regime's `urban redevelopment' programme or as part of its counter-insurgency operations in the ethnic minority regions. As a method of social engineering it predates the SLORC, but most observers are agreed that there has been an escalation in the scale of relocations since 1988, which has led to serious human rights abuses. It is estimated that at least a million people, possibly a million and a half, have been forcibly moved since the accession to power of the SLORC in 1988; in some areas — for example, those occupied by the Karenni and Palaung minority groups — up to 20 per cent of the population are reported to have been subject to relocation.

In its first form, the practice typically involves residents of city centre settlements being required at short notice — usually of between seven and 10 days — to vacate their existing homes and move to `satellite new towns'. To ensure compliance, the authorities have on occasion first disconnected the electricity and water supplies at the old settlements and then razed them to the ground. The residents have rarely been offered compensation for properties or homes lost, or the necessary assistance for building their new homes. Many of the new settlements have also initially lacked the infrastructure to support large-scale relocation of people: they have sometimes been flooded, lacked proper sewage facilities, with little health care provision or sources of clean water, rendering many of those who move in vulnerable to diseases such as malaria and diarrhoea. Once relocated, residents are not free to move again to another area of their choice, as they are registered with the authorities in their new habitat and are obliged to report to them.

The government has justified such resettlements as being necessary to "cleanse" the cities of squatters. Critics of the policy have pointed out, however, that not all those moved are squatters: many of them, they say, had legal title to their properties, while others had acquired title by virtue of long and uninterrupted possession. It has also been alleged that some of the relocations have been motivated by personal greed on the part of army officers: given soaring real estate prices in the cities, some officers are alleged to have received backhanders for the sale of vacated lands to developers and property speculators.

In its second form, pioneered as a counter-insurgency weapon by General Ne Win and the Burmese army after 1962, the forced relocation policy involves the declaration of large areas in ethnic minority regions as `free-fire' zones and the expulsion *en masse* of populations from such areas to government-controlled territory. It is usually part of a strategy known as the `Four Cuts': cutting off the four main links — of food, finance, intelligence and recruits — between civilians and armed opposition forces operating in insurgency-prone areas. Since assuming power, the SLORC is reported to have used this strategy, with devastating results, in the Kachin, Karen, Kayah (Karenni), Mon and Shan States, in particular.

It is estimated, for example, that the inhabitants of at least 1,300 ethnic minority villages have been forcibly relocated since 1988. One well-documented case, implemented under the `Four Cuts' strategy, concerns the forced relocation in March 1992 of some 12,000 Karenni villagers based in the south-west of Kayah State. These villagers, mostly Catholics and spread over 57 villages, were ordered by the local SLORC authorities to leave their homes for the small rural town of Pruso at two weeks' notice. Anyone disobeying the order would, said the military orders, be considered insurgents and could be shot. Ten army battalions moved in to enforce the order, and all homes, cattle and food belonging to the villagers were either confiscated or destroyed. While some of the residents managed to make the move to Pruso, others fled to neighbouring Thailand and the rest were confined to four refugee camps where over 50 of them reportedly died from disease and malnutrition. In a further local escalation of this policy, in June 1996, 10,361 inhabitants of 96 villages in the north of Kayah State were ordered to move to the small towns of Shadaw and Ywathit. In addition, recent reports indicate that the policy of forced relocation is, on occasion, being used for ethnically-motivated purposes, that is, to change the ethnic balance in

politically sensitive areas, especially in the Arakan State where many Muslim communities have been compelled to move.

Both forms of forcible relocation have reportedly been accompanied by the arrest and detention of people offering resistance to the army's orders. In many cases the victims of such relocations have also been forced to work on construction projects without pay. This can be seen as constituting a form of forced labour or servitude.

The practice of forced relocation contravenes both Burmese domestic law and international human rights law. Under the 1974 Constitution of Burma, every citizen is entitled to settle and reside in any part of the country and his/her legally acquired property, including residential buildings, and lawful possessions are guaranteed legal protection. Under international law as well, every person has the right to property and to freedom of movement and residence within national borders. Forced relocations, to the extent that they are used for `ethnic cleansing', contravene the prohibition of discrimination on grounds of race, religion or national or social origin. Furthermore, the practice is contrary to the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities which, among other things, requires countries to protect the existence of minorities within their respective territories. It also contravenes the International Labour Organization's (ILO) Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, which expressly requires the free and informed consent of any population that is sought to be relocated.

5.2.8 Forced Labour and Forced Portering

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The practice of forcible conscription of civilians for labour duties by the Burmese military has been a matter of grave concern to human rights monitors for years. Though used since the BSPP times, it appears to have become more widespread and harsher under the SLORC. It is estimated that, in all, hundreds of thousands of people, including children, pregnant women and the elderly, have been affected by this practice.

The victims come from different backgrounds: they may be villagers living near project sites, forcibly recruited by local Law and Order Restoration Council (LORC) officials; convicted prisoners; people taken by the military from trains, ferries, buses and cinema theatres; or people picked up randomly off the streets. In the past, villagers in minority areas were particularly vulnerable but, as the demand for labourers has grown, the army has widened its net to other parts of the country. Muslims living in Arakan State — known as `Rohingyas' — have been a particular target. Once conscripted, the forced labourers are made to work on a variety of projects including construction of roads, airfields, railway lines, hydroelectric plants and army barracks, and in commercial ventures such as prawn cultivation or bamboo cutting. On occasion, the conscripts are transported long distances and kept away from their families for months at a time.

