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## Justice in Burma

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Law & Policy Group  
(PILPG)

for its advice to the

National Council for  
the Union of Burma  
(NCUB)

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## EXECUTIVE SUMMARY

This report is prepared by Oxford Pro Bono Publico (OPBP) for the Public International Law & Policy Group (PILPG). The report will contribute towards PILPG's work in providing legal advice to the National Council for the Union of Burma (NCUB) to assist the NCUB in its efforts to support the pro-democracy movement among Burmese populations inside and outside of the country.

The events of September and October 2007 in Burma served as a reminder to the world of the stark political and economic problems facing Burma. In light of these recent crackdowns and ongoing political repression in Burma, many have asked: what can the law offer the people of Burma?

This report seeks to answer that question by examining international law violations perpetrated by the State Peace and Development Council (SPDC), the potential consequences of such violations and the international mechanisms available to provide justice and redress in response. In light of current negotiations for democratic transition, the report also considers potential options for transitional justice to deal with past human rights abuse.

The SPDC has committed a broad range of violations of international law, which give rise to both individual and state responsibility. Specifically, the SPDC is found to have violated the prohibitions on forced labour, torture and cruel, inhuman and degrading treatment, forcible displacement of civilians and the use of child soldiers. Further, the SPDC is shown to have violated internationally recognised rights to fair trials and due process, to be protected from arbitrary detention, and freedom of expression, association and assembly.

The available international mechanisms for accountability and redress that can be engaged by Burmese citizens in relation to the violations identified – whether against the state or particular individuals – are limited. If the SPDC is to be held accountable for its actions, the international community or a future democratic Burmese government must take action.

States can initiate mechanisms within UN charter bodies and other international organisations. However, as this report demonstrates, these mechanisms have been regularly used in recent years with respect to Burma, but have had little effect. Ongoing human rights abuse in Burma highlights the ineffectiveness of soft pressure in encouraging the Myanmar government to respect and protect human rights. However, actions by States – unilateral and multilateral – may yet prove effective. The effectiveness of such actions will depend on the willingness of key regional players, China in particular, to cooperate.

Finally, if Burma begins to make the transition to democracy, and to emerge from this period of widespread human rights abuse and violations of international law, transitional justice and potential transitional justice mechanisms will need to be considered. These mechanisms provide different means by which to provide justice for perpetrators of serious crimes, to provide justice to victims and to allow Burmese society to come to terms with its history of abuse. OPBP reiterates that decisions on the precise role for transitional justice in Burma's transition are for the people of Burma, to be determined by the informed discretion of its elected leaders. However, it is hoped that the insight provided in this report will assist in informing future decisions relating to transitional justice in Burma.

Justice in Burma cannot, of course, come quickly enough for the millions of people who have suffered under the military's repressive rule. Since the protests of September 2007 there has been a widespread expectation that it is only a matter of time before a new system of government is put in place and Burma begins its transition to democracy. Of course, the precise nature of any new system remains uncertain. Electing a democratic government that gives a voice to the disparate aspirations of the people will be only one aspect of this transition. It is essential to create a broader system that protects internationally recognised human rights and provides a means for redressing past human rights violations.

By analysing international law violations perpetrated by the SPDC, the potential consequences of such violations, and the potential international and domestic mechanisms to provide justice and redress in response, this report hopes to make a contribution to a democratic future for the people of Burma.

## TABLE OF ABBREVIATIONS

AAPP	Assistance Association for Political Prisoners
AHRC	Asian Human Rights Commission
ASEAN	Association of South-East Asian Nations
ATCA	Aliens Tort Claims Act
CAT	Convention Against Torture
CIDT	Cruel, Inhumane and Degrading Treatment
CPJ	Committee to Protect Journalists
CRC	Convention on the Rights of the Child
CEDAW	Convention on the Elimination of Discrimination Against Women
CIDT	Cruel, inhuman and degrading treatment or punishment
GATT	General Agreement on Tariffs and Trade
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International humanitarian law
ILO	International Labour Organisation
NCGUB	National Coalition Government for the Union of Burma (the exiled government of Burma)
NCUB	National Council for the Union of Burma
NLD	National League for Democracy
OPBP	Oxford Pro Bono Publico
PILPG	Public International Law & Policy Group
Rome Statute	The Rome Statute of the International Criminal Court
TBBC	Thai-Burma Border Consortium

SPDC	State Peace and Development Council
TRC	Truth and Reconciliation Commission
UDHR	Universal Declaration of Human Rights
UN	United Nations
WTO	World Trade Organisation

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# INTRODUCTION

## The Political Context: Burma after the Crackdown

In September and October 2007 the world was reminded of the stark political and economic problems facing Burma.<sup>1</sup> In a matter of days, optimistic images of anti-government demonstrations were replaced by news that a widespread crackdown had begun. This crackdown showed the extent to which the country's military government remains determined to eliminate dissent. By ordering a repressive response, the government invited international condemnation as the price for bringing to an end the demonstrations. Burma's 'Saffron Revolution' was abruptly postponed as key leaders of the protest movement were arrested, forced further underground, or compelled to flee into exile. Over 700 demonstrators remain incarcerated in a network of prisons across the length and breadth of the country.

Less than six months after that crackdown the generals who rule Burma have set about continuing their '7-step road-map to democracy'. They have announced a constitutional referendum for May 2008 and, for the first time, have indicated that general elections will be held in 2010. These announcements have been met with optimistic applause by some. Others see them as simply another tactical manoeuvre by a military government which regards itself as the only true guardian of the country. There are grave doubts about the fairness of any referendum or subsequent elections. There has been no opportunity for open, public debate of the constitution or any of its provisions.

Alongside these recent political developments the wide-ranging economic crisis that helped inspire the 2007 protests has not been brought under control. Rising inflation and the scarcity of basic consumer goods remains a nationwide concern. In particular, the price of fuel has increased dramatically in the past year. Together with the curtailment of basic rights and liberties, these economic hardships faced by tens of millions of ordinary citizens have fuelled Burma's recent political conflicts.

Under these conditions many have asked: *what can the law offer the people of Burma?*

## OPBP – PILPG Project

### Background: PILPG and NCUB

PILPG is providing legal assistance to the National Council for the Union of Burma (NCUB) in its efforts to support the pro-democracy movement among Burmese populations inside and outside of the country. The NCUB is an umbrella organisation of pro-democracy groups, which includes members of the National Coalition Government for the Union of Burma (NCGUB), the exiled government of Burma, and National League for Democracy (NLD), Nobel Prize laureate Aung San Suu Kyi's political party.

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<sup>1</sup> Scholars who work on Burma customarily footnote their first usage of 'Burma' or 'Myanmar' and explain the cultural or political significance of their chosen presentation. In this Introduction we have opted for a compromise: 'Myanmar' for the government and 'Burma' for the whole country. This is a precise way of clarifying a range of contested political claims. To refer to the whole country as 'Myanmar' is to miss the fractured and incomplete reality of the territory that the government controls. The report has attempted to remain faithful to this use of terms throughout.

The NCUB seeks dialogue with the National Coalition Government for the Union of Burma (NCGUB), National League for Democracy (NLD) and SPDC, as equal parties, to negotiate a free, democratic future for Burma. This goal has been unattainable, as the SPDC continues to use harsh, repressive tactics to maintain its control within the state of Burma.

PILPG advises the NCUB on the application of various legal mechanisms at the international level to challenge the actions and legitimacy of the current military regime, the State Peace and Development Council (SPDC). PILPG's work primarily addresses questions of democratic transition, constitutional review, peace negotiations, and public outreach.

### **OPBP Project & Methodology**

OPBP was approached by PILPG to produce a report on justice in Burma. After consultation, it was determined that OPBP would investigate the following issues:

1. Potential violations of international law by the SPDC and potential international consequences for those violations.
2. What international actions, mechanisms or other means of redress exist and how they might be invoked.
3. If the government were to change and Burma were to make the transition to democracy, the potential options for transitional justice to address past human rights abuse in Burma.

This report and is not based on original fieldwork. OPBP researchers have relied upon the evidence and observations of reputable international agencies and organisations, such as the ILO Commission of Enquiry, Amnesty International and Human Rights Watch.

### **OPBP Report: What can the law offer the people of Burma?**

To answer this question, this report includes three substantive components.

Part I is a non-exhaustive introduction to potential violations of international law by the Myanmar government. It considers past actions of the government since assuming power in 1988 as well as the most recent and well-known actions. By relying upon the primary field work performed by individuals and agencies not affiliated with OPBP, this Part introduces these potential violations from the point of view of general international law, international human rights law and international criminal law.

Part II provides an overview of the international actions and means of redress for such violations by the Myanmar government. It considers international mechanisms of redress used in the past as well as potential future avenues. This Part also investigates how Burmese citizens or other states could initiate such international mechanisms for action against the Myanmar government.

Part III discusses the potential options for transitional justice if the government were to change in Burma. This Part showcases possible avenues for transitional justice, such as a truth and reconciliation commission, special tribunal or reform of the domestic courts.

## Contextualising the Report

There are a number of political, social and economic factors that require clarification. The goal of this Introduction is to contextualise the political situation in order to interpret the legal arguments contained in this report. We consider, in turn, the following contexts: (1) administrative, (2) political, (3) ethnic, (4) international and (5) legal.

### Administering Burma

After 62 years as a British colony, the independent Union of Burma was founded with an elected constitutional government in 1948. From the very start that government faced challenges. The trials of a flagging economy were compounded by the insurgencies that raged around the country. Civilian rule only survived until 1962 when General Ne Win seized control. His efforts to impose a 'Burmese Way to Socialism' led to even more widespread civil war and for decades the country was fragmented by communist and ethnic rebellion. Ne Win's repressive and isolationist regime eventually collapsed in 1988 when an uprising—spearheaded by Nobel Peace laureate Aung San Suu Kyi and her party, the National League for Democracy—forced Burma's first democratic elections in 30 years. A group of senior generals responded by declaring martial law, renaming the country the Union of Myanmar and incarcerating Aung San Suu Kyi. The result of the May 1990 elections, won overwhelmingly by the National League for Democracy, has never been accepted by the generals, the SPDC.

The SPDC is the supreme body that rules the Union of Myanmar.<sup>2</sup> Its 12 members are all senior military figures of the rank Lieutenant General and above. Some of these generals are responsible for specific geographic zones while others hold important national political or military posts. At the pinnacle of this system is Senior General Than Shwe. He is the Chairman of the SPDC and the Commander-in-Chief of Defence Services.<sup>3</sup> He has held these paramount positions since 1992. The next most senior figure is Vice-Senior General Maung Aye. Both of these generals are supported by the military figures and protégés who have accompanied their rise through the ranks.

Important aspects of administrative and operational control are delegated throughout the country to a number of regional military commands. The officers in charge of these commands (who are usually Major Generals) are not full members of the ruling SPDC. However, each necessarily maintains strong links to a number of the most senior generals. The government also controls a tiered system of partly civilian ministries, regional administrative bodies, and local governments. However, the real power of the system is widely considered to rest with the military leadership alone. This is one reason that the regional military commands have become a crucial component of the administrative landscape.

Another is that Burma's administration is a consequence of colonial and post-independence policies that have sought to maintain a homogeneous core of 'Burmese' divisions surrounded by resource-rich and socially diverse 'ethnic' states.<sup>4</sup> This bifurcation of the country into different administrative structures has created an

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<sup>2</sup> From its foundation in 1988 until a re-branding in 1997 the SPDC was known as the State Law and Order Restoration Council.

<sup>3</sup> 'Defence Services' (Army, Navy and Air Force) is the common umbrella title for all of the Myanmar government's armed forces.

<sup>4</sup> Distinctions between the 'Burmese' or 'Burman' majority population of the country and the many minority groups are a standard part of the way that the country has been described since at least British colonial times.

unstable and unwieldy system. It is, however, one of the only ways in which any government since independence has managed to exert control in the often rebellious 'non-Burmese' fringes. Almost everything recently written about Burma mentions the many problems that this administrative arrangement has caused. Since the country's independence it has remained an unresolved issue. Any future government of the country will need to negotiate with minority leaders who may still see independence from Burma as the best prospect for people of their ethnicity.

### **Political alternatives**

Throughout the post-independence history of Burma a number of possible alternatives to this system of entrenched military rule have emerged. Until 1989 the now defunct Communist Party of Burma provided the most concerted ideological and military opposition to the government. Since its collapse and subsequent fragmentation there has been no dominant armed opposition to the government. Instead opponents who are actively campaigning for a transition to a democratic system of government have come to the fore.

