

### 3. The Karenni right to self-determination has been violated by the Myanmar government.

As a people capable of asserting their right to self-determination, the Karenni have the right to determine their political status, pursue their economic, social, and cultural development. Each of these rights has been and continues to be violated, both by the British government during Burma's colonial period, and by the current Myanmar government. Because the Karenni have the right to determine their political status, they have both the right to form their own independent state, and the right not to be forced into political arrangements against their will.

During the colonial period, the British government began its relations with the Karenni by recognizing their independence under the 1875 agreement. However, by the end of their governance of Burma, they, along with the AFPFL, conspired against the Karenni by creating an independent Burma that included the Karenni against their will. Since then, the successive governments in Myanmar consistently have refused to allow the Karenni to form an independent state. The Karenni, therefore, have not been allowed their right to determine their own political status.

The Myanmar regime has also violated Karenni rights to pursue their own economic development. Although their lands contain several large and potentially profitable mineral deposits and mines, the Karenni have not been allowed to work them. Rather, the Myanmar government has given mining jobs to Burmans who have moved up from the valley. The Karenni have not been allowed to exploit their own natural resources, a right granted to them as a part of their right to self-determination. Finally, the Karenni have not been able freely to pursue their social or cultural development. The Myanmar government has moved them off of their lands and out of their villages, it has, through the army, forced Karenni villagers to work as porters under conditions that amount to slavery, and it has initiated a program of detention without arrest and torture against many of the ethnic minorities in Myanmar, including the Karenni. Under these conditions, the Karenni are unable to develop either socially or culturally.

### 4. The Regimes' Denial of Karenni Self-determination is Invalid.

The Myanmar government makes three arguments against the Karenni right to self-determination. First, the regime claims that the Karenni are merely an ethnic minority, and therefore do not have any such right. According to the regime, it has the right to Karenni lands in law as they claim on paper. Second, the Myanmar government argues that they obtained Karenni lands



legitimately from the British and with the agreement of the Karenni themselves. Burma and then Myanmar has characterized its actions against the Karenni as necessary to protect their right to maintain their own territorial integrity. These argument must fail in light to of the historical facts and law set out above. In particular regarding the second Burmese claim -- the United Kingdom could not legally give the Karenni lands to the new independent Burma. It would defeat the basic concept of self-determination if the colonial power defined the successor States or if the colonial power had the legal right to extinguish self-determination rights for peoples.

As a final argument, the Myanmar regime argues that their own domestic laws allow the repression of the Karenni, and that they have not agreed to recognize or support the right of self-determination in the international community. This argument also must fail. First, as signatories of the United Nations Charter, the Myanmar government has agreed to support the right of self-determination as set forth in that document and explained more fully in subsequent resolutions. The fact that the Myanmar government has not ratified any subsequent human rights treaties does not relieve them of their obligations under the Charter.

Second, even if the domestic laws of Myanmar allow such acts, those domestic laws are in violation of binding international standards. In conclusion, the Karenni, a sovereign people with the right to self-determination, have been denied their rights under international law by the Myanmar government in a consistent and brutal fashion. The Karennis' rights must be recognized by the international community, and the Myanmar government must end its violations of those rights.

## II. HUMANITARIAN LAW

The Karenni people have been engaged in an armed struggle against successive regimes in Burma for much of the post-colonial period. The international community does not always recognize the existence of wars, and accordingly may treat combatants as "terrorists". In spite of that, humanitarian law is automatically invoked by war meeting the conditions set out below. Application of humanitarian or armed conflict law to the Karenni war against the Myanmar regime may enhance Karenni claims to self-determination and help generate international will to support resolution of the Karenni political situation according to the wishes of the Karenni people and to provide immediate aid to the Karenni people.

### A. Sources of Humanitarian Law



Humanitarian law exists in treaties and customary international law. Treaty law includes the Hague Convention of 1907 (land warfare and the protection of civilians); Geneva Convention I (sick and wounded combatants in the field), 75 U.N.T.S. 31; Geneva Convention II (sick and wounded and shipwrecked at sea), 75 U.N.T.S. 85; Geneva Convention III (prisoners of war), 75 U.N.T.S. 135; Geneva Convention IV (civilians), 75 U.N.T.S. 267; Protocol Additional I to the Geneva Conventions (wars of national liberation), 1125 U.N.T.S. 3; Protocol Additional II to the Geneva Conventions (civil wars), 1125 U.N.T.S. 609.