As well as being denied any payment, those conscripted are known to suffer harsh, often inhuman, conditions of work, especially in ethnic minority areas. Many are reportedly subjected to ill-treatment by the army: beatings, in particular, are said to be commonplace, and there have been complaints of rape of women conscripts. Occasionally, conscripts are known to die from exhaustion, heatstroke or diseases such as malaria or diarrhoea. Some of those who are too old or too weak to work, or who have tried to evade conscription, are reported to have been killed by soldiers. Village leaders who fail to meet the quota set for them for the supply of porters or labourers have also been tortured or killed. The system has reportedly spawned widespread corruption, with military officials routinely demanding bribes of up to 5,000 kyats (US$800) to let civilians avoid conscription.

A particularly disturbing aspect of the phenomenon, which has invited strong criticism from international human rights monitors, concerns the military's practice of sometimes using civilian porters during front-line operations as `human shields'. Testimony provided by former army officers indicates that, for every soldier engaged in war zone duty, one civilian porter was drafted into service as well. A telling example of the large-scale use of such civilians was to be found in the army's unsuccessful 1991-1992 offensive in the Mannerplaw area of the Karen State. Here, at least 2,000 porters, most of them people of ethnic minority backgrounds, were believed to have been sent to front-line trenches, many to suffer horrific injuries and even death.

The legal basis for the forced conscription of labourer and porters is ostensibly to be found in two pre-independence statutes, the Village Act 1908 and the Towns Act 1907. The continuing validity of these laws has been questioned, not least by the UN Special Rapporteur who, in his 1993 report, points to a contradiction in the SLORC's position concerning them. "The Constitution was cited," says the Special Rapporteur, "by Goverment sources as the authority for the continuation of the portering law, despite the fact that the Constitution has been abolished." The SLORC has, however, maintained its position, arguing that in recruiting civilians for public works, it follows the three criteria provided by the laws, namely, that they must be unemployed, that they must be fit, and that wages must be agreed. Additionally, it has argued that Burma has a `tradition of labour' and that, being a Buddhist country, people consider contributing such labour to be a `noble deed'.

However, despite such arguments and denials, in October 1995 the SLORC informed the UN that, having regard to the ILO's views on the subject, it had "started the process of amending [the Village Act and the Towns Act]." The SLORC also issued two `secret' directives in April and June 1995 to discourage the practice of forced labour in irrigation and other national development projects, copies of which were made available to the UN Special Rapporteur to Burma in October 1995. However, as the Special Rapporteur notes in his report, "the contents of neither directive constitutes abrogation of any of the laws under the 1908 Village Act and the Towns Act ... which are still in force in the country." Besides, "several months after their publication, these directives are still not public and therefore not accessible to those to whom they would apply and to those protecting the rights of persons accused of breaking the laws." The Special Rapporteur goes on to say that, from the many complaints received by him, it appears that "neither of the directives is being

implemented rigorously", a conclusion which is supported by human rights monitors in the non-governmental sector.

Significantly, the directives only require that any labour obtained for the purpose of (civilian) `national development projects', such as construction of roads, bridges, railways and dams, is paid for. They do not prohibit the practice of forced portering.

The practice of forced labour contravenes several international human rights standards, including the prohibition against slavery or servitude, the prohibition against discrimination on the grounds of race, religion or national or social origin, the prohibition against arbitrary deprivation of life; and the prohibition against torture and cruel, inhuman or degrading treatment or punishment. It also violates the ILO Conventions on Forced or Compulsory Labour and on Freedom of Association and Protection of the Right to Organize, both of which Burma ratified in 1955. In November 1994, the ILO entered a formal finding to this effect, and in June 1995 the organization's Committee of Experts on the Application of Conventions and Recommendations, after further investigation, rejected the SLORC's arguments in defence of the practice.

In addition, the use of civilians as porters during military operations constitutes a clear infringement of international humanitarian law, in that, contrary to the prohibition contained in Common Article 3 of the Geneva Conventions, it involves the cruel and inhuman treatment of people not involved in armed conflict. The Burmese government has been a party to these Conventions since 1992.

5.2.9 Citizenship Rights

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Considerable concern has been expressed in recent years over the manner in which the Burmese government has sought to use citizenship legislation to deny many of its inhabitants equal rights under the law. In a sharp departure from its long-standing practice of conferring full citizenship rights based on universally-accepted criteria, such as birth or naturalization, the BSPP government in 1982 enacted a new law which introduced three classes of citizenship and made it extremely burdensome for a large number of people to qualify for citizenship rights. The law has been seen to be particularly discriminatory against racial and ethnic minorities, notably Muslims in the Arakan State.

Under the law, the government has wide discretionary powers to classify people as citizens, associate citizens or naturalized citizens. To qualify as a full citizen, a person must produce evidence that his or her ancestors were settled in some part of the national territory prior to 1824, that is, the beginning of British colonization. If he or she fails to do so, or if even one of their ancestors was a citizen of another country, the individual is classified as an associate citizen. A naturalized citizen is a person, one of whose parents is a full citizen and the other a foreigner, or one of whose parents is an associate citizen and the other a naturalized citizen or

foreigner. In order to qualify for naturalization, the applicant must, among other things, be able "to speak one of the national languages well."