The National League for Democracy (NLD) is a political party founded in 1988, just before the last major crackdown on anti-government forces. Led by Aung San Suu Kyi, the NLD is the most important alternative political organisation inside Burma. In the country's 1990 elections the party won a convincing majority of 392 of 492 seats. It was then the target of a major campaign of harassment and suppression by the government. Only sporadic government-sponsored assassinations have punctuated the mundane and oppressive restrictions of subsequent years. 13 NLD candidates who were elected in 1990 reportedly remain imprisoned, and many others have been forced into exile. Nobel Laureate Aung San Suu Kyi also remains under house arrest in Yangon. Her personal commitment to the cause of democratic reform in Burma has seen her incarcerated for over 12 years. Today she is one of the world's most famous political prisoners and remains, at the time of writing, under house arrest.

Many of the NLD candidates who were elected in May 1990 left Burma and formed a government-in-exile. That government, the National Coalition Government of the Union of Burma, has taken on a key advocacy role and has sought to remain a legitimate alternative to the military rulers inside the country. The core of this government-in-exile is based in Thailand and the United States of America, but there are also significant populations of politically-active exiled Burmese in Malaysia, Singapore, the United Kingdom, Australia and Norway, among other countries.

Along the Thailand-Burma border, which is at the heart of much political activity, there have been substantial efforts to create alternatives to life under military rule. Some of those alternatives—whether they come in the form of media organisations, human rights reporting outfits or humanitarian relief agencies—have been widely supported by the ethnic groups, particularly the Shan and Karen, who live along the border. The National Council of the Union of Burma has become a central body for many people interested in a democratic future for the country. All of these humanitarian and political movements have benefited from the relative freedom and safety they enjoy on the Thai side of the border. In India and China there are comparatively smaller populations of exiles who also continue to agitate for change. The ethnic and political differences that exist inside the country have also sometimes been transferred to the exiled political movement. Arguably, these ethnic and strategic tensions play some part in reducing the effectiveness of the exiled movement as a whole. It has certainly been weakened by the in-fighting that has come with many years of frustration and disappointment.

Regardless of the setbacks to alternative political forces, the events of 2007 demonstrate that the SPDC's rule does not go unchallenged. And there are many people outside the country willing to support the efforts of those 'on the inside'. Acts of defiance and rebellion continue throughout the country on a regular basis. Challenges to the authority of local government officials have also been widely reported in the media organisations run by exiles. At the same time, violent opposition to the government continues with sporadic bombing campaigns inside the country attributed (perhaps egregiously) to underground rebel movements. Support for alternative politics of many different kinds is particularly strong, for reasons that will become clear, among Burma's many ethnic minority groups.

### **Ethnicity and Politics in Burma**

It is often repeated that Burma is one of the most ethnically and linguistically diverse countries in the world. In particular the seven states where non-Burmese populations form a local majority have been sites of continued anti-government agitation. Resentment against the unifying mandate imposed by the government, or against policies of 'Burmanisation', led many ethnic groups to take up arms against the central authorities. Many of these rebellions ensured that, at the nadir of its power, the government only controlled a fraction of the national territory.

However, beginning in 1989, ceasefires were agreed between the SPDC and some of these regional 'ethnic' armies. Across the country—in the Kachin, Shan, Rakhine, Karenni, Karen and Mon states—20 ceasefire agreements were signed and 12 'Special Regions', based on the territories controlled by formerly anti-government armies, were promulgated. Some of these armies, like the United Wa State Army, were formed by the fracturing of the Communist Party of Burma while others, such as the Kachin Independence Army, have been longstanding, autonomous opponents of military rule. The disparate origins of these ethnic armies, and their current unwillingness to develop a unified political platform, have frustrated their efforts to contribute to lasting political change.

The ceasefires with ethnic armies are the linchpin of a government anti-insurgency strategy that supports the SPDC's goals of 'peace' and 'development'. For the government the signing of ceasefires with rebel groups is an ongoing priority and some tentative ceasefires with small armed factions were signed as recently as 2006. Each ceasefire brings a rebellious group back into what the government calls the 'legal fold'. Economic incentives, and special access to lucrative markets or sectors, are widely believed to underpin most of the ceasefire agreements. For instance, it has been widely reported that after the fragmentation of the Communist Party of Burma agreements in the Shan state were made possible by the government's acquiescence to increased narcotic production.

At a more formal level, armed groups that have signed ceasefires with the government have actively participated in its road map to democracy. By sending delegations to Yangon for the recently completed constitution-drafting National Convention, the armed groups have lent their backing to the agenda espoused by the SPDC. Within the ranks of some ethnic groups this is considered, understandably, to be a controversial move. Many of the armed groups suffer from other disagreements which have, in some cases, led to high-profile schisms.

There are also a number of ethnic armies that have resisted the overtures of the SPDC and who continue their armed opposition to its rule. The most prominent of these armies are the Karen National Union and the Shan State Army - South. Both armies have suffered repeated setbacks in the SPDC's long-running and concerted

campaigns against them. Both of these armies, and most of the other small rebel outfits that remain, have been forced to find refuge near the border between Thailand and Burma. Venturing too far from the border makes them vulnerable. This is one sign of the general weakness of armed opposition to the military government since the effort to sign ceasefires began.

## International Responses

The basic configuration of political power inside Burma has not altered since the State Law and Order Restoration Council seized control upon the disintegration of General Ne Win's government in 1988. That configuration has not helped the country to improve its image. With Aung San Suu Kyi usually under arrest and with government condoned narco-armies in some border areas, the SPDC has been tarred as an international pariah. As a consequence, some countries have implemented sanctions in the hope that they will pressure the government to alter its policies.

These sanctions, which have been strengthened since the crackdown on protestors in 2007, have, however, failed to disrupt the government's most important trading relationships within its immediate region. China, Thailand and Singapore have not severed the commercial ties that most fully support the government. Increasingly sophisticated commercial arrangements—particularly those focused on natural resource extraction and hydropower development—mean that the generals are not struggling financially.

The reluctance among some Asian countries to impose sanctions ensures that there has never been a united international effort to oppose the Myanmar military government. In fact, the government has continued to receive support of many kinds (including weapons) from around the world. Russia, China and Israel have all been major suppliers of military and other hardware. Thailand and Singapore have played similarly crucial roles as intermediaries and partners. The targeted sanctions from the European Union, the United States of America and Australia are of limited effect when there are such substantial regional, and international, interests continuing to provide encouragement to the Myanmar government.

The lack of international unity has also combined with a fragmentation of the exiled political movement outside the country. Spread around the world, and without regular access to Aung San Suu Kyi as a unifying figure, fragmentation in the political realm has led to much infighting and dissatisfaction. Without a united position on issues such as sanctions, boycotts and humanitarian aid, the exiled political movement has found it difficult to grow or take advantage of changing circumstances inside the country. The resulting picture of Burmese politics that emerges on an international scale is of inter-locking stalemates. From the Thai border districts where the Karen National Union continues its armed struggle, to the boardrooms where the government-in-exile agitates for more change—stalemates have come to characterise the political context.

Under these stalemates the Myanmar military government has sought to strengthen its position. When they have seen international strategic advantage the generals have also been keen to demonstrate a reformist streak. At present their reforms are tied to the '7-step road-map to democracy'. Within this framework, the implementation of any further political reform is entirely a matter for the government. But the generals have not remained in power by accident. Their commitment to neutering opposition, and to patiently negotiating self-serving ceasefire agreements, has demonstrated their ability to stay in control.

## The Law and Military Rule

Under the State Peace and Development Council, legal authority in Burma has been subsumed as part of a militarised executive and legislative mandate. The secrecy that surrounds the operation of many judicial mechanisms inside the country ensures that outside understanding of the current legal system remains incomplete. The details of prosecutions and judicial proceedings that do emerge from the country are usually inadequate for drawing out any general principles. Nonetheless, the consensus outside the country is that the legal system, and all of its component parts, has been skilfully deployed to further the interests of the SPDC. When challenged, the Myanmar bureaucracy can fall back on an opaque system of rules and regulations. The limits to these powers are uncertain.

However, the best analysis is that the limits on power under Myanmar military rule are only set by shifting political alliances. The purging in 2003 of former Prime Minister, General Khin Nyunt, and his nationwide intelligence infrastructure is a good example. Until his displacement by Senior General Than Shwe he had developed an impressive parallel government apparatus through his military intelligence chain of command. In a rapid purge, most of the important figures in his networks were either arrested or forced to flee into exile. He was, of course, charged with numerous offences but any legal gloss given to his prosecution was only for show.

This example from within the ruling SPDC is better known than the many more obscure legal 'precedents' set by the military government. However, the demonstrated lack of consistency and transparency in the legal sphere is only one part of the government architecture about which relatively little is known. Almost all other elements of government, from top-level decision-making downwards, are similarly opaque. The difficulty of accessing clear and accurate information on the country means that the actual functioning of the legal system remains a topic of much conjecture.

At some stage in the future the legislative and judicial system that has been established by the SPDC may need to be thoroughly, and perhaps completely, reformed. At present, it fails to provide certainty for Burmese citizens or foreigners and is based, ultimately, on the whims of the most senior generals of the SPDC. As they continue their fight to stay in power the many inconsistencies in the legal system and the draconian sentences that they impose will continue to draw attention. What they may fear most is the implementation of a rule of law system in Burma where they themselves might be held accountable for their actions.

## Conclusion

After the anti-government demonstrations of 2007, the Myanmar military government has reconsolidated its control of the country. That control is predicated on the silencing of dissent and the generals' belief that the world will continue to allow Burma to follow its own path. By briefly introducing aspects of the political context with which this report engages, this introduction has endeavoured to provide a more accessible picture of Burma's problems. The substantive parts of the report that follows are each focussed on international legal aspects of the situation in Burma today. By analysing the potential legal mechanisms for challenging the Myanmar military government this report hopes to begin new conversations about the future of this embattled country.



# PART I: VIOLATIONS OF INTERNATIONAL LAW

## Introduction

This Part is a brief introduction to the violations of international law committed by the SPDC since taking power in 1988. There has been a broad range of human rights that have been routinely violated by the SPDC. It is not the goal of this report to identify each infringement, nor is it possible to do so with the confines within which this report is prepared, particularly the need to rely upon the published fieldwork and reports of others. This Part provides an overview of the violations and a framework to understand them.

The consequences of these violations of international law will be considered in Part II of this report.

### *Applicable law*

The international legal norms considered in this report derive mainly from two bodies of international law: international humanitarian law and international human rights law. Before examining the substantive content of the relevant norms, it is first necessary to discuss the circumstances in which each body of law is applicable.

International humanitarian law governs the conduct of both internal and international armed conflicts. Thus, for there to be a violation of international humanitarian law, there must be an armed conflict. According to the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadic* jurisdiction appeal,

an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.<sup>5</sup>

Applying this concept of armed conflict to the present case, there has been an ongoing non-international armed conflict in Burma. Notwithstanding the numerous ceasefire agreements that have been concluded between the Myanmar government and various organized armed groups within Burma, protracted armed violence has continued between the government and those armed groups, and no general peace settlement has brought military operations in the region to a close. The rules of international humanitarian law governing non-international armed conflicts are therefore applicable to the present case.

Common Article 3 of the Geneva Conventions stipulates the minimum standards of conduct applicable in any armed conflict, whether international or non-international in character. The ICJ stated in *Nicaragua* that Common Article 3 constitutes a rule of

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<sup>5</sup> *Prosecutor v Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1-AR72 (2 Oct 1995), [70].

customary international law and is therefore binding on all states.<sup>6</sup> Whilst Burma is a party to the Geneva Conventions, it is not a party to Additional Protocol II, which contains more detailed rules regulating non-international armed conflicts. Nonetheless, many of the provisions of Additional Protocol II constitute rules of customary international law. This report focuses upon the protections provided by Common Article 3, which reflect 'elementary considerations of humanity'.<sup>7</sup> The rules contained in Article 3 explicitly protect those persons taking no active part (or no longer taking active part) in the hostilities.

Unlike international humanitarian law, international human rights law is a general regime applicable both in peacetime and in times of armed conflict. The protection offered by human rights law does not cease in times of armed conflict, except in certain limited circumstances through the effect of treaty provisions for derogation of the kind to be found in Article 4 of the ICCPR. However, in times of armed conflict the protections provided by human rights law must be interpreted by reference to the *lex specialis* of international humanitarian law.<sup>8</sup>

Burma is not a party to a significant number of the major human rights law treaties.<sup>9</sup> Nonetheless, given the widespread ratification of the main human rights treaties, many of the rights enshrined therein are considered customary law and therefore binding on all states. Many of the rights considered in this Part are rules of customary international law: the rights to be free from forced labour, torture and cruel, inhumane and degrading treatment or punishment, forcible displacement of civilians and the right to a fair trial and prolonged arbitrary detention. Some of these rights are *ius cogens* rules of international law – principles of international law so fundamental that no nation may ignore them or attempt to contract out of them through treaties.