Myanmar is one of the only countries that has not ratified the four modern Geneva Conventions and the Protocols Additional. Even so, Myanmar and any combatant groups are bound to comply with all "customary" international rules of war.<sup>43</sup>

The customary rights of combatants (including Karenni militants) are: (1) the right to medical care if sick or wounded; (2) the right to be treated as a POW if captured; (3) the right not to be criminally charged for acts considered acts of war; (4) the right to defense if charged with violations of the rules of war.

The customary rights of civilians (including Karenni civilians) are: (1) the right not to be the target of military operations; (2) the right to medical and other humanitarian aid; (3) the right to defense of detained by the opposing forces; (4) the right to flee and seek refuge in a safe place, including in another country.

The duties of combatants include: (1) the duty to protect civilians from military operations; (2) the duty to not carry out military operations against sick, wounded or captured combatants<sup>44</sup>; (3) the duty to grant POWs their full rights (life, freedom from torture, humane treatment, etc.); (4) the duty to protect enemy medical facilities and all humanitarian relief supplies and personnel; (5) the duty to refuse orders that violate the rules of war.

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<sup>43</sup>See, e.g. Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.) 1986 I.C.J. 14. The Court ruled that the Geneva Convention themselves can be considered to set out the content of binding customary international law and apply not only to States that have not ratified them, they even apply to States not actively engaged in an armed conflict. Attached to this memorandum, please find Karen Parker, Military Operations: What Is Legal and What is Illegal In Light Of International Humanitarian Law.

<sup>44</sup>Such combatants are called hors de combat. It is a war crime to kill or injure combatants who are hors de combat.



A civil war exists when there is an armed conflict in the territory of an independent state between the government armed forces and opposition forces which under responsible command, carried out sustained and concerted military operations and controls some territory. The opposition force must also be able to comply with all applicable humanitarian law rules.

Civil unrest (demonstrations) and government reactions (arrests, torture, declaration of "martial" law) do not qualify as a civil war unless there is military type activity between combatant forces. The territory held by the opposition need not be large or even permanently held, but it must be sufficient to support the war efforts of the parties.

Civil wars may be fought to sever the state (Pakistan/Bangladesh) or to overturn or modify the power of a seated government (El Salvador). They can be fought for any reason, and generally require the international community to assume a neutral position regarding the war. This is because a civil war in an internal affair of the state, and international law forbids intervention in the internal affairs of another state. In practice, however, most states take a side in a civil war. If the opposition force wins, however, and establishes either a replacement government or a separate State, the international community eventually accepts it -- even those States that sided with the original government.

#### C. The Karenni Against Myanmar: National Liberation.

To enhance your claim to self-determination rights, is far more useful to characterize your war as a war of national liberation and avoid any use of the term "civil war". Even if no other State recognizes your claim at the present time, with time, some may come around. And if you win militarily, eventual the other States will begin to recognize an independent Karenni state.

#### D. Violations of the Rules of War by Myanmar.

The Myanmar regime's armed conflict against the Karenni people and their military forces is carried out using military operations that violate the fundamental rules of war. In fact, it is probably true that the Myanmar forces would be unable to obtain any of their military objectives if they fought within the legal limits -- the war may have been over long ago and an independent Karenni state long established.

Making the international community aware of the gross violations committed by the Myanmar military forces can help rally both acceptance for your position regarding sovereignty



and pressure on the Myanmar regime to step down. Bringing to light the needs of the Karenni civilians in the face of humanitarian law violations can also help rally the international community to provide or help to provide humanitarian assistance such as you requested in your letter to the United Nations Secretary-General.

### III. SPECIAL STATUS OF THE RIGHT TO SELF-DETERMINATION AND HUMANITARIAN LAW: JUS COGENS.

The right to self-determination and humanitarian law as a whole has now achieved special status in international law: jus cogens. Jus cogens norms are the highest rules of international law and are considered binding, mandatory, peremptory on all states.<sup>46</sup> Jus cogens laws are binding on all States, whether or not they have protested those laws.