Everyone is issued with an identity card which, since 1989, states the person's ethnicity and religion and their class of citizenship. The card has to be carried by the holder at all times and is required for a host of transactions, including the purchase of bus, train or boat tickets, application for admission to a school or application for a government job. Foreigners wishing to reside in Burma for longer than three months are required to register with the authorities and to obtain Foreigner Registration Certificates, which are also to be carried at all times. Under the law, the government can revoke the citizenship of any person, except a citizen by birth, "in the interest of the State". Anyone who loses their citizenship either by a voluntary act — for example, by acquiring the citizenship of another country or by revocation by the State — is barred from applying for any kind of citizenship again. An announcement made by the SLORC in May 1993, however, invited former Burmese nationals settled abroad who wished to give up their foreign nationalities and re-acquire Burmese citizenship in order to again settle in Burma, to apply within a year.

Those not holding full citizenship are reportedly subject to a number of disabilities in practice if not in law. They cannot, for instance, contest any elected post, own land or other immoveable property, train for certain lucrative professions such as medicine or engineering or work for any foreign employer, including UN agencies. The possession of an identity card evidencing citizenship is extremely important as without such a card a resident may be denied a wide range of basic services. The cards are colour-coded according to the type of citizenship granted, making discrimination against associate and naturalized citizens all too easy.

The rigours of the Citizenship Law have been felt most acutely by members of ethnic minorities, many of whom do not possess an identity card, either because they live in armed opposition-controlled areas and find it difficult to travel outside those areas or because they have been victims of a general unwillingness on the part of the government to register them. Promises by the SLORC to issue identity cards to families and children of armed opposition soldiers covered by recent cease-fire agreements have remained largely unfulfilled. However, by far the worst affected group are Muslims from Arakan State, many of whom fled their homes in 1991-1992 and sought refuge in neighbouring Bangladesh following persecution by the Burmese armed forces. Since many had never been issued with identity cards, or their old cards were confiscated by the army as they left the country, they were effectively stateless upon their return under a resettlement programme sponsored by the UN High Commissioner for Refugees (UNHCR). Nevertheless, the government has frequently referred to them as Bangladesh citizens who have crossed the border into Burma in search of seasonal work. Particular victims of the law are the children born in the refugee camps, who seem condemned to remain stateless.

The Citizenship Law contravenes several international human rights standards, including Article 15 of the Universal Declaration of Human Rights and the Convention on the Reduction of Statelessness. Insofar as its application condemns large numbers of people to second-class status and is grossly discriminatory against ethnic minorities, it infringes the prohibition against discrimination on the grounds of race, religion or national or social origin. The law also violates the Convention on the

Rights of the Child, which Burma under the SLORC has ratified, and under which States are obliged to "respect the right of the child to preserve his or her identity, including nationality..." and for every child immediately after birth to have the right to acquire a nationality.

5.2.10 Freedom of Movement, Assembly and Association

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The SLORC has severely curtailed freedom of movement, assembly and association since its accession to power. As well as imposing curfews, banning gatherings, putting wide-ranging restrictions on the formation and running of political parties and other non-governmental organizations, and banning strikes, it has imprisoned hundreds of people, including parliamentarians and political activists, and placed the leader of the NLD, Aung San Suu Kyi, under prolonged house arrest in conditions that clearly violated internationally-recognized human rights norms. It also launched a systematic campaign of harassment of NLD supporters and other political dissenters. It banned several political parties and organizations, including the Democratic Party for New Society, the People's Progressive Party, the United Nationalities League for Democracy, the Rakhine League for Democracy, the Party for National Democracy, the Anti-Fascist People's Freedom League, the League for Democracy and Peace and the National Politics Front for Youth.

Free movement within the country is also restricted to those residents who carry officially-issued identity cards — a condition which precludes a large number of people, who are unable to meet the highly restrictive requirements of Burmese citizenship law, from being able to move between different parts of the country. All movements are subject to reporting requirements and every resident is obliged to register overnight guests with the local authorities. Travel abroad is restricted by the requirement of an exit visa which is frequently difficult to obtain. Applications for passports are reportedly decided on political considerations, which results in the denial of security clearance to many applicants.

A decree passed on 20 October 1990 banned all independent Buddhist monks' (*Sangha*) organizations — historically an important agent of political change — while another passed the following day authorized army commanders to bring monks before military tribunals for "activities inconsistent with and detrimental to [Buddhism]". The tribunals, whose procedures fell far short of international standards on fair trial, could impose punishments ranging from three years' imprisonment to death (see section 5.2.5). These actions were taken in retaliation for a countrywide refusal by many monks to administer religious rites to soldiers and their families in protest at the SLORC's refusal to recognize the result of the May 1990 election. In one demonstration in Mandalay in August 1990, one monk and one student were reportedly killed by the security forces.

A law, passed a few days later, sought to establish a single, officially-approved *Sangha* organization for the whole of the country. This organization, composed of nine listed sects, has wide-ranging powers to discipline monks and

novices and to punish anyone criticizing it with imprisonment of between six months and three years.