In addition to these serious breaches of customary international law, this Part also considers a number of civil and political rights in Burma. In anticipation of possible forthcoming elections in Burma particular concern is directed to the repression of civil and political rights necessary for democratic participation such as freedom of expression and freedom to peacefully assemble and associate and the connection of violations of these rights with arbitrary detention. The clear policy and practice of the military regime in Burma to arrest or impose penalties upon those who exercise these freedoms to express their political opposition to the government has serious implications for the upcoming elections in Burma and for the prospects of a transition to democracy. The international community must be cognisant of these connections and the implications the violations identified in this report.

While Burma is not a party to the International Covenant on Civil and Political Rights (ICCPR), it is important to consider certain civil and political rights widely violated in Burma. As this Part will demonstrate, the Myanmar government consistently violates

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<sup>6</sup> *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v USA)* (Judgment) ICJ Rep 1986, [218]. The ICTY Appeals Chamber confirmed this in *Prosecutor v Tadic* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) ICTY-94-1-AR72 (2 Oct 1995), [102].

<sup>7</sup> *Ibid.*

<sup>8</sup> See *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) ICJ Rep 1995, [25]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) ICJ Reports 2004, [106].

<sup>9</sup> For example, Burma is not a party to the Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on the Elimination of All Forms of Racial Discrimination, the Convention for the Protection of All Persons from Enforced Disappearance, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

the rights to freedom of expression, association and assembly in Burma. These are fundamental rights recognised in many multilateral human rights treaties, the Universal Declaration of Human Rights (UDHR)<sup>10</sup> and customary international law. Burma's failure to accede to the ICCPR does not deny Burmese citizens these rights, but it does restrict the remedies available on the international plane to respond to these violations.

#### *An Overview of the International Law Violations in Burma*

1. Violation of the obligation to suppress all forms of **forced labour** under customary international law and Article 1 of the Forced Labour Convention 1930;
2. Violation of the prohibition against **torture and cruel, inhuman and degrading treatment or punishment** under customary international law, international human rights law (Article 1 of the Convention Against Torture and Article 7 ICCPR) and international humanitarian law (Common Article 3 of the Geneva Conventions);
3. Violation of prohibition on **forcible displacement of civilians** certain treatment of civilians during non-international armed conflicts under customary international law and international humanitarian law (Common Article 3 of the Geneva Conventions and AP II)
4. Violation of the prohibition on the **use of child soldiers** in breach of customary international law and Article 38, Convention on the Rights of the Child (CRC);
5. Violation of **fair trial rights and due process guarantees** under customary international law and international human rights law (Articles 10 and 11, UDHR; Articles 14 and 15 ICCPR);
6. Violation of protections against **arbitrary detentions, involuntary disappearances, and arbitrary interference with the person**, in violation of customary international law and international human rights law (Articles 2, 9, 12 UDHR; Article 17, ICCPR);
7. Violations of **freedom of expression**, with special attention to the rights of political dissidents and opponents and freedom of the press, contrary to Article 18, 19 and 27, ICCPR.
8. Violations of **freedom of association and assembly** contrary to Article 20 UDHR and Articles 21, 22 ICCPR.

This does not constitute an exhaustive list of all international law violations committed in Burma. The analysis in this report is necessarily limited to some of the most serious violations and those for which there exists the most evidence obtainable from the primary fieldwork performed by individuals and agencies not affiliated with OPBP.

#### *Consequences of Violations*

The above violations may give rise to two distinct forms of international responsibility: state responsibility and individual criminal responsibility. Part II considers the consequences of violations in detail, but a brief summary is helpful at this stage.

When state officials or other persons acting on behalf of the state engage in forced labour, their actions constitute a violation of the state's international obligations under

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<sup>10</sup> (adopted 10 December 1948 UNGA Res 217 A(III)) (UDHR).

both customary law and treaty. The state is internationally responsible for that violation, since '[e]very internationally wrongful act of a State entails the international responsibility of that State'.<sup>11</sup> It is important to emphasize that state responsibility is *not* a form of criminal responsibility. There has been no development of penal consequences for states for breaches of international norms. Instead, state responsibility gives rise to two principal secondary obligations on the part of that state: to cease the wrongful conduct and to make full reparation for the injury caused by that act.<sup>12</sup> Where appropriate, reparation may include the payment of damages, but the function of damages is essentially compensatory rather than punitive.<sup>13</sup> The consequences of state responsibility and the possible mechanisms for enforcement are considered in Part II.

In terms of legal theory, the international responsibility of a state arises automatically upon the commission of an internationally wrongful act by that state. In practice, however, that responsibility must be invoked by the injured state or some other interested party (such as an individual applicant before a human rights body with jurisdiction). The primary beneficiaries of the international obligations in this report are not other states, but *individuals* within Burma. In human rights law, not only may individuals be entitled to invoke responsibility on their own account, but there exists a number of institutionalized procedures for the settlement of disputes.

Moreover, some of the obligations considered in this report (such as the prohibition of slavery) are obligations *erga omnes*, meaning that they are owed to the international community as a whole. Where Burma has violated such obligations, another state may be entitled to invoke the responsibility of Burma if the violation 'specially affects that state'.<sup>14</sup>

The procedure for the presentation and settlement of international claims against the state of Burma is essentially similar to the imposition of civil responsibility in domestic legal systems. The available means of settling disputes include negotiation, mediation and conciliation (perhaps with the involvement of a regional organisation or the United Nations (UN)), arbitration, or adjudication by the International Court of Justice (ICJ) (although Burma may be unlikely to grant jurisdiction to the ICJ). International Organisations (such as human rights treaty bodies) play a key role in holding states to account for violations of human rights, as discussed in Part II of this report.

Quite apart from the question of state responsibility, the international law violations considered in this report may constitute an international crime giving rise to the individual criminal responsibility of the persons involved. As the International Military Tribunal stated in 1946, '[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'.<sup>15</sup> The potential mechanisms for prosecution of individuals for international crimes committed in Burma are considered in Part II, and the options for pursuing transitional justice are considered in Part III.

The remainder of this Part examines in detail each of the eight violations of international law identified above.

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<sup>11</sup> International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (2001) (ILC Articles), art 1.

<sup>12</sup> ILC Articles, arts 30 and 31.

<sup>13</sup> In the *Velásquez Rodríguez*, Compensatory Damages case, the Inter-American Court of Human Rights held that international law did not recognize the concept of punitive or exemplary damages (Series C, No. 7 (1989)). See also *Letelier and Moffitt*, ILR, vol. 88, 727 (1992).

<sup>14</sup> See ILC Articles, art 42.

<sup>15</sup> International Military Tribunal (Nuremberg), judgment of 1 October 1946, reprinted in 41(1) *AJIL* (1947), p 221.

## 1. Forced Labour

Forced labour is prohibited by customary international law. Burma is obligated by customary international law and its commitments under the Forced Labour Convention 1930 (ratified in March 1955 and coming into effect in March 1956) to refrain from using forced labour and to protect its citizens from forced labour. However, the use of forced labour by the Myanmar Government is well documented. Burma has been found by the International Labour Organisation (ILO) to have engaged in forced labour, in violation of the prohibition of forced labour under international law.<sup>16</sup>

### *Prohibition of Forced Labour in Customary International Law*

The prohibition against forced labour has achieved the status of a peremptory, *ius cogens*, norm in international law.<sup>17</sup> As such, the prohibition on forced labour must be observed by Burma irrespective of treaty commitments. No derogation or limitation is permitted in any circumstances.

Forced labour is defined as 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.'<sup>18</sup>

The prohibition is contained in numerous international treaties. The Slavery Convention of 1926<sup>19</sup> imposed an obligation on all state parties to take all necessary measures to prevent forced labour from developing into situations similar to that of slavery. Article 25 of the ILO Forced Labour Convention 1930 states that 'the illegal exaction of forced or compulsory labour shall be punishable as a penal offence'. Burma has been a party to the Forced Labour Convention since 1956.<sup>20</sup> The Forced Labour Convention 1930 was further strengthened by the Abolition of Forced Labour Convention 1957.<sup>21</sup> Forced labour is also explicitly prohibited by the ICCPR.<sup>22</sup>

Extreme forms of forced labour may constitute slavery. Slavery is defined in the first international instrument on the subject in 1926 as the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.<sup>23</sup> The ICJ in *Barcelona Traction* cited in *obiter dicta* the obligation to prevent slavery as one of the obligations *erga omnes* in international law.<sup>24</sup>

### *Forced Labour as a Violation of International Law by the State*

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<sup>16</sup> ILO Commission of Enquiry Report on Observance of the Forced Labour Convention, 1930 by Myanmar (Geneva, 2 July 1998) (ILO Report).

<sup>17</sup> *Ibid*, para 203.

<sup>18</sup> Forced Labour Convention (adopted 28 June 1930, entered into force 1 May 1932), 39 UNTS 55 art 2(1) (Forced Labour Convention 1930).

<sup>19</sup> Slavery Convention (adopted 25 September 1926, entered into force 9 March 1927), 60 LNTS 253.

<sup>20</sup> Burma ratified the Forced Labour Convention in 1955 on 4 March 1955 and it came into force in Burma on 4 March 1956.

<sup>21</sup> Abolition of Forced Labour Convention (adopted 25 June 1957, entered into force 17 January 1959), 320 UNTS 291

<sup>22</sup> International Covenant on Civil and Political Rights, (adopted by UNGA Res. 2200A(XXI) (16 December 1996), entry into force 23 March 1976) (ICCPR) art 8.

<sup>23</sup> Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention of 1926 (Slavery Convention of 1926) (entered into force March 9, 1927) 60 LNTS 253, art 1(1).

<sup>24</sup> *Case Concerning the Barcelona Traction, Light and Power Company Limited (New Application, 1962) (Belgium v Spain)* (Judgment) 46 ILR 178, paras 33-34.

When state officials or other persons acting on behalf of the state engage in forced labour, their actions constitute a violation of the state's international obligations under both customary law and treaty.

### *Forced Labour as an International Crime by an Individual*

All forms of forced labour constitute criminal offences under the 1930 Forced Labour Convention.<sup>25</sup> The crime of slavery – an extreme form of forced labour defined above – may constitute a crime against humanity if committed in a widespread and systematic manner, giving rise to the *individual* criminal responsibility of the persons involved.<sup>26</sup> Article 7(1)(c) of the Rome Statute of the International Criminal Court (the Rome Statute) stipulates that enslavement may constitute a crime against humanity.

The prohibition on forced labour is a peremptory norm of international law. It can attract responsibility of both states and individuals. The mechanisms by which states and individuals can be brought to account – including the exercise of universal jurisdiction by the domestic courts of another state – will be discussed in Part II, and the potential mechanisms for seeking transitional justice will be discussed in Part III. The following discussion focuses upon whether Burma has violated the prohibition.

### **Forced Labour in Burma**

As concluded by the ILO Commission of Inquiry, the Myanmar Government has clearly violated the prohibition on forced labour. The Commission stated that:

There is abundant evidence before the Commission showing the pervasive use of forced labour imposed on the civilian population throughout Myanmar by the authorities and the military for portering,<sup>27</sup> the construction, maintenance and servicing of military camps, other work in support of the military, work on agriculture, logging and other production projects undertaken by the authorities or the military, sometimes for the profit of private individuals, the construction and maintenance of roads, railways and bridges, other infrastructure work and a range of other tasks, none of which comes under any of the exceptions listed in Article 2(2) of the Convention.<sup>28</sup>

Forced labour in Burma is widely performed by women, children and elderly persons as well as persons otherwise unfit for work. It is almost never remunerated and is often accompanied by exaction of money, food and other supplies from the civilian population.<sup>29</sup> Ethnic groups are particularly targeted and bear the greatest burden of forced labour in Burma.<sup>30</sup>

The United States Department of Labor Report on Labor Practises in Burma in 1998 cited numerous instances of forced labour in Burma on infrastructure developments, gas pipelines and military works and cited legislation which empowered the government to call upon involuntary labour<sup>31</sup> and to impose penal sanctions against

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<sup>25</sup> Forced Labour Convention 1930, art 25.

<sup>26</sup> See Rome Statute of the International Criminal Court (adopted 17 July 1998, entry into force 1 July 2002) 2187 UNTS 90 (Rome Statute), art 7(1)(c), which reads: '1. For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: .....(c) Enslavement'. Although Burma is not a party to the Rome Statute, article 7)(1)(c) is expressive of customary international law.

<sup>27</sup> Transporting, e.g. rations and supplies, for the military.

<sup>28</sup> ILO Report, para 528.

<sup>29</sup> Ibid. para 532.

<sup>30</sup> Ibid. para 534.