Mr. Gros Espiell states that the "exceptional importance of the principle of the self-determination of peoples in the modern world is such that today the principle has been held to constitute an example of jus cogens," and cites the wide support for this view.<sup>47</sup> Mr. Gros Espiell points out, the right to self-determination has become jus cogens by virtue of its widespread, almost unanimous, acceptance. Dr. Ian Brownlie, an international law scholar, concurs. As he states in his landmark work: "certain portions of jus cogens are the subject of general agreement, including . . . self-determination."<sup>48</sup>

Humanitarian law has also reached the status of jus cogens. In the International Court of Justice case Military and Paramilitary Activities In and Against Nicaragua, the Court declared that the basic principles of humanitarian law are "a

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<sup>46</sup> See, Karen Parker and Lyn Neylon, Jus Cogens: Compelling the Law of Human Rights, 12 Hastings Int'l & Comp. Law Rev. 411 (1989); see especially, Christopher Cline, Pursuing Native American Rights in International Law Venues: A Jus Cogens Strategy After Lyng v. Northwest Indian Cemetery Protective Association, 42 Hastings L.J. 591, 598-99 (1991) regarding the application of jus cogens to indigenous peoples. Jus cogens also applies to humanitarian (armed conflict) law violations, genocide, apartheid, and other serious human rights crimes.

<sup>47</sup> Gros Espiell, at p. 31. As he states, "no one can challenge the fact that, in light of the contemporary realities, the principle of self-determination necessarily possesses the character of jus cogens. Id. at p. 12.

<sup>48</sup> I. Brownlie, Principles of Public International Law, 515 (4th Ed. 1990).



minimum yardstick . . . and they are rules which . . . reflect . . . 'elementary considerations of humanity'."<sup>49</sup>

Violations of fundamental principles of humanitarian law norms are war crimes in international law.<sup>50</sup> War crimes are "among the gravest the crimes in international law,"<sup>51</sup> which reinforces their jus cogens character.

## INTERNATIONAL POLITICS

### I. ACTION AT UNITED NATIONS HUMAN RIGHTS FORUMS

Action regarding Myanmar has occurred primarily at the United Nations human rights bodies, and generally at the instigation of non-governmental organizations rather than governments.<sup>52</sup> Non-governmental organizations have repeatedly raised the situation of human rights in Burma at the United Nations human rights bodies, especially since 1987.<sup>53</sup>

Both governments and non-governmental organizations (with the exception of my organization International Educational

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<sup>49</sup>1986 I.C.J. at p. 114. The Court was quoting its 1949 Corfu Channel Case. The jus cogens character of humanitarian law was set out at p. 100-01, and 113-15 of the opinion of the Court and at p. 151-53 (Singh, J., separate opinion) and 199-200 (Sette-Camara, J., separate opinion).

<sup>50</sup>Convention on the Non-Applicability of Statutory Limitation to War Crimes and Crimes Against Humanity, 754 U.N.T.S. 73.

<sup>51</sup>Id.

<sup>52</sup>There has also been some action by the Secretariat or by specialized agencies of the United Nations such as the United Nations High Commissioner for Refugees (UNHCR). Regarding the refugee situation on the Bangladesh side of Myanmar, the Secretary-General appointed a special assistant to travel to the area, presumably in conjunction with the UNHCR High Commissioner Ogata.

<sup>53</sup>Only our non-governmental organization, International Educational Development has raised the humanitarian law issues to be discussed in this memorandum and the possibility of sovereignty for ethnic nations such as the Karen. We have coordinated these efforts with the KNU, who have also had representatives at the Sub-Commission's Working Group on Indigenous Populations. Other human rights organizations have focused on the human rights issues related to the pro-democracy movement's issues.



Development, Inc. and other organizations working with Dr. Em Marta and Karen delegates) have only raised human rights issues such as torture, detention and problems with the democratic process. They have not raised self-determination nor the legal situation of the ethnic nations. Some have clearly used language against any self-determination for Karenni by discussing the "ethnic minorities" -- thereby reinforcing the Myanmar regime's position that the Karenni, the Karen and all other ethnic nations are legally under the Myanmar regime's control.

The United Nations Commission on Human Rights passed Decision 1989/112 expressing concern about alleged violations of human rights. In the resolution the Commission welcomed a promise by the regime to hold elections. A document issued by the UN Secretary-General<sup>54</sup> was presented at the 1990 session (February 1990) of the Commission on Human Rights setting out a note verbale from the Myanmar regime regarding elections to be held in May, 1990.