Public servants too have had wide-ranging curbs imposed on their freedom of association. They have generally been banned under the labour laws from being a member of any political organization or providing financial assistance or other support to any political party, or engaging in party politics. Since 1991, they are also required to "prohibit their dependants or persons under their guardianship from taking direct or indirect part in activities that are aimed at opposing the government." The ban on political activities extends to membership of trades unions and other similar bodies. Those covered by these restrictions include members of the defence forces, all employees of government departments and state economic enterprises and any other "people who earn salaries from the state treasury." A "warning notice" issued by the SLORC in September 1991 also cautioned public service personnel against "deceiving and playing tricks on the government." It did not specify, however, any sanctions that might be imposed for violation of this injunction. In a further move to restrict the freedom of civil servants to join associations of their choice, since 1993 all civil servants have been pressured by threats of dismissal to join the newly formed Union Solidarity Development Association (USDA), a mass membership organization headed by members of the SLORC.

NLD members have become particular targets of official harassment since the party withdrew in protest from the National Convention in November 1995. They are reportedly required to seek permission from local LORCs for any travel they undertake or any meetings they attend. They have also been repeatedly discouraged from attending gatherings outside the house of their leader, Aung San Suu Kyi, since her release from house arrest: on 18 November 1995, for example, three NLD members were reportedly arrested and summarily sentenced to two years' imprisonment after being charged with interfering with the police who were erecting barricades in front of Suu Kyi's house. More recently, in May 1996, some 300 NLD members, including 273 elected MPs, were detained in order to prevent them from attending an NLD conference in Rangoon. While most were soon released, at least 30 were known to remain in detention in August 1996.

The harassment of NLD members and supporters was further stepped up with the promulgation on 7 June 1996 of the Law to Protect the Stable, Peaceful and Systematic Transfer of State Responsibility and the Successful Implementation of National Convention Tasks Free From Disruption and Opposition, which made it an offence to, among other things, disrupt or hinder the implementation of National Convention tasks or attempt to draw up a new constitution for the country. Under this law, any organization or political party found guilty of contravening its broadly-worded provisions could render itself liable to disbandment or being declared illegal. As an illegal organization, all members would face arrest and imprisonment for up to 20 years.

Workers are systematically denied the right to organize and to join independent trade unions. Existing trade unions face severe obstacles in their attempts to affiliate with international organizations. Since 1958, the International Labour Organization has been concerned over the denial of workers' rights in Burma, and a June 1995 meeting of the ILO Committee on the Application of Standards again

condemned the Burmese government's failure to implement its obligations under the organization's conventions, despite frequent promises to do so.

Many, if not most, of the laws and practices concerning freedom of movement, association and assembly clearly violate internationally-accepted human rights standards. As well as contravening Articles 13, 21 and 22 of the ICCPR, they also violate the 1948 ILO Convention concerning Freedom of Association and the Right to Organize.

5.2.11 Right to Democratic Participation

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In addition to the SLORC's refusal to acknowledge the results of the 1990 elections, it has, over the years, put in place a plethora of legal measures designed to further restrict the right to democratic participation in Burma. Some of these measures were aimed at putting opposition parties and candidates in the elections at a considerable disadvantage; others were enacted to stifle whatever opposition remained after the elections.

Foremost among the latter is a July 1991 amendment to the People's Assembly Election Law, which ordained that any member elected to the Assembly, who is convicted of "an offence relating to law and order or an offence relating to moral turpitude as determined and declared from time to time by the [SLORC]", shall immediately cease to be a member. Such a person would also be disqualified from contesting any future election to the Assembly if the offence was one of high treason or one which could lead to a sentence of death or transportation for life; any other offence would result in a 10-year disqualification. A similar disqualification attaches to someone whose election has been declared void by the Election Tribunal or who has failed to submit returns concerning his/her election expenses within the prescribed time. The law also imposes a five-year disqualification on unsuccessful candidates who are deemed to have fallen foul of its provisions.

The various offences covered by the law were elaborated in a separate Order issued the same day. According to this Order, high treason, sedition, "misprison of high treason" [sic], offences under the 1950 Emergency Provisions Act, offences under the Official Secrets Act, offences relating to arms, and illegal emigration to and immigration from a foreign country, were deemed to constitute offences relating to law and order, while theft, robbery, banditry, cheating, misappropriation, adultery, rape, kidnapping, abduction, slavery, forced labour, assault on a woman with intent to outrage her modesty, offences relating to pregnancy, prostitution, gambling and drugs, offences relating to foreign exchange, and offences under the Printers and Publishers Law or the People's Assembly Law, were deemed to amount to "moral turpitude".

The Election Commission has disqualified some 94 elected MPs under this law. This has resulted in some 20 per cent of the 485 seats contested in the elections being unrepresented. In the opinion of one observer, "in most of the cases, reliable information reveals that the conduct complained of amounted to nothing more than a

peaceful exercise of freedom of expression, association and assembly and the criminal charges do not meet internationally recognisable standards." Moreover, the bans on contesting future elections were imposed retroactively. Furthermore, in none of the seats rendered vacant in this way — or where the sitting MP has died — have fresh elections been ordered.

In an even more obvious attempt to ride roughshod over the results of the 1990 elections, a state-controlled newspaper ran an article in May 1996 which declared that "since the term of the so-called MPs elected in May 1990 is now six years, their term has automatically expired... [P]arliament has been dissolved and their seats have been vacated." If the MPs persisted in their claim to represent their voters, they would, said the article, be exposing themselves to charges of treason.