<sup>31</sup> See ss. 11(d), 8(1)(g), (n) and (o) of the Village Act and s. 9(b) of the Towns Act.

individuals who fail to comply.<sup>32</sup> The legislation provided for the village head and town authorities to receive and implement government requests for labour.<sup>33</sup>

The ILO Commission of Inquiry also found that the Myanmar Government forced people to be porters. People from both urban and rural areas were forced to carry supplies and materials for military and civilian purposes. The Commission also reported widespread ill-treatment of porters and the pathetic conditions of work. In many instances porters were found to be used as human mine sweepers. The practice of forcibly recruiting porters appears to be widespread across Burma, including Chin, Kachin, Karen, Kayah, Kayin, Mon, Rakhine and Shan States and Ayeyarwady, Bago, Sagaing, Tanintharyi and Yangon Divisions.<sup>34</sup>

There were also a large number of cases in which civilians were forced to work in military camps and provide other assistance to the military. Civilians, outside the context of portering, have been used as human mine sweepers and human shields. Other instances of forced work include forced recruitment into militia like *tatmadaw*, working in agricultural fields, logging, building of roads, bridges and other infrastructural facilities. Individuals are forced to grow food and cash crops for the army and receive no compensation. Crops like rice, beans and corn, sugar cane and rubber are grown for the military in Kachin, Kayah, Kayin, Mon, Rakhine and Shan States and Bago, Sagaing and Tanintharyi Divisions. Workers suffer in terrible working conditions, none of the work is remunerated and the military often extracts large sums of money from people trying to escape forcible work.<sup>35</sup>

### Conclusion: Violations of Forced Labour Prohibitions

The ILO Commission of Inquiry reported Burma to be in violation of the following provisions:

- **Forced Labour Resulting in Private Benefit:** The use of forced labour in cultivation of cash crops, logging, brick kilns, resulting in private benefits for individuals within the army and other private interests,<sup>36</sup> violates Article 4(1).
- **Forced Labour from Women, Children and Elderly Persons:** Exacting forced labour from women (even pregnant women),<sup>37</sup> children (under 18 years) and the elderly (over 45 years) violates Article 11.
- **Forced Labour Without Remuneration:** Article 14(1) requires that remuneration must not be less than the rate prevailing for similar kind of work. The Commission's report suggests in many cases forced labour is not remunerated at all.
- **Punishment for the Illegal Use of Forced Labour:** Burma's failure to punish those engaged in illegal use of forced labour violates Article 25. While

<sup>32</sup> See s.12 of the Village Act and s.9A of the Town Act. Cited in US Department of Labor *Report on Labor Practises in Burma*, September 1998, available at <<http://www.dol.gov/ILAB/media/reports/ofr/burma1998/main.htm>>

<sup>33</sup> Patrick Bolle, 'Supervising Labour Standards and Human Rights: The Case of Forced Labour in Myanmar', (1998) 137 *International Labour Review* 391, 396.

<sup>34</sup> Karen Human Rights Group, 'Shouldering the Burden of Militarisation: SPDC, DKBA, KPF order Documents since September 2006', (14 August 2007) < <http://www.khrg.org/khrg2007/khrg0702.html>> accessed 12 March 2008.

<sup>35</sup> ILO Report, paras 394-400.

<sup>36</sup> See also Karen Human Rights Group, 'Surviving in Shadow: Widespread Militarization and the Systematic Use of Forced Labour in the Campaign for Control of Thaton District', (17 January 2006), <<http://www.khrg.org/khrg2006/khrg0601d.htm>> accessed 1 March 2008

<sup>37</sup> See also Shan Human Rights Foundation and Shan Women's Action Network, 'License to Rape', (May 2002), < [http://www.shanland.org/resources/bookspub/humanrights/LtoR/forced\\_portering.htm](http://www.shanland.org/resources/bookspub/humanrights/LtoR/forced_portering.htm)>, accessed 3 March 2008.

section 374 the Penal Code criminalises unlawful engagement of labour without the consent of a person, this is contradicted by the practice of the Myanmar government and even instances of direct legislative sanction for forced labour. Burma is therefore in violation of Article 25.

None of the instances of forced labour evidenced in the ILO Commission of Inquiry Report falls within the exceptions provided in Article 2 of the Convention.<sup>38</sup> It is therefore clear that the Myanmar Government is in breach of its obligation not to subject civilians to forced labour.

The Myanmar Government entered into an agreement with the ILO on 20 March 2007 to pay compensation to people who have been victims of such labour camps over the last forty years. As reported in the Guardian newspaper, the ILO expects the government to set up a complaint mechanism.<sup>39</sup> However, groups closely connected with Burma are sceptical about the impact this measure will have given the climate of fear that has been created by the Myanmar Government.<sup>40</sup> The ILO, in cooperation with other UN bodies, must exert pressure on the Myanmar Government to create an effective mechanism where claimants do not fear to come forward with their claims for compensation. Protection of such claimants must be the primary concern. It must be emphasised that this agreement does *not* relieve Burma of international responsibility for the use of force labour, nor does it relieve individual Burmese leaders of their responsibility under international criminal law.

## 2. Torture and Cruel, Inhuman and Degrading Treatment or Punishment

The right to be free from torture and cruel, inhuman or degrading treatment or punishment is found in the UDHR,<sup>41</sup> the ICCPR<sup>42</sup> and the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).<sup>43</sup>

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<sup>38</sup> Article 2(1) of the Forced Labour Convention 1930 provides that 'forced or compulsory labour' shall not include:

- a) Any work or service exacted in virtue of compulsory military service laws for work of a purely military character;
- b) Any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country;
- c) Any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority and that the said person is not hired to or placed at the disposal of private individuals, companies or associations;
- d) Any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population;
- e) Minor communal services of a kind which, being performed by the members of the community in the direct interest of the said community, can therefore be considered as normal civic obligations incumbent upon the members of the community, provided that the members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services.

<sup>39</sup> D. McDougall, 'Shackles, Torture, Executions: Inside Burma's Jungle Gulags' *Guardian* (London 25 March 2007) <<http://www.guardian.co.uk/world/2007/mar/25/burma.theobserver>> accessed 25 February 2008

<sup>40</sup> See, for example, Karen Human Rights Group, 'The Limits of the New ILO Mechanism and Potential Misrepresentation of Forced Labour in Burma', (10 April 2007), <<http://www.khrg.org/khrg2007/khrg07c1.html>> accessed 25 February 2008

<sup>41</sup> UDHR, Art 5.

<sup>42</sup> ICCPR, Art 7.

<sup>43</sup> Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (adopted 10 December 1984 GA Res 39/46, entered into force 26 June 1987) UN Doc A/39/51 (CAT) art 1.



The use of torture or cruel, inhuman or degrading treatment (CIDT) by Burmese officials or agents constitutes a violation of international law for which the Myanmar Government is responsible. Such conduct also constitutes an international crime by the individuals in question.

### *Torture*

Article 1 of CAT defines torture as 'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession...'. It may be 'inflicted by or at the instigation of or acquiescence of a public official or other person acting in an official capacity.'

The prohibition on torture is a *ius cogens* norm.<sup>44</sup> Almost all international human rights instruments contain prohibitions against torture,<sup>45</sup> and common article 3 of the Geneva Conventions of 1949 also prohibits torture in non-international armed conflicts. Despite not being a party to the Convention Against Torture,<sup>46</sup> the Government of Burma therefore has an obligation under customary international law to not subject persons within its territory to torture.

### *Torture and Cruel, Inhuman or Degrading Treatment (CIDT)*

While both torture and CIDT are equally protected in Article 7, ICCPR and customary international law, a distinction is often drawn between the two on the grounds of intention and severity of treatment.<sup>47</sup> Mistreatment that does not meet the definition of torture, either because less severe physical or mental pain is inflicted, or because the necessary purpose of the ill-treatment is not present, may nevertheless violate the right of every person not to be subjected to cruel, inhuman or degrading treatment.

The prohibition on torture and CIDT in Article 7 relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim, including threats against family or loved ones, corporal punishment and excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure, and prolonged solitary confinement. Article 7 does not contain any definition of the acts considered torture or inhuman or degrading treatment, nor has the Human Rights Committee considered it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment. Instead, the Committee has indicated that 'the distinctions depend on the nature, purpose and severity of the treatment applied'.<sup>48</sup>

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<sup>44</sup> *Prosecutor v. Furundzija* (Judgment) ICTY Trial Chamber (1998) IT-95-17/1, 121 ILR 213, 254-257, 260-261.

<sup>45</sup> See, for example, UDHR art 5; ICCPR art 7; Charter of Fundamental Rights of the European Union, (adopted 2 October 2000, entry into force 7 December 2000) O.J. (C 364) 20 (2000), art 4; American Convention on Human Rights (entry into force 18 July 1978) 1114 U.N.T.S. 123, art 5(2); African Charter on Human and Peoples' Rights (adopted 27 June 1981, entry into force 21 October 1986) 21 ILM 58, art 5; Inter-American Convention to Prevent and Punish Torture (adopted 12 September 1985, entry into force 28 February 1987) 25 ILM 519, art 1.

<sup>46</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading treatment or Punishment (adopted by UNGA Res. 39/46 (10 December 1984), entry into force 26 June 1987).

<sup>47</sup> This can be deduced by the language of Article 16 of CAT, which states, that states shall also take measures to punish 'other acts of cruel, inhuman or degrading treatment or punishment *which do not amount to torture* as defined in article 1'. However, the view is not uncontroversial. The US government relies on this distinction regarding its interrogation techniques in Guantanamo Bay but this stands in stark contrast to the view taken in the European Court of Human Rights.

<sup>48</sup> Human Rights Committee, 'General Comment 20, Article 7 (Forty-fourth session, 1992)' UN Doc HRI/GEN/1/Rev.1 at 30 (1994) (HRC General Comment 20) para 4.

Human Rights Watch provides examples of such prohibited mistreatment, including being forced to stand spread eagled against the wall, being subjected to bright lights or blindfolding, being subjected to continuous loud noise, being deprived of sleep, food or drink, being subjected to forced constant standing or crouching, or violent shaking. In essence, any form of physical treatment used to intimidate, coerce or 'break' a person during an interrogation constitutes prohibited ill-treatment. If these practices are intense enough, prolonged in duration, or combined with other measures that result in severe pain or suffering, they can qualify as torture.<sup>49</sup>

For the purposes of this analysis, it is sufficient to note that there are many forms of mistreatment, which do not amount to torture, but may nevertheless constitute cruel, inhuman or degrading treatment. In any event, the examples to be cited in this report demonstrate clearly that torture is practiced by the military regime in Burma.

### *Torture and CIDT Non-Derogable Norms*

The prohibition against torture and CIDT is a norm from which no derogation is ever permitted. The non-derogable nature of the prohibition is reiterated by Article 2(2) of CAT, '[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture'<sup>50</sup> This is further affirmed by Articles 4 and 7 of the ICCPR. Moreover, '...the accused person possesses a non-derogable right to be free from torture at all times during the criminal process, including interrogation, detention, trial, sentencing and punishment. Accordingly, evidence obtained as a result of torture may never be admitted, except in proceedings against alleged perpetrators'.<sup>51</sup>

### *Torture or Inhuman Treatment as a War Crime*

The use of torture or inhuman treatment also constitutes a war crime perpetrated by the *individuals* involved, potentially giving rise to criminal prosecution in an international or national court or tribunal (see discussion in Parts II and III). Article 8(2)(c) of the Rome Statute states that, in cases of non-international armed conflict, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949 constitute war crimes. Article 8(2)(c)(i) expressly identifies 'mutilation, cruel treatment and torture' as examples of serious violations of common article 3.

### *Torture as a Crime Against Humanity*

Where knowingly committed as a part of a systematic or widespread attack against the civilian population, torture constitutes a crime against humanity by the *individuals* involved, potentially giving rise to criminal prosecution in an international or national court or tribunal (see discussion in Parts II and III). This is explicitly stated in Article 7(1) of the Rome Statute.<sup>52</sup> Article 7(1)(f)<sup>53</sup> read with Article 7(2)(e)<sup>54</sup> defines torture

<sup>49</sup> See Human Rights Watch, *The Legal Prohibition Against Torture*, 1 July 2004, available at <<http://www.hrw.org/press/2001/11/TortureQandA.htm>> accessed 10 April 2007.

<sup>50</sup> See also ICCPR, art 7, and HRC General Comment 20.

<sup>51</sup> S. Chernichenko and W. Treat, 'The Administration of Justice and the Human Rights of Detainees, The Right to a Fair Trial' UN Doc. E/CN.4/Sub.2/1994/24 (1994), para. 132, cited by Amnesty International, 'Fair Trial Manuals' (London: Amnesty International Publications, 1998). See, also, Bassiouni, C., 'Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions', *Duke Journal of Comparative and International Law* 3 (1993), 235–297.

<sup>52</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute).

<sup>53</sup> Article 7(1)(f) reads: 1. For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: .....(c) Torture

<sup>54</sup> Article 7(2)(e) reads: For the purpose of paragraph 1: .....(e) Torture means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control

as the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.

There is a crucial difference between the definition of torture under the Convention Against Torture and that under the Rome Statute: the latter is not confined to persons acting as, or with the consent or acquiescence of, a public official or in an official capacity.