Meanwhile, a communication was submitted under the "1503" procedure.<sup>55</sup> The Sub-Commission addressed on Myanmar under the "1503" procedure in both 1988 and 1989, and in 1989 it sent the Myanmar dossier to the Commission for action.

At the Commission session in 1990, there was heavy lobbying on the part of non-governmental organizations for the removal of Myanmar from the "1503" procedure and its inclusion instead under the public procedure for gross violations of human rights. Due to extensive counter-lobbying by the Myanmar regime (which as indicated promised to hold election in May of that year) and other countries (China/US for example) the Commission voted to keep the "1503" procedure. However, the Commission appointed a Rapporteur (Mme Sadako Ogata of Japan) to "establish direct contact with the Government of Myanmar with a view to following the developments in the human rights situation in the country and to report thereon to the forty-seventh session [1991] of the Commission."<sup>56</sup>

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<sup>54</sup>U.N. Doc. E/CN.4/1990/69.

<sup>55</sup>This procedure was established by the Economic and Social Council in its resolution 1503. The procedure allows any person or group to raise complaints that show a "consistent pattern of violations" rather than individual cases. United Nations action under "1503" petitions remains confidential -- neither the petitioners or any human rights groups may attend the hearings and the reports and resolutions are all restricted to only members of the Sub-Commission or Commission.

<sup>56</sup>See Ogata, Report on Direct Contacts with the Government of the Union of Myanmar, U.N. Doc. E/CN.4/1991/R.3 at para. 6.



Mme Ogata drew up a list of issues to present to the regime, including the functions of SLORC, political developments since 27 May 1990 election, personal freedoms, administration of justice, and economic rights issues. Also included was the issue of the rights of "ethnic minorities" and the "disruptive activities of insurgents". She visited Myanmar in November 1990 and submitted her report to the 1991 session of the Commission.

In her report, Mme Ogata combined the issue of insurgents and what she then called "national races." Regarding them, she states the opinion of the government officials ("the internal relations between the indigenous national groups of the country . . . has been one of political, economic and social interaction, resting on a pattern of mutual accommodation through the ages." Government sources indicated to her that current problems arise from "outside interference of both leftist and rightist extremists, made with malicious intent of undermining national unity." She also reported the regimes contention that insurgents had no popular following and that there was no "indigenous" issue because of, *inter alia*, the Panlong Agreement of 1947. Mme Ogata did not challenge these contentions by the regime in her report.

Mme Ogata made one useful recommendation related to the issues affecting the Karenni people and Karenni sovereignty when she encouraged adherence to the Geneva Conventions of 1949 and the 1977 Protocols Additional to the Geneva Conventions of 1949.

At the 1991 session of the Commission on Human Rights there was once again strong pressure from non-governmental organizations to place review of Myanmar under the public procedure. The Commission again bowed to political pressure from the Myanmar regime and others and kept the "1503" procedure. However, in spite of the government's efforts to cancel the Rapporteur, the Commission reappointed Mme Ogata. Mme Ogata, however, resigned the position due to her appointment as the United Nations High Commissioner for Refugees.

At the 1992 session of the Commission of Human Rights, the Commission finally yielded to efforts to make review of Myanmar public. In the public resolution to that effect<sup>57</sup>, the Commission made no reference to any report that may have been filed under the "1503" procedure, but instead mentioned the Report of the Working Group on Detention.<sup>58</sup> The Commission authorized a new "public" rapporteur. That rapporteur's mandate

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<sup>57</sup>United Nations Commission on Human Rights resolution 1992/58.

<sup>58</sup>U.N. Doc. E/CN.4/1992/20. That document mentions that the Working Group was presented with 2 cases regarding Myanmar. One of these cases is my petition in favor of Daw Aung San Suu Kyi. I don't know what the other case is.



heavily emphasizes the transfer of power to a civilian government, the constitution process, and issues of political detainees. While not specifically excluded, the Commission does not mention ethnic groups, ethnic insurgencies or other similar issues of interest to Karenni sovereignty claims in the operative paragraphs. There is mention of "imposition of oppressive measures directed, in particular, at minority groups" in preambular paragraph 5.