Another law, passed hurriedly in June 1996, renders all remaining political parties and organizations liable to disbandment or being declared illegal if found guilty of a number of widely-worded offences, including saying or doing anything that is likely to "disrupt or deteriorate the stability of the state, community peace and tranquillity, and the prevalence of law and order", hindering the work of the National Convention, or attempting to draw up a Constitution for the state without legal authorization. The last-mentioned prohibition is particularly threatening for the NLD, as the party recently announced its intention to write a new national Constitution based on democratic principles. If it goes ahead with its plan and is found guilty of contravening the law, it risks not only being banned, but also having its assets confiscated. This law thus represents a clear denial of the basic human right to democratic participation, enshrined in, among other international instruments, the Universal Declaration of Human Rights.

The SLORC has also effectively dismantled the multi-party structure which emerged during the 1990 elections by arbitrarily `de-registering' most of the parties which contested those elections. The de-registrations, carried out by the Election Commission ostensibly under the Political Parties Registration Law, have meant that only 10 out of the 93 parties which took part in the elections are now legal. Some of the parties were de-registered on the grounds that they did not win any seats in the elections or because they were "unable to form at least 10 party organizations" — grounds which find no basis in law. Others, including parties which had won seats, were abolished summarily without being assigned any reasons. The de-registration process took no account of the rules of natural justice: none of the parties affected were given an opportunity to be heard.

Under the Political Parties Registration Law, the Election Commission has wide discretion to de-register any party if it: (1) is declared illegal under any domestic law; (2) is an insurgent organization that takes up arms against the state; (3) makes use, directly or indirectly, of funds or property belonging to the state; (4) receives money or other form of assistance from a foreign government or organization; (5) uses religion for political gain; or (6) has as its members personnel belonging to the defence or police forces or anyone earning a salary from state funds. The first head of disqualification is particularly suspect given the unjust and vague nature of many of the SLORC-enacted laws.

The Election Commission has also collaborated in the SLORC's harassment of opposition political parties by interfering with party structures. It has consistently refused permission for the filling of vacancies in party central executive committees, knowing that, once the number of members in such committees falls below a prescribed minimum level, the party renders itself liable for de-registration under the rules. The Commission has also refused to allow the NLD to reinstate Aung San Suu Kyi, and other senior figures who have been freed from detention, to their former positions within the party, after their forced removal from their posts during their years under arrest.

These restrictions further deny the Burmese people their right to democratic participation and clearly violate internationally-accepted norms on the subject. They also infringe the prohibition against retroactive legislation.

5.2.12 Human Rights Violations Against Children and Women

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Disturbing evidence has emerged over the years of the conscription by the Burmese authorities of children to work as porters carrying arms and supplies for the army, and even to be recruited into the armed forces as soldiers. The United Nations Children's Fund (UNICEF), for example, has reported that many 14-year-old children have been `informally conscripted' all over the country; the organization identified at least one military camp in the Shan State where children as young as seven have been recruited for a future life with the army. A former senior military official, Brigadier Aung Gyi, also claimed that secret orders had been issued by the SLORC whereby every district and every village would supply at least one child-soldier to the army. As child-soldiers, boys as young as 13 are removed from their families and brutalized in army training camps and some reportedly see front line duty by the time they reach 15 years old.

Women too have been the victims of ill-treatment by the Burmese armed forces, especially in ethnic minority areas. Abuses inflicted on them include extrajudicial execution, torture, including rape, arbitrary detention and forced portering and forced labour. These abuses have been well-documented by several international human rights monitors and by the UN Special Rapporteur to Burma who, in his 1995 report, cited three specific examples of gross brutality by the army and local SLORC officials and pointedly asked the Burmese government if any of those identified in such abuses have been brought to account. In their reply, the government flatly denied the allegations, characterizing them as "unfounded [and] emanating from anti-government sources and terrorist groups."

Such ill-treatment of children and women contravenes several international human rights norms, including those contained in the Convention on the Rights of the Child 1989, to which Burma acceded in 1991, and the anti-discrimination provisions of the Universal Declaration of Human Rights. It also clearly violates the provisions of the Convention on the Political Rights of Women of which Burma is a signatory. These practices also offend against the Convention on the Elimination of All Forms of

Discrimination against Women — an instrument to which Burma is not a party, but whose provisions it has a good faith obligation to respect, given its periodic affirmations of adherence to international human rights norms. The abuses also infringe Burmese domestic law: both the 1947 and 1974 Constitutions, for example, guaranteed women equal rights with men, while the Child Law of 1993 contains a number of guarantees for the protection of children.

5.3 VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

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As well as the infringement of international human rights standards, the SLORC's use of torture, including rape and other inhuman treatment, inflicted on civilians and armed participants alike during military operations also violates international humanitarian law. Credible allegations have emerged of ill-treatment by the Burmese military of prisoners of war (POWs) belonging to some of the insurgent groups, in contravention of the Geneva Conventions. There have also been well-documented reports of indiscriminate attacks on civilians and their villages, extrajudicial executions, forcible relocation of large populations and the widespread use of enforced labour by the army. Some of those allegations are discussed in detail above.