### **The Use of Torture & Cruel, Inhuman and Degrading Treatment or Punishment in Burma**

Various organisations and groups concerned with Burma have found that the Myanmar Government inflicts torture upon its citizens, in particular, members of various minority ethnic groups and members of opposition political parties. Amnesty International notes that the Myanmar Government has increasingly used torture since 1988 and currently holds around 1700 political prisoners.<sup>55</sup>

In December 2005, a comprehensive analysis of the reach and extent of torture practices in Burmese prisons was compiled by the Assistance Association for Political Prisoners (AAPP) (and endorsed by the Burma Campaign UK), in the form of a report entitled *The Darkness We See*.<sup>56</sup> The report is based on interviews with thirty-five former political prisoners and documents the various forms of physical, psychological, and sexual abuse used by the junta. AAPP explain how deliberately poor prison conditions combined with purposeful medical negligence are encouraged and perpetrated by the junta to cause an aggravated degree of suffering tantamount to torture. AAPP conclude that Burma's prisons have become institutions whose primary function is to deliberately and systematically shatter the identity of political activists and other civilians deemed threatening by the Myanmar Government.<sup>57</sup>

The report identifies the following practices which are used on political prisoners in jails in Burma, each of which would separately violate criteria in Article 1 of CAT:

- severe beatings, often resulting in loss of consciousness and sometimes death;
- electrocution to all parts of the body, including genitals;
- rubbing iron rods on shins of prisoners until flesh is ripped off, a tactic known in Burma as the 'iron road';
- burning with cigarettes and lighters;
- prolonged restriction of movements, for up to several months, using rope and shackles around the neck and ankles;
- repeatedly striking the same area of a person's body every second for several hours, a tactic known in Burma as 'tick-tock torture';

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of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions

<sup>55</sup> Amnesty International, 'Burma: Extrajudicial Execution and Torture of Ethnic Minorities' AI Index: ASA/16/05/88 (London, 1988); Amnesty International, 'Myanmar: The Institution of Torture', AI Index: ASA/16/024/2000 (London, 13 December 2000).

<sup>56</sup> Assistance Association for Political Prisoners (AAPP), 'The Darkness We See: Torture in Burma's Interrogation Centers and Prisons (2005)' < [http://www.aappb.org/tortour\\_report.pdf](http://www.aappb.org/tortour_report.pdf)> accessed 20 February 2008 (AAPP Report).

<sup>57</sup> Ibid.

- using dogs to attempt to rape prisoners;
- keeping prisoners in cells full of rats, maggots and faeces.<sup>58</sup>

There are numerous further illustrative examples contained in the report. For example, deprivation of food, water, light, sleep and the use of toilet is resorted to in order to force victims to answer questions put to them. Instances have been reported where prisoners have resorted to drinking toilet water because they are deprived of drinking water. All sorts of instruments including rifle butts, truncheons, rubber cords, belts etc are used to beat the prisoner. The interrogators inflict bodily injuries on all parts of the body and make the prisoners assume specific positions before beating them. The 'iron road' is a particularly cruel form of torture when an iron bar is pressed and rolled over the shin of the prisoner until the skin is peeled off by the iron bar. Use of stress positions, water torture, electric shocks, burning with hot wax and cigarettes, widespread sexual abuse are other commonly used measures. Another system of torture developed by the Myanmar Government is called *Poun Zan*. Here the prisoner has to stand on her/his toes, keep knees bent at 45 degrees and the back absolutely straight with hands behind the head and the face held straight. Prisoners are required to maintain this position for long periods and sometimes pins are placed underneath their feet so that their feet will be pierced in case the position changes. Methods of psychological torture like use of hoods and blindfolds, witnessing of torture and incommunicado detention are also extensively used.<sup>59</sup>

The AAPP report also exposes the way in which a chain of command is instituted in prisons in Burma, according to which public officials are given specific responsibility to perpetrate torture:

...The Minister of Home Affairs, Minister of Defense, and Minister of Foreign Affairs all serve on a three-person committee responsible for overseeing the detention of prisoners charged under section 10 (A) and (B) of the junta's State Protection Act, which provides the 'legal' basis for which many prisoners are held. In that capacity, these individuals are directly responsible for torture in Burma, in addition to those serving under them. Torture carried out during initial interrogations is carried out mainly by the Military Intelligence Service, which is under the Directorate of Defense Services Intelligence, organized under the Minister of Defense. Interrogation is additionally conducted by the Bureau of Special Investigations, and the Special Investigations Department (also known as the Special Branch, part of the Burma Police Force), that report to the Ministry of Home Affairs.<sup>60</sup>

Finally, the Asia Human Rights Commission has suggested parallels between the military regimes past practices of mistreating individuals, according to the criteria contained in CAT, and the military regime's likely current handling of protestors who formed part of the September 2007 uprisings:

It is safe to assume that the monks and persons alike who have been taken into detention by illegal methods in Burma during recent days will be subjected to torture and cruel and inhuman treatment. This is incidental to the lack of medical treatment, nutritious and adequate food, hygienic conditions and other aspects of prison life in Burma that have caused former inmates to describe the country's jails system as a living hell, and leave most who survive with permanent physical and psychological damage.<sup>61</sup>

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<sup>58</sup> Ibid.

<sup>59</sup> AAPP Report paras 28-54.

<sup>60</sup> Ibid.

<sup>61</sup> Asian Human Rights Commission, 'Burma: Torture and Inhuman Treatment of Detained Prisoners' (October 2007) <<http://www.ahrchk.net/statements/mainfile.php/2007statements/1225/>> accessed 15 March, 2008.

### *Torture as a Crime Against Humanity in Burma*

The systematic nature of the violence inflicted against members of opposition parties is also well documented. The AAPP makes the case that the Myanmar Government inflicts torture in a widespread and systematic manner, such that the individual perpetrators would satisfy the definition of torture as a crime against humanity in article 7(1) of the Rome Statute. As evidence of the widespread nature, the AAPP reports that at least 5000 people have been held as political prisoners and even this number reflects only the verifiable cases. The AAPP also notes that the numbers do not reflect the large number of ethnic minorities who are regularly detained and tortured in rural Burma in locations other than the disclosed 43 prisons.

It would also be difficult for the government to argue that that the detentions and torture is not part of a governmental policy as is the requirement of article 7(2)(a) of the Rome Statute.<sup>62</sup> The government uses the police and the military to carry out these detentions and even though there not might be a formal declared policy to eliminate political opposition, such a policy is evident from the actions of government forces.

While Burma is not a signatory to the Rome Statute, analysis of the potential criminal responsibility of governmental officials and other individuals who have committed torture as part of a governmental policy under the Rome Statue is relevant to the assessment of the perpetration of crimes against humanity in Burma and for future consideration of accountability for two reasons. While the ICC does not at present have jurisdiction over events in Burma, there is always a possibility of a referral by the Security Council under article 13(b) of the Rome Statute sometime in the future. This is discussed further in Parts II and III.

### *Cruel, Inhuman or Degrading Treatment and Punishment*

There are examples of mistreatment of prisoners that do not amount to torture, but may nevertheless constitute cruel, inhuman or degrading treatment in breach of Article 7, ICCPR. There are also parallels between arbitrary detention (discussed below) and the subjection of imprisoned individuals to cruel, inhuman and degrading treatment or punishment.<sup>63</sup> This is an acute concern regarding political prisoners, since the Myanmar Government's 'policy and practice works towards the continued suffering of political prisoners and slow destruction of their physical and mental health.'<sup>64</sup> The suffering inflicted upon prisoners may amount to cruel or unusual treatment or punishment.

The mistreatment of individuals, on the basis of their status as political prisoners, is a particular problem in prisons in Burma. For example, the AAPP has reported the experience of U Than Thwin, an elderly political prisoner who has spent time inside Mandalay prison. In March 2008, AAPP detailed how U Than Thwin, aged 70, is losing his eyesight because of the authorities' neglect and refusal to allow him access to hospital treatment.<sup>65</sup>

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<sup>62</sup> Article 7(2)(a) reads: For the purpose of paragraph 1: (a) 'attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack

<sup>63</sup> See Article 5, UDHR.

<sup>64</sup> AAPP, 'Statement on Political Prisoners' Health in Burmese Prisons' (5 March 2004), <<http://www.aappb.org/release44.html>> accessed 15 April 2008. .

<sup>65</sup> AAPP, 'Malicious Burmese Military Regime destroys eye sight of Burmese elected Member of Parliament' (6 March 2008) <<http://www.aappb.org/release102.html>> accessed 15 April 2008.

## Conclusion: Torture and Cruel, Inhuman and Degrading Treatment or Punishment is practiced in Burma

Customary international law recognises the prohibition against torture and inhuman or degrading treatment. As such the prohibitions are binding upon all states, including Burma. The prohibition against torture is well established under customary international law as *ius cogens*; it cannot be restricted or derogated from in any circumstances, whether in times of war or peace. The reports of AAPP show that the use of torture and other forms of cruel and inhumane mistreatment is endemic in Burma. The methods of interrogation employed by the Myanmar Government clearly satisfy the requirements of the definition under the CAT and the Rome Statute. The government is therefore in breach of the prohibition on the use of torture and cruel, inhuman or degrading treatment or punishment.

Academic treatment of torture and morally equivalent practices in international law identifies the difficulties in rendering the prohibition against torture and other inhuman treatment a reality on the ground:

The question is to what extent does commitment to these treaties actually influence government practices? Extreme physical and psychological abuse of citizens is very difficult to influence through treaty instruments. First, torture tends to be used when 'national security interests' are at stake. Second, it is often used in a very decentralized fashion.<sup>66</sup>

Convening debate in respect of how to foster '...the conditions under which treaty agreements can influence these practices'<sup>67</sup> in Burma should be raised among the international community and its institutions.

Accordingly, this report echoes the stance taken by the AAPP in its report of December 2005, in recommending that '...the UN Security Council should immediately take up the issue of Burma',<sup>68</sup> and in calling upon the UN Secretary General, Ban Ki-Moon to take action on the issue of torture and similar practices in Burma.<sup>69</sup> Further remedies available in international law are discussed in Part II.

### 3. Forced Internal Displacement

Forced displacement connected to an internal armed conflict is prohibited under customary international humanitarian law. Due to its various strategies to control rebel groups along with its land, labour and agricultural policies, the Burmese Government has forced hundreds of thousands of people to leave their homes. This massive displacement of people within Burma constitutes a violation of international law for which Burma is responsible. Where individuals are at fault, this also constitutes an international crime.

#### *Forced Displacement as a breach of International Humanitarian Law*

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<sup>66</sup> B. Simmons, 'International Law and Human Rights: The Case of Torture and Inhumane Treatment' (paper presented at the annual meeting of the International Studies Association, Town & Country Resort and Convention Center, San Diego, California, USA, March, 2006): <[http://www.allacademic.com/meta/p97955\\_index.html](http://www.allacademic.com/meta/p97955_index.html)>

<sup>67</sup> Ibid.

<sup>68</sup> AAPP, 'AAPP Calls for UN Security Council Action in Burma' (May 23, 2006) <<http://www.aappb.org/release75.html>> accessed 15 April 2008.

<sup>69</sup> Ibid.

Forced displacement is prohibited under Article 17 of Additional Protocol II to the Geneva Conventions,<sup>70</sup> applicable in non-international armed conflicts. While Burma is not a party to this protocol, this specific provision has been recognised as now constituting customary international law by the International Committee of Red Cross (ICRC) Customary Law Study (2005).<sup>71</sup> Article 17 of Additional Protocol II explicitly prohibits forced movement of civilians, providing that:

The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.

Reference may also be made to Common Article 3 of the four Geneva Conventions,<sup>72</sup> which applies to all conflicts of a non-international character occurring within territories of a party to the Convention. Burma has been a party to the Geneva Conventions since 1992. One of the prohibited acts within Common Article 3 is outrage upon personal dignity, in particular humiliating and degrading treatment.<sup>73</sup> Arguably the forced displacement of persons from their homes constitutes a significant outrage upon personal dignity in that such persons are deprived of their fundamental security.

#### *Forcible Displacement as a War Crime and Crime Against Humanity*

Article 8(2)(e) of the Rome Statute expressly states that, in a non-international armed conflict, '[o]rdering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand' constitutes a war crime. Article 7(1)(d) of the Rome Statute expressly provides that, where knowingly committed as a part of a systematic or widespread attack, the deportation or forcible transfer of civilians constitutes a crime against humanity by the individuals involved. Thus, the persons who order such displacements may be individually responsible under international criminal law and may be prosecuted in an international or national court or tribunal (see further discussion in Parts II and III).

#### **Forced Internal Displacement in Burma**

According to the 2007 report of the Thailand-Burma Border Consortium (TBBC),<sup>74</sup> thirty per cent of all battalions in the Myanmar Army are active in Eastern Burma. The report notes that around 76,000 people were forced to leave their homes during 2006 as a result of the armed conflict and human rights abuses by the military in these regions. Forced displacement has been at its most intense in northern Karen

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<sup>70</sup> Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entry into force 7 December 1978), 1125 UNTS 609 (Additional Protocol II).

<sup>71</sup> Henckaerts, J.M., and Doswald-Beck, L. 'ICRC Study on Customary International Humanitarian law, Volume I: Rules' (2005, Cambridge University Press) (ICRC Study) Rule 129, 453.

<sup>72</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 31 (GC I); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85 (GC II); Geneva Convention relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (GC III); Geneva Convention relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GC IV) (Geneva Conventions).

<sup>73</sup> Geneva Conventions, art 3(1).

<sup>74</sup> Thailand Burma Border Consortium, 'Internal Displacement in Eastern Burma' (October 2007), <<http://www.tbbc.org/idps/report-2007-idp-english.pdf>> accessed 29 February 2008.

State and eastern Pegu Division. The TBBC puts the total number of displaced persons at half a million, which includes 295,000 people living in temporary settlements of ceasefire areas.<sup>75</sup> The internal displacement has been attributed to coerced movements of small groups caused by confiscation of land, forced procurement policies, forced labour, extortion and arbitrary taxation. The Myanmar Government is explicitly implementing these measures – cutting food, information, recruits and funds – as state policy to counter insurgent groups. This state policy requires civilians to leave their villages in insurgent areas and relocate to government controlled areas. The policy is implemented by the military, which forces civilians to relocate by attacking villages, destroying houses, burning crops, planting landmines and shooting anyone returning home. Reports also suggest that at least 10,000 people have been displaced due to the construction of the new capital in Naypidaw.<sup>76</sup>

### **Conclusion: The Government is Forcibly Displacing Persons within Burma**

The TBBC report suggests that large numbers of civilians are being forced to relocate due to confiscation of land and other measures linked to the Burmese military's role in the ongoing internal armed conflict. The nature of this displacement does not appear to come within the limited justifications provided for by Article 17 of Additional Protocol II. These actions therefore constitute breaches of customary international humanitarian law by the State, and furthermore, individuals responsible may be criminally liable for perpetrating war crimes and/or crimes against humanity.

## **4. The Use of Child Soldiers**

The use of child soldiers is strictly prohibited by the Geneva Conventions and the Convention on the Rights of the Child (CRC). The systemic use of child soldiers in Burma constitutes a breach of Burma's obligations under both conventions, as well as customary international law. Individuals responsible may be criminally liable under international criminal law.

### *Use of Child Soldiers as a breach of International Humanitarian Law and Human Rights Law*

International humanitarian law and human rights law prohibit the recruitment and use of children as soldiers. Article 4(3)(c) of Additional Protocol II, which applies during non-international armed conflict, prohibits states and non-state armed groups from recruiting or using children under the age of 15 in armed conflict.<sup>77</sup> This standard is also reflected in the Convention on the Rights of the Child (CRC), which Burma ratified in 1991.<sup>78</sup> The prohibition on the recruitment and use of children below the

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<sup>75</sup> Thailand Burma Border Consortium, 'Internal Displacement in Eastern Burma' (October 2007), <<http://www.tbbc.org/idps/report-2007-idp-english.pdf>> accessed 29 February 2008

<sup>76</sup> Internal Displacement Monitoring Centre, 'No End in Sight for Internal Displacement Crisis' (October 2007),

<[http://www.internaldisplacement.org/8025708F004CE90B/\(httpCountrySummaries\)/CA157EECA36DF78EC12573E40062F57F?OpenDocument&count=10000](http://www.internaldisplacement.org/8025708F004CE90B/(httpCountrySummaries)/CA157EECA36DF78EC12573E40062F57F?OpenDocument&count=10000)> accessed 28 February 2008

<sup>77</sup> Article 4(3)(c) of Additional Protocol II, which governs non-international armed conflicts, states that 'children who have not attained the age of 15 years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities'.

<sup>78</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) U.N. Doc. A/44/49 (CRC). Article 39 of the CRC is based on the 1977 Additional Protocols to the Geneva Conventions (see above). See also Article 3(a) of the Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (ILO No. 182) (adopted 16 June 2000, entered into force 19 November 2000), 38 ILM 1207; Articles 1 and 2 of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts (Adopted 25 May 2000, entered into force 12 February 2002) UN Doc A/RES/54/263.



age of 15 is now considered customary international law,<sup>79</sup> and is binding on all parties to armed conflict. Thus, the use of child soldiers by individuals acting on behalf of the Burmese state (such as members of the Myanmar military government) constitutes a violation of international law for which Burma is responsible.

### *Use of Child Soldiers as a War Crime*

The use of child soldiers also constitutes an international crime for which the individuals involved may be held criminally responsible under international law. The Rome Statute includes the 'conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities' in its definition of 'war crimes' in the context of non-international armed conflicts under Article 8(2)(e)(vii).

### **The Use of Child Soldiers in Burma**

Human Rights Watch reports that use of child soldiers is rampant across Burma and states in clear terms that both the Myanmar Army and the armed opposition forces in Burma forcibly recruit children. It is estimated that there could be as many as 70,000 children amongst the 350,000 soldiers in the Myanmar Army, meaning Burma has the highest number of child soldiers in the world.<sup>80</sup>

Amongst the opposition forces, the report notes that the practice is varied.<sup>81</sup> Of the estimated thirty armed opposition groups, the report estimates that 20 groups use child soldiers in varying degrees. In 2002, Human Rights Watch estimated that there could be nearly 6000-7000 children in the opposition armed forces. However, as a result of almost twenty groups entering into a ceasefire with the Myanmar authorities and the depleting size and resources of other groups, the report notes a decline in the use of child soldiers by these groups. The United Wa State Army, the largest armed opposition group, which entered into ceasefire agreement with the SPDC in 1989 is estimated to have around 2000 child soldiers, thereby making it the largest user of child soldiers amongst opposition groups.

The Child Soldiers Global Report notes that according to available information there was no official DDR programs (Disarmament, Demobilisation and Reintegration) for child soldiers in Burma. The report also notes that in April 2003 the UN Commission on Human Rights adopted, by consensus, a resolution deploring the systematic use of child soldiers in Burma.

### **Conclusion: The Prohibition on Use of Child Soldiers is not enforced in Burma**

The Myanmar Army, and opposition groups within Burma, are clearly in breach of the prohibition on the use of child soldiers under customary international law and the CRC. Burma must immediately give effect to its obligation under the CRC to prohibit the use of child soldiers in the Myanmar Army and the armed opposition groups. In the process of this prohibition, it must take note of the Security Council recommendation in Resolution 1314 to institute DDR programs for child soldiers. In addition to engaging the responsibility of the state of Burma, the use of child soldiers may entail the international criminal responsibility of the individuals involved. These mechanisms are further discussed in Part II.

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<sup>79</sup> See, for example, *Trial of CDF Accused* (Judgment) Special Court of Sierra Leone (2 August 2007), 55.

<sup>80</sup> See Human Rights Watch, *'My Gun Was As Tall As Me': Child Soldiers In Burma* (HRW), New York 2002) and the more recent report, *Sold to Be Soldiers: The Recruitment and Use of Child Soldiers in Burma* (HRW, New York and London 2007).

<sup>81</sup> *Ibid*, 111.

## 5. Fair Trial Rights and Judicial Process Guarantees

The right to a fair trial and judicial process guarantees exists in customary international law,<sup>82</sup> and is contained in both the UDHR and ICCPR. The interference of the military and SPDC in the judiciary severely undermine the rule of law and place the Myanmar Government in breach of customary international law obligations to ensure fair trials for persons within its territory.

### *The Right to a Fair Trial in Customary International Law*

The UDHR – considered to be declaratory of customary international law – provides that '(a)ll are equal before the law';<sup>83</sup> that '(n)o one shall be subject to arbitrary arrest, detention or exile';<sup>84</sup> that '(e)veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him';<sup>85</sup> and that '(e)veryone charged with a penal offence has the right to be presumed innocent until proven guilty according to law at a public trial at which he has had all the guarantees necessary for his defence'.<sup>86</sup>

The ICCPR further expands on this right in Article 14. While Burma is not a party to this convention, its widespread ratification is an example of the content of the customary law right to a fair trial. Article 14 reflects the UDHR, obliging states to inform defendants 'promptly and in detail...of the nature and cause of the charge against him'<sup>87</sup> and to try defendant 'without undue delay.'<sup>88</sup>

The ICCPR further stipulates that the presumption of innocence and the prohibition on retrospective application of criminal law cannot be derogated in any circumstances. While states may take limited and strictly necessary measures derogating from certain guarantees under Article 14 when there is a public emergency that threatens the life of the nation and where the state of emergency is officially proclaimed,<sup>89</sup> such circumstances do not presently exist in Burma.

### **Fair Trial Rights and Judicial Process Guarantees in Burma**

#### *Judicial Independence, the Rule of Law and Criminal Procedure in Burma*

Reports suggest the judiciary in Burma is not independent and is subject to military control.<sup>90</sup> The influence of the authoritarian military government has a pronounced effect on courts in Burma. As a result, the rule of law is an impoverished, under-developed concept in trials in Burma. In part, the right to a fair trial is undermined because criminal process is not sufficiently developed.<sup>91</sup> There appears to be little

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<sup>82</sup> ICRC Study, 352, Rule 100.

<sup>83</sup> UDHR, Art 7.

<sup>84</sup> UDHR, Art 9.

<sup>85</sup> UDHR, Art 10.

<sup>86</sup> UDHR, Art 11(1).

<sup>87</sup> ICCPR, Art 14(1).

<sup>88</sup> ICCPR, Art 14(3)(d).

<sup>89</sup> Article 4, ICCPR.

<sup>90</sup> See, e.g., U.S. Department of State-Country Reports on Human Practice 2003 (Country Reports on Human Rights Practices 2003, released by the Bureau of Democracy, Human Rights, and Labor, February 25, 2004): <http://www.birmanie.ch/orgint/USdep2003.htm> accessed 15 April 2008.

<sup>91</sup> For an excellent overview and treatment of the issues implicated in judicial proceedings, see the various UN-produced documents on problems associated with fairness of trial proceedings: Chernichenko, S., and Treat, W., *The Right to a Fair Trial, Brief Report, Prepared by Mr. Stanislav Chernichenko and Mr. William Treat in Accordance with Resolution 1989/27 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities* (Geneva: United Nations, U.N.

understanding among judges about concepts including proportionality, parsimony and minimum application of the criminal law. This invites disparity of treatment among individuals appearing before criminal courts and an overly punitive, opaque sentencing regime.

There is no culture of judicial robustness and independence in Burma. Political interference in individual trials is common. An example of this were the protracted political show-trials of those allegedly involved in the events of 6 May 2003, following an attack on the motorcade of party supporters of the National League for Democracy (NLD). The Burma Council of Lawyers has noted the regularity of political infringements on the domain of the judiciary in Burma: 'In 2000, the Judiciary Law [5/2000-2/1988] was enacted which further removed any shred of independence left in the Burmese Judicial System and further restricted the access to a fair trial and due process'. One commentator asserted that 'for the foreseeable future, it appears to be ...total control of the judiciary by the military'.<sup>92</sup>

The lack of judicial independence, political interference in trials and the under-developed notion of the rule of law in Burma all contribute to a number of specific violations of fair trial guarantees.

### *Vague & Arbitrary Laws*

As one report has noted '[d]etained individuals are often sentenced for prolonged periods in accordance with laws that are both broad and vague.'<sup>93</sup> Laws must be clearly posited and prospective, in order that individuals can ascertain their obligations and rights under the law. The Burma Council of Lawyers has produced a document outlining the pervasive practice in Myanmar of the military government issuing vague laws, and the subsequent injustices these so-called 'laws' have wrought on Burma's population.<sup>94</sup>

Vague and arbitrary laws breach Articles 10 and 11 of the UDHR because they do not meet basic requirements of legality. By failing to state with clarity the charges faced, individuals are unable to properly contest the charges at trial. Vague laws deployed to arrest and detain individuals before setting a date for trial are incompatible with the presumption of innocence. Holding a person without trial law – pursuant to law – nullifies the rights that Articles 10 and 11 safeguard for individuals.

In May 2003, Amnesty International presented a memorandum to the SPDC, raising significant concerns about the administration of justice.<sup>95</sup> In particular, Amnesty

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Doc.E/CN.4/Sub.2/1990/34, 1990); *The Right to a Fair Trial: Current Recognition and Measures Necessary for its Strengthening, Second Report, Prepared by Mr. Stanislav Chernichencko and Mr. William Treat in Accordance with Resolution 1990/18 of the Sub-Commission and Resolution 1991/43 of the Commission on Human Rights* (Geneva: United Nations, U.N. Doc. E/CN.4/Sub.2/1991/29); *The Right to a Fair Trial: Current Recognition and Measures Necessary for its Strengthening, Fourth Report, Prepared by Mr. Stanislav Chernichencko and Mr. William Treat* (Geneva: United Nations, U.N. Doc. E/CN.4/Sub.2/1992/24, 1992), bibliography available at: <<http://law.jrank.org/pages/1390/International-Criminal-Justice-Standards-BIBLIOGRAPHY.html>> accessed 15 April 2008.