These allegations clearly point to a violation of Common Article 3 of the Geneva Conventions, to which Burma acceded on 24 August 1992, and whose provisions it is bound to comply with in respect of actions for which it is responsible since that date. Even in respect of actions occurring before that date, it is obliged to respect the well-recognized rule of international customary law which requires all states to have regard to `elementary considerations of humanity' in times of armed conflict and of peace.

Of particular relevance are the three customary principles of human rights protection during internal armed conflict which have been collectively incorporated in what is called the `Martens Clause' in international humanitarian law and which apply independently of a country's participation in any of the relevant treaties: (a) that the right of parties in a conflict to choose the means and methods of warfare — that is, the right to inflict injury on the enemy — is not unlimited; (b) that a distinction must be made between the persons participating in military operations and those belonging to the civilian population so that the latter are not unnecessarily harmed; and (c) that no attacks should be launched against the civilian population as such. These principles have been recognized as being non-derogable even during war, and their fundamental character has been underlined by the International Court of Justice on more than one occasion.

It is also well-established that there are at least three principles common to international humanitarian law and human rights law which governments are obliged to respect during internal armed conflicts. These are: (a) the principle of inviolability, which forbids any act that threatens the right of an individual to his life, physical or moral integrity, and any attribute inseparable from his personality; (b) the principle of non-discrimination, which requires all persons to be treated without any

discrimination based on race, sex, nationality, language, social standing, wealth, political, philosophical or religious opinion, or on other similar criteria; and (c) the principle of security, which requires the security of every person to be respected.

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6 CONSTITUTIONAL DEVELOPMENTS: THE NATIONAL CONVENTION

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Much controversy has surrounded the National Convention which was announced by the SLORC in April 1992 to lay down the basic principles for the elaboration of a new Constitution for Burma. The need for such a Constitution was first mooted by Lt-Gen Khin Nyunt, the Secretary-One of the SLORC, in a public announcement made on 27 July 1990 when he declared, unilaterally, that "the wish of the majority of political parties that contested the [May 1990] general elections is to draw up a new Constitution." Most opposition politicians and observers saw this as a ploy by the SLORC to defer honouring the results of the elections and transferring power to the duly-elected civilian government.

The Convention, which did not meet until January 1993, is a body consisting of 702 delegates hand-picked by the government, ostensibly representing workers, peasants, intellectuals, members of racial minorities and the army. It also has some "specially invited persons". Only 106 of the delegates successfully stood as candidates in the 1990 elections: the NLD, which won a majority of seats in that election, was studiously ignored for chairmanship of any of the working groups. A stringent code of procedure laid down by the SLORC governs the National Convention's deliberations: this code has the effect of severely restricting the freedom of delegates. The SLORC has also laid down six `objectives' which the Convention is obliged to follow in drafting the constitutional principles: these include the "participation of the Defence Services in the leading role in national politics [sic] of the State in the future" — a prescription which, according to many observers, is designed to perpetuate military rule.

All discussion within the Convention room is tightly controlled. Sessions are held in camera and the Convention's day-to-day deliberations are not allowed to be published. Any delegate wishing to submit a proposal for consideration has first to submit it to the National Convention Convening Committee (NCCC) for vetting. Delegates are required to live in dormitories during sessions and cannot leave the Convention complex without official permission. Even where such permission is granted, they cannot take out any written materials. They are under constant surveillance by army sergeant clerks, and are not free to mix with other delegates living within the complex. Many of them have complained of harassment by local SLORC officials when they return to their homes to see their families. Two NLD delegates, Dr Aung Khin Sint and U Than Hla, were arrested in August 1993 for publicizing speeches delivered at the Convention and sentenced to 20 and 15 years'

imprisonment respectively. Dr Aung Khin Sint has since been released, but was briefly detained in May 1996, along with other NLD MPs, and in July he resigned from his seat and from the party under pressure from the SLORC.

These restrictions apart, the procedure followed by the Convention makes a mockery of its claims to be a truly deliberative body. Nearly all the proposals have originated as "suggestions" from SLORC-sponsored delegates which are swiftly rubber-stamped as `agreed' principles by the chairman of the NCCC, Lt-Gen Myo Nyunt (who is also the Minister for Home and Religious Affairs) in his periodic summing-up speeches to the Convention. The extent of the SLORC's involvement in the work of the Convention was indicated by Lt-Gen Nyunt himself in unambiguous terms. All proposals, he said, would, after scrutiny by the National Convention Convening Work Committee and confirmation by the NCCC, "have to seek the approval of SLORC. The SLORC ... will take the appropriate action as deemed necessary to be included in the constitution if the basic principles are in compliance with the policies."

The `principles' approved so far include proposals to create a bicameral legislature with substantial representation from the armed forces in both the Houses, and a State Presidency with wide-ranging powers whose incumbent will be a former or serving member of the armed forces. The President will be elected by an electoral college which will also be heavily dominated by representatives of the armed forces. Candidates who are married to foreigners or are second-generation foreigners or who receive support from abroad are automatically disqualified from contesting, as are those who have not lived uninterruptedly in the country for at least 20 years — provisos which many believe have been added with the express intention of excluding Aung San Suu Kyi from the Presidency. The proposals provide for the presidential candidate to be automatically nominated to one of the two posts of Vice-President envisaged by the Convention, should he or she fail to get elected as President.