<sup>92</sup> Myint Zan, 'Judicial Independence in Myanmar: No March Backwards Towards the Past' (2000) 1 APLPJ 5, 38.

<sup>93</sup> AAPP, 'Arbitrary Detention and Enforced or Involuntary Disappearances' (March 2004) cited in Collaboration of the School of Information and Library Science and the School of Journalism and Mass Communication at the University of North California: <[http://www.ibiblio.org/obl/docs/New\\_Page.doc](http://www.ibiblio.org/obl/docs/New_Page.doc)><<http://www.ibiblio.org/obl/docs/HRDU2003-04/Arbitrary%20Detention.htm>> accessed 15 April 2008.

<sup>94</sup> Burma Council of Lawyers 'Burma's State Protection Law: An Analysis of the Broadest Law in the World' <[http://www.blc-burma.org/legal\\_resource.html#s1](http://www.blc-burma.org/legal_resource.html#s1)> accessed 15 April 2008.

<sup>95</sup> Amnesty International, 'Myanmar: Justice on Trial' (30 July 2003) <<http://asiapacific.amnesty.org/library/Index/ENGASA160192003?open&of=ENG-MMR>> accessed 15 April 2008 (Amnesty 2003 Report).

International requested that the SPDC ‘...clarify the legal basis for [arbitrary or otherwise unjustified] detention in Myanmar law’.<sup>96</sup> The SPDC refused to cooperate with the request and continued to refer to such official – but illegal – practices, maintaining that incarcerated individuals were being held ‘[in] temporary custody’; ‘for their security while under interrogation,’ and had been ‘...requested...to stay at home peacefully.’<sup>97</sup> Clearly, these responses are inconsistent with due process procedures and rights enshrined in law in Burma and in international human rights law. Substantiating this, the Burma Council of Lawyers has identified ‘...the emasculatation of the principles of fair trial and due process by the military regime’.<sup>98</sup>

### *Impunity and Failure of Due Process in Burma*

Following the attacks on the convey of the detained opposition leader, Aung San Suu Kyi, in May 2003 Amnesty International identified a culture of impunity and government protection of certain individuals against the ordinary criminal law in Burma and the impact this has on freedom of expression. Amnesty International called upon the Myanmar Government:

...to permit an independent, immediate, impartial, and effective investigation into the 30 May events, and to bring those found responsible for attacks on the NLD to justice. The longer the delay in bringing those found responsible to justice, the more the culture of impunity will prevail. In the climate of fear experienced by the people of Myanmar, it is almost impossible for them to exercise their rights to freedom of expression and assembly.<sup>99</sup>

The events of May 2003 did appear to expose official involvement in the attack on Aung San Suu Kyi’s motorcade, according to a statement in an interim report made by Mr. Paolo Sergio Pinheiro, the Special Rapporteur on the situation of human rights in Myanmar.<sup>100</sup>

The incident in Depayin on 30 May 2003 involved serious human rights abuses and had deep political implications... From what I heard and saw during this mission, I can say that there is a *prima facie* evidence that the Depayin incident could not have happened without the connivance of State agents.<sup>101</sup>

The Special Rapporteur continues, in his interim report on Burma, to specifically address the issues of human rights violations and impunity, which emerge as conjoined problems:

What happened at Depayin constitutes a lamentable regression in the area of human rights, not only the incident itself but also its ripple effects: the closure of all NLD offices in the country; the incommunicado detention of DASSK; the house arrest of NLD-CEC members; arrests and sentencing of NLD members and supporters, and other activists; and their increased surveillance and intimidation. Effective measures to bring to justice the perpetrators are still lacking, as mostly people, who were victims of attack, rather than their attackers had been arrested.<sup>102</sup>

The Special Rapporteur makes certain recommendations:

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<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

<sup>98</sup> Burma Council of Lawyers, ‘Judicial System of Burma’ <[http://www.blc-burma.org/legal\\_resource.html#s](http://www.blc-burma.org/legal_resource.html#s)> accessed 15 April, 2008.

<sup>99</sup> Amnesty 2003 Report.

<sup>100</sup> Paolo Sergio Pinheiro, ‘Statement to 58<sup>th</sup> Session of General Assembly, Third Committee, Item 117(c)’ (12 November 2003) cited <<http://www.ibiblio.org/obl/docs/GA2003-SRM-oral.htm>> accessed 15 April 2008.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid.

Rectifying this regression requires the immediate and unconditional release of all those who have been in detention or under house arrest since 30 May 2003. In addition, compensation for the surviving victims and the families of those who lost their lives should be considered. There should also be a thorough investigation, in accordance with international standards, including public announcement of its results and accountability of those responsible..<sup>103</sup>

The Special Rapporteur's reference to action requiring 'the immediate and unconditional release' of those individuals who have been subject to detention since the events of May 2003, feeds into the concern that political prisoners, in particular, are especially vulnerable to being seized on the basis of exercising freedom of speech. Freedom of speech is discussed further below.

### **Conclusion: Burma is neither providing Fair Trial Rights nor Guaranteeing Judicial Process**

The Myanmar Government is in breach of customary international law obligations reflected in Articles 10 and 11 of the UDHR and Articles 14 and 15 of the ICCPR. The application of vague and arbitrary laws breaches fair trial and due process protections, including the right to be informed promptly and in detail of the charges brought and the right to be free from retrospective application of the law. The prolonged detention of individuals without charge and without trial is clearly in breach of Article 14, ICCPR. The failure to bring to justice perpetrators of human rights violations is a further transgression of Burma's obligation to provide judicial process guarantees.

## **6. Arbitrary Detentions, Involuntary or Enforced Disappearances and Arbitrary Interference with the Person**

The prohibition of prolonged arbitrary detention is recognised in customary international law.<sup>104</sup> The customary prohibition is expressed in Articles 3, 9, and 12 of the UDHR which protect against arbitrary arrests and detentions, and, more generally, any unjustified interferences with liberty of the person. Article 3 provides that '[e]veryone has the right to life, liberty and security of person'. Article 9 provides that '[n]o one shall be subjected to arbitrary arrest, detention or exile'. Consolidating this protection and concern for liberty, Article 12 sets out that '[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks'.

### **Arbitrary Detentions and Arbitrary Interference with the Person in Burma**

#### *Arbitrary Detention as State Policy in Burma*

Following the popular uprisings in September 2007, the Asia Human Rights Group reported on the absence of due process and lack of transparency that surrounded detentions:

The numbers of persons and Buddhist monks and nuns who have been taken into custody in Burma during recent days remains unknown. This is largely

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<sup>103</sup> Ibid.

<sup>104</sup> ICRC Study, 344, Rule 99.

because none of them have been taken in accordance with any law. There has not even been the pretence of law as normally exists in Burma.<sup>105</sup>

The report continues describing the military government's action in respect of arbitrary arrests and detentions, and states that persons subject to such detention should be classified as having been abducted, rather than arrested (presumably given that 'arrest' imports misplaced connotations that the individuals were subject to due process):

Hundreds have been rounded up from in and around protest sites, and in virtually every township of Rangoon there are reports of persons having left their homes in the morning who have not come back at night. But many more have been taken directly from their houses and offices around the country, especially members of the National League for Democracy, lawyers and human rights defenders. Those taking people away have included soldiers, police, local council officials, members of the quasi-government Union Solidarity and Development Association and government-organised Swan-arshin gangs, and others. For the most part, where they are being detained and what is likely to happen to them also remains unknown: thus the Asian Human Rights Commission (AHRG) has said that these persons should be treated as forcibly disappeared until shown otherwise, and their removal be treated as abduction rather than arrest.<sup>106</sup>

The Myanmar Government refers to individuals whose liberty has arbitrarily been deprived as 'security detainees.' In 2002, the International Committee of the Red Cross reported there were approximately 3,500 'security detainees' in Burma. Of these, at least 1,300 were believed to be political prisoners, including elected members of parliament:

Most, if not all, were arbitrarily arrested for exercising their freedoms of opinion and expression...The right to a fair trial, including the right to access a lawyer, continues to be denied to most detainees, in particular those accused of political dissent. Torture and mistreatment of detainees is common, especially during pre-trial detention in military intelligence interrogation centers. Authorities continue to extend the detention of political prisoners who have served their prison sentences by placing them under 'administrative detention.' This practice is used even with elderly and infirm prisoners.<sup>107</sup>

As this quote demonstrates, the issue of arbitrary detention is inextricably linked with breaches of the right to due process (discussed above). Furthermore, there are also links between the use of arbitrary detention and repression of freedom of expression and participation in public and political life in Burma (discussed further below).

### *Arbitrary Detention and Freedom of Expression*

Human Rights Watch UK has noted the link between the political practice on the part of the Myanmar Government of arbitrary detention and the adverse effect such detentions have on the circulation of views and information in Burma.<sup>108</sup> An example of the government tactic of using arbitrary arrest and detentions to silence Burma's population was seen in the government's crackdown on peaceful protestors in

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<sup>105</sup> Asia Human Rights Group, 'BURMA: Torture and inhuman treatment of detained protestors,' (October 2007), available at <<http://www.ahrchk.net/statements/mainfile.php/2007statements/1225/>> accessed 15 April 2008.

<sup>106</sup> Ibid.

<sup>107</sup> Human Rights Watch: Human Rights Overview – Burma: <<http://www.hrw.org/english/docs/2005/01/13/burma9826.htm>> accessed 15 April 2008.

<sup>108</sup> Human Rights Watch UK, 'Burma: Arbitrary Detention of Protesters: Crackdown Follows Government Hike of Fuel Prices', Human Rights Watch UK <<http://hrw.org/english/docs/2007/08/22/burma16718.htm>> accessed 15 April 2008.

August 2007.<sup>109</sup> Arbitrary detention is also inextricably bound up with the criminal justice system. Reform of the criminal law in Burma requires its liberalisation and adherence to the rule of law:

Throughout years of military occupation in Burma, laws have been established that criminalize freedom of thought, expression, association, assembly and movement, thus legitimizing these arbitrary arrests.<sup>110</sup>

Breaches of the right to freedom of expression and assembly are discussed further below.

### *Arbitrary Detention and Participation in Public Life*

Arbitrary arrests and detentions have also had a significant negative impact on participation in political affairs in Burma. The Governing Council of the Inter-Parliamentary Union, based in Geneva, Switzerland, as part of a resolution against arbitrary State treatment of individuals, has drawn up a list of members-elect of the *Pyithu Hluttaw* (People's Assembly) of the Union of Myanmar who have been subject to arbitrary detention, some of whom have since died in state custody. The list also registers those parliamentarians who were assassinated by the military regime, having taken a stance in opposition to the policies of the military regime. The impact of these arbitrary arrests and detentions has obvious ramifications for undermining the transitional democratic process in Burma:

...not only have the election results of 27 May 1990, in which the National League for Democracy (NLD) won 392 of the 485 seats, not been implemented, but also many MPs-elect have been eliminated from the political process through arbitrary means, including their arbitrary arrest, detention and sentencing under laws infringing basic international human rights standards...<sup>111</sup>

### **Conclusion: Arbitrary Detentions and Interferences with the Person is practiced in Burma**

The documentation of evidence showing a clear and extensive use of arbitrary arrests and detentions belies the Myanmar Government's stated commitment to protect individuals from such practices. These practices are being used to curtail freedom of expression and free participation in political life. These many instances of prolonged arbitrary detention constitute transgressions of customary international law.

## **7. Prevention of Freedom of Expression**

The right to freedom of expression and to religious freedom are part of customary international law. These customary law rights are reflected in both the UDHR and ICCPR, which protect individuals' right to freedom of expression and religion.<sup>112</sup> The right to freedom of opinion and expression includes the 'freedom to hold opinions without interference and to seek, receive and impart information and ideas through

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<sup>109</sup> Ibid.

<sup>110</sup> 'New Page, Old Story', Report Card, Burma (1 April - 30 June 2002), ALTSEAN, Burma (pub. September 2002), Collaboration of the School of Information and Library Science and the School of Journalism and Mass Communication at the University of North California: <[www.ibiblio.org/obl/docs/New\\_Page.doc](http://www.ibiblio.org/obl/docs/New_Page.doc)> accessed 15 April 2008.

<sup>111</sup> Governing Council of Inter-Parliamentary Union, 'Resolution adopted unanimously by the Governing Council at its 174rd session' (23 April 2004) <<http://www.ipu.org/hr-e/174/Myn01.htm>> accessed 15 April 2008.