Other proposals which entrench a guaranteed role for the military in the running of the government include automatic representation in legislative bodies at the central, regional and state levels; unchallengeable nomination of military appointees to the posts of Ministers of Defence, Security/Home Affairs, and Border Affairs and to executive bodies at all levels of the administration; and the exclusion of ordinary judicial jurisdiction over crimes committed by members of the armed forces. A constitutional duty is also sought to be imposed on every citizen to "learn military science".

One of the most controversial proposals to emerge from the Convention concerns the status of ethnic minorities, who have consistently been demanding autonomy from Rangoon in the management of their affairs. Under the structure proposed, the country is to be divided into seven Regions (currently known as Divisions), inhabited mainly by the majority Burman population, and seven States inhabited by seven different ethnic groups — a division which is considered unfair by leaders of many minorities. In addition, there would be "self-administered zones" and "self-administered areas" for groups of minorities living within ethnic states who were not the majority group and who had no representation elsewhere (i.e. in other ethnic states). This proposal has been questioned by many of the minorities concerned, who believe that any such division should be preceded by a population census and a

national referendum. A further grievance is that not all ethnic groups or parties have been allowed to be represented in the Convention. Amongst the armed opposition groups, only those which have signed cease-fire agreements with the SLORC have been asked to attend. Significant omissions include the Karen National Union and the Muslim Rohingyas, the latter having not been recognized by the SLORC as an ethnic group at all.

Concern has also been expressed over the Convention's proposal that such rights and freedoms as may be conferred by the new Constitution shall only be available to "citizens" and not to all persons lawfully residing in the country. Given the discriminatory and onerous nature of Burmese citizenship law described above, this proposal would effectively deprive large numbers of people, especially those from certain ethnic and religious minority communities, of even the weak constitutional protection that may be available against infringements of basic human rights.

Another controversial proposal that has been mooted in the Convention allows the army to exercise unfettered discretionary powers during states of emergency. These have been broadly defined as "situations in which lives, shelter or property are threatened in a region, self-administered area, or where adequate information exists that such threats could occur, or where attempts are made to take sovereign power of state by force, disturbances and violence, or there is a conspiracy to do so."

Some observers of Burmese politics fear that the constitutional reforms will be pushed through as quickly as possible and presented as a *fait accompli* in the next few months. The formation, in September 1993, of a SLORC-sponsored "social organisation", the Union Solidarity and Development Association (USDA), has been seen as a significant development in this context. This government-backed organization has been organizing widely-publicized rallies throughout Burma in which the virtues of the constitutional principles put forward by the National Convention are extolled and resolutions are passed affirming popular support for them. Attendances at these rallies are reportedly far from spontaneous, with civil servants, students, peasants and others being required to attend or face adverse consequences. As a result, the USDA has been seen as the basis for an officially-sanctioned political party that may emerge in the near future.

The NLD, 86 of whose members were nominated by the SLORC to serve on the National Convention, has boycotted the body since 29 November 1995 following the denial of the party's request to have the Convention's working practices reviewed. This boycott led the Work Committee of the Convention to expel the NLD members by invoking a rule which requires all delegates to obtain permission for remaining absent without leave for more than two days. The NLD has repeatedly expressed its dissatisfaction over both the manner in which the Convention was created and the lack of procedural fairness governing its work. It has pointed out that, despite being the single largest national political party with an unquestionable democratic mandate, it has been relegated to the position of a permanent minority in the Convention, with less than an eighth of the total number of seats being allocated to it. The party has also expressed unhappiness over the manner in which the SLORC has stifled free and frank discussion within the Convention chamber and railroaded decisions to suit its purposes. The NLD also contends that the Convention has been making decisions not

only on broad principles for the proposed Constitution, but also on its details, contrary to the Convention's declared mandate. The NLD has characterized the body as a `sham'.

Since the expulsion of the NLD, its members have been subjected to considerable harassment by the authorities. The party has been continuously vilified in the government-controlled media, sometimes in terms verging on the bizarre: one press item, for example, likened Aung San Suu Kyi to a reviled nineteenth century traitor, Maung Ba Than, who had collaborated with the British. NLD activists have also been singled out for especially harsh treatment by the courts: one of them, a young man who had been involved in a minor traffic accident, was sentenced to five years' imprisonment after being denied bail or allowed to engage a defence lawyer, even as, in another case, the son of a senior military officer who had caused death by negligent driving, was set free on bail and permitted to seek legal representation. This incident drew a sharp protest from Aung San Suu Kyi, who publicly condemned the judiciary's lack of impartiality and independence.

The establishment and the manner of functioning of the National Convention raise serious questions of legality under both Burmese domestic law and international human rights law. As has been noted earlier, the SLORC's accession to power in the *coup d'état* of 18 September 1988 and its refusal to transfer power to a civilian government following the elections of May 1990 are both egregious infringements of several internationally-recognized norms. Moreover, its unilateral and arbitrary decision to exclude a majority of those duly elected at the 1990 elections, and therefore from the new, unrepresentative, constitution-making body flies in the face of its own Election Law which contemplated the emergence of a democratic National Assembly.

These illegalities have been compounded by the grossly unfair and unjust procedures which have informed the Convention's functioning so far. Given the background of continuing and widespread suspension of basic freedoms and the climate of fear and intimidation created by the SLORC, which has severely constrained the possibility of any meaningful public debate on constitutional reform, the deliberations in the Conventions are clearly devoid of democratic authority.

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7 THE SLORC'S SENSITIVITY TO INTERNATIONAL CRITICISM

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The SLORC has shown a high degree of intolerance to outside scrutiny and criticism of its human rights record. As well as consistently refusing permission for on-site research visits by international non-governmental human rights organizations and periodic prison inspections by the International Committee of the Red Cross (ICRC), it has failed to provide UN representatives full and unimpeded access to people and

places within the country, despite frequent protestations to the contrary in international fora.

The UN Special Rapporteur to Burma has, while welcoming the SLORC's continued willingness to allow visits by him to the country, nevertheless documented numerous instances where SLORC officials prevented him from meeting detainees or other relevant parties during such visits. He also complained of systematic intimidation and harassment of people who had expressed a desire to meet him; even where he did manage to hold meetings with ordinary people, they were not allowed to speak to him in confidence.

The SLORC has also consistently refused to accept the customary procedures of the ICRC for visits under the Geneva Convention to places of detention in Burma. Its oft-repeated plea that it was still scrutinizing a draft memorandum of understanding between the ICRC and itself for compatibility with national sovereignty and national laws has been seen by many observers as an exercise in foot-dragging. In his 1996 speech to the General Assembly, the UN Special Rapporteur to Burma criticized the continued exclusion of the ICRC from Burma as "a negative step towards [the] amelioration of [prison] conditions." In the face of the continued refusal of the Burmese government to allow the organization to carry out its functions, the ICRC was reported to have closed down its office in Rangoon on 15 August 1995.

The UN Special Rapporteur has also expressed disappointment over the failure of the Burmese government to honour a promise made to him to distribute copies of the Universal Declaration of Human Rights in Burmese translation to delegates at the National Convention.

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8 CONCLUSIONS AND RECOMMENDATIONS

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Decades of military rule in Burma have prevented the rule of law from taking deep root during the country's post-colonial history. The concept of the rule of law suffered a particularly severe blow with the accession to power of the SLORC in the *coup d'état* of 18 September 1988. Most of the laws passed since that date reveal a persistent disregard for internationally-recognized human rights norms. What is more, the few vestiges of constitutionalism and legality that remained at the time of the *coup* have been all but extinguished by this military government whose legitimacy to govern is highly questionable both under Burmese domestic law and international law.

By a curious paradox, despite loudly proclaiming its non-recognition of any constitutional norms at the time of coming to power, the SLORC has often since asserted its adherence to human rights and the rule of law in various international fora. An examination of its record does not, however, support this claim. Not only do human rights abuses continue to occur on a large scale, but the regime has disregarded

repeated calls from both within Burma and internationally to transfer power to the civilian government that was elected by the peoples of Burma in May 1990.

An indication of its lack of good faith is provided by the manner in which it has sought to force through proposals for constitutional reform which are designed to perpetuate military rule under the guise of democratic government. The National Convention, which it created without any mandate or consultation and whose working methods are so patently unfair and lacking in either transparency or legitimacy, bodes ill for the future of democracy and freedom in Burma.

Urgent action is required to establish the rule of law, human rights and governmental accountability in Burma. Many of these recommendations have been made by the UN General Assembly and the Commission on Human Rights in successive resolutions on Burma since 1990. We urge the SLORC to:

- lift all emergency measures and restrictions on fundamental freedoms, including the right to freedom of expression, and undertake to safeguard the rights guaranteed in international human rights standards;

- revoke or amend all laws, decrees and orders in order to ensure their full conformity with the provisions of international human rights and humanitarian law;

- take steps to ensure that all laws in force are fully and readily accessible to the public;

- implement without further delay its stated commitment to return Burma to democratic and accountable government, taking fully into account the results of the general election held in May 1990;

- take steps to accede to relevant international instruments on the protection and promotion of human rights, particularly the International Covenant on Civil and Political Rights and its (first) Optional Protocol; the International Covenant on Economic, Social and Cultural Rights; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention relating to the Status of Refugees; and the two protocols additional to the Geneva Convention of 1949;

- comply with its obligations under the relevant Conventions of the International Labour Organization and other UN bodies, and stop the practice of forced portering and other similar practices;

- ensure that the rights and interests of ethnic and other minorities are duly respected and that minorities are protected against discrimination;

- invite the International Committee of the Red Cross to resume operations in Burma, by guaranteeing the ICRC unfettered and regular access to all prisons and prisoners, including all those held on political grounds or taken prisoner in the course of conflict, in accordance with the ICRC's

standard requirements for access to prisoners, and allow similar access to other independent international human rights monitors;

- ensure that all military, police and other law enforcement personnel are thoroughly informed about and trained in the need to ensure fair and humane treatment to all persons in accordance with the provisions of international human rights and humanitarian law;

- bring to justice, promptly and fairly, all state officials, including members of the police or military services, implicated in the commission of human rights violations, and provide prompt and adequate compensation to all victims of such violations;

- co-operate fully with the United Nations and other inter-governmental organizations in facilitating the full and speedy restoration of the rule of law and civil government in Burma.

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