<sup>112</sup> UDHR, Arts 18, 19, 27; ICCPR, Arts 18, 19. See also, Human Rights Committee, 'General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18)' (30 July 1993) UN Doc. CCPR/C/21/Rev.1/Add.4.

any media and regardless of frontiers'.<sup>113</sup> Individuals also 'ha[ve] the right to freedom of thought, conscience and religion'. This right 'includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance'.<sup>114</sup>

Freedom of the press is also guaranteed by the right to freedom of expression. Freedom of speech protected by the UDHR and ICCPR includes 'freedom to...seek, receive and impart information and ideas through any media and regardless of frontiers'.<sup>115</sup> Restrictions on the freedom of the Burmese press is closely linked to freedom of expression for Burmese citizens and their ability to freely receive information and form their opinions.

Under the ICCPR, the right to freedom of expression and religion may only 'be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.<sup>116</sup>

#### *Violation of Freedom of Expression of Political Opponents and Burmese Citizens and its Impact on Democratic Participation*

When reporting on the May 2003 attacks, Special Rapporteur on the situation of human rights in Myanmar, Mr. Paolo Sergio Pinheiro, called for the 'the immediate and unconditional release' of those individuals who have been subject to detention since the events of May 2003. The Special Rapporteur's report highlights concerns that political prisoners are arrested and detained unlawfully for exercising their freedom of speech.<sup>117</sup>

The most recent example is the restriction being placed on those who oppose the upcoming referendum on the new constitution, a constitution that no one has seen.<sup>118</sup> On 27 February 2008, the military government announced there would be stiff penalties for those voicing their opposition. As reported in the Southeast Asian press

... the Burmese-language *Myanma Alin* published a new law signed by the general. The state-controlled newspaper reported that those who make speeches and distribute statements and posters against the referendum will face sentences of up to three years imprisonment and fines of 100,000 kyat (US \$77).<sup>119</sup>

That the government is placing such restrictions on the expression of opposing political views offers bleak prospects for the realisation of the government's pledge to place Burma on 'the road to democracy.' By placing such penalties and restrictions the expression of political opposition to the referendum places Burma in violation of the right to freedom of expression. The lack of protection for the right to freedom of expression in Burma has obvious implications for the fairness and regulation of the country's impending referendum. The absence of an independent body to monitor the referendum is 'raising fears that Burmese citizens will be forced to vote 'yes' at

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<sup>113</sup> See UDHR Art 1; ICCPR Art 19.

<sup>114</sup> UDHR Art 18.

<sup>115</sup> *Ibid.*

<sup>116</sup> ICCPR, Arts 18(2), 19(2).

<sup>117</sup> Paolo Sergio Pinheiro, 'Statement to 58<sup>th</sup> Session of General Assembly, Third Committee, Item 117(c)' (12 November 2003) cited <<http://www.ibiblio.org/obl/docs/GA2003-SRM-oral.htm>> accessed 15 April 2008.

<sup>118</sup> Aung Zaw, 'Why an Independent Media Matters in Burma': <[http://www.irrawaddy.org/opinion\\_story.php?art\\_id=10782](http://www.irrawaddy.org/opinion_story.php?art_id=10782)> (10 March, 2008). Aung Zaw's opinion was originally presented at a conference on 'Burmese Media: Present and Future', organized by the Democratic Voice of Burma, held in Bangkok (6-7 March 2008).

<sup>119</sup> *Ibid.*



gunpoint.<sup>120</sup> The absence of safeguards for freedom of expression undermines the possibility of inclusive, transparent, democratic participation in the forthcoming referendum.

### *Freedom of the Press and Media Censorship*

The work of journalists, and human rights activists, has been significantly hampered by restrictions on freedom of expression.<sup>121</sup> Violations of press freedom serve to restrict information in the public domain, curtailing democratic participation of Burmese citizens and undermining government accountability. In a recent editorial, journalist Aung Zaw highlighted the significance of a free press to the exchange and circulation of information in the months preceding the pledged referendum later this year, and national election, which will follow:

As Burma's military regime prepares for a referendum in May [2008] and an election in 2010, the exiled media continues to play a key role in ensuring that Burmese people and the rest of the world remain informed about developments inside the country. If sudden or gradual change comes to Burma, exiled journalists must be prepared to safeguard their independence. There is no guarantee that change at the top will bring democratic values, good governance or the rule of law, so the press must be vigilant and work to hold the government accountable.<sup>122</sup>

Securing the conditions under which there is meaningful freedom of the press in Burma is important in terms of (i) enabling citizens of Burma to access information which is essential to their exercise of freedom of conscience, opinion and expression; (ii) rendering more transparent and open to observation the activities and policies of the ruling party in Burma; and (iii) promoting democracy in Burma.

However, freedom of the press is not a reality in Burma. Aung Zaw explains this:

Burma's rulers and democratic opposition forces have limited experience with a free and independent media. This is definitely worrying for a future democratic Burma...Even if democratic opposition forces and the winners of the 1990 elections came into power, it would be naive to expect a friction-free relationship between politicians and the press beyond an initial honeymoon period...exiled media groups founded by former activists and students may find themselves at odds with a future democratic government of Burma.<sup>123</sup>

The 2006 Special Report of the Committee to Protect Journalists (CPJ) lists Burma among the five most censored countries in the world, ranking second behind North Korea.<sup>124</sup> State-sponsored censorship was identified by criteria including state control of all media, the existence of formal censorship regulations, the use by the state of violence, imprisonment and harassment against journalists, jamming of foreign news broadcasts, and restrictions on private Internet access.<sup>125</sup> CPJ reports that Burma's restriction of press freedom is unacceptable, 'by any international standard'.<sup>126</sup> In particular it was reported that

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<sup>120</sup> *Ibid.*

<sup>121</sup> See, for example, *ibid.*

<sup>122</sup> *Ibid.*

<sup>123</sup> *Ibid.*

<sup>124</sup> After Myanmar are: Turkmenistan, Equatorial Guinea, Libya, Eritrea, Cuba, Uzbekistan, Syria, and Belarus. See <<http://www.cpj.org/censored/index.html>>, accessed 15 April 2008. The appalling record Myanmar has for press restrictions has been affirmed by many different sources. See, for example, the Press Freedom Index of Reporters San Frontières ranking Burma 164<sup>th</sup> of out 169 countries in 2007 (<[http://www.rsf.org/article.php3?id\\_article=24025](http://www.rsf.org/article.php3?id_article=24025)> accessed 15 April 2008).

<sup>125</sup> *Ibid.*

<sup>126</sup> *Ibid.*

The junta owns all daily newspapers and radio, along with the country's three television channels. Media dare not hint at, let alone report on, antigovernment sentiments. Burma's few privately owned publications must submit content to the Press Scrutiny Board for approval before publishing; censorship delays mean that none publishes on a daily basis. In 2005, the junta took control of Bagan Cybertech, Burma's main Internet service and satellite-feed provider. Citizens have been arrested for listening to the BBC or Radio Free Asia in public. Entry visa requests by foreign journalists are usually turned down except when the government wants to showcase a political event.<sup>127</sup>

In one particular example cited by the CPJ:

An article in the June 4, 2005, edition of *New Light of Myanmar* (Burma) titled 'Have positive attitude in broadcasting news' explains the government's approach to media: 'The Myanmar people do not wish to watch, read, or listen to corrupt and lopsided news reports and lies. The Myanmar people even feel loathsome to some local media that are imitating the practice of featuring corrupt and lopsided news and lies.' *The Voice*, a Rangoon-based weekly, was suspended in May 2005 as punishment for an innocuous front-page story about Vietnam's withdrawal from Burma's New Year water festival, which the junta found embarrassing.<sup>128</sup>

### **Conclusion: Freedom of Expression is not guaranteed in Burma**

The military regime in Burma is in breach of the internationally recognised right to free speech. The repression of free speech is manifest in the arrest and detention of political dissidents and journalists who express opposition or criticism of the government, financial penalties imposed upon those expressing opposition to the upcoming referendum and censorship of media sources. The forthcoming elections should provide fresh impetus for the international community to concern itself with freedom of expression in Burma, integral to the exercise of democratic rights.

## **8. Prevention of Freedom of Association and Assembly**

The rights to freedom of peaceful assembly and association are part of customary international law. These customary international law rights are reflected in the UDHR<sup>129</sup> and the ICCPR.<sup>130</sup> Restrictions on the right to freedom of assembly and association may only be those which are necessary in a democratic society in the interests of national security or public safety and order, the protection of public health or morals or the protection of the rights and freedoms of others'.<sup>131</sup> Any infringements on the right to freedom of association and assembly, therefore, must be tightly argued: the language of the right as it is conceived speaks to pre-defined, narrow permissible restrictions in accordance with law.

### **The Right to Freedom of Association and Assembly in Burma**

The military regime routinely restricts Burmese people from exercising their right to freedom of association and assembly. The agreement brokered between the SPDC and Aung San Suu Kyi in 1999, mandating that she not hold any public rallies, is a high-profile example of the government's policy.<sup>132</sup> The Special Rapporteur on the

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<sup>127</sup> Ibid.

<sup>128</sup> Ibid.

<sup>129</sup> UDHR, Art 20.

<sup>130</sup> ICCPR, Arts 21, 22.

<sup>131</sup> ICCPR, Arts 21(2), 22(2).

<sup>132</sup> 'New Page, Old Story', Report Card, Burma (1 April - 30 June 2002), ALTSEAN, Burma (pub. September 2002): Collaboration of the School of Information and Library Science and the School of Journalism and Mass Communication at the University of North California: <[www.ibiblio.org/obl/docs/New\\_Page.doc](http://www.ibiblio.org/obl/docs/New_Page.doc)> accessed 15 April 2008.

situation of human rights in Myanmar reported, in 2003, that threats, provocation, harassment, intimidation, bullying, and orchestrated acts of violence were perpetrated against those who opposed the government or government affiliated bodies.<sup>133</sup> In October, 2007, the Security Council issued a statement 'deploring the use of violence against peaceful demonstrations in Myanmar' and calling for the 'the early release of all political prisoners and remaining detainees'.<sup>134</sup>

### *State Laws Prohibiting the Exercise of these Rights*

There are several laws which prohibit peaceful assembly, including SLORC Order 2/88 which made it an offence for more than five people to gather in a public place. Other laws have been used to prohibit or restrict freedom of association and have been employed to arrest activists and members of political parties. These have included the Official Secrets Act 1923, Emergency Provisions Act 1950, Unlawful Associations Act 1957 and the Printers' and Publishers' Registration Law 1962.<sup>135</sup>

The Official Secrets Act 1923 imposed seven years imprisonment for any individual who

causes or intends to disrupt the morality or the behaviour of a group of people or the general public, or to disrupt the security or the reconstruction of stability of the Union.<sup>136</sup>

Amnesty International observed that this provision '...is frequently used by the authorities to criminalize peaceful political activity'.<sup>137</sup> For example, in May 1996 nine political activists and members of the National League for Democracy (NLD) were arrested, ostensibly under the terms of the Act, for their political membership and peaceful political activities.<sup>138</sup> A similar provision is found in the Emergency Provisions Act 1950.<sup>139</sup> The Burma Lawyers Council has provided the following analysis of the 1950 Act:

It allows anyone who causes or intend[s] to disrupt the morality or the behaviour of a group of people or the general public, or to distrust [sic] the security or the reconstruction of stability of the Union shall be sentenced to seven years in prison, a fine or both.<sup>140</sup>

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<sup>133</sup> n. 16.

<sup>134</sup> UN Department of Public Information, 'Security Council Deplores Violence Used Against Myanmar Demonstrators' (11 October, 2007) UN Doc. SC/9139.

<sup>135</sup> Ibid.

<sup>136</sup> See section 5(j) of the Act cited in Amnesty International, 'Myanmar: Over 200 activists still held': <[http://fra.controlarms.org/library/pdf/ASA160231996ENGLISH/\\$File/ASA1602396.pdf](http://fra.controlarms.org/library/pdf/ASA160231996ENGLISH/$File/ASA1602396.pdf)> (May 1996) accessed 15 April 2008

<sup>137</sup> Ibid.

<sup>138</sup> Ibid.

<sup>139</sup> Burma Lawyers' Council: <http://www.blc-burma.org/index.html>. The Council's website is an excellent resource more generally. It includes statements and analysis of issues connected with infringements of the principle of legality and human rights in Burma, and also information on how to contact the Council and links to affiliated organisations, including, for example, LawAsia. The Mission Statement of the Council, taken from the website provided, is as follows: 'By vigorously opposing all unjust and oppressive laws, and by helping restore the principle of the Rule of Law, the Burma Lawyers' Council aims to contribute to the translation of Burma where all the citizens enjoy the equal protection of the law under the democratic federal constitution which will guarantee fundamentals of human rights'. The website also provides that the Burma Lawyers' Council '...is an independent organization which was formed in a liberated area of Burma in 1994. It is neither aligned nor is it under the authority of any political organization. Individual lawyers and legal academics have joined together of their own free will to form this organization.' The Council identify what it terms its 'target population' as '...the entire grass roots population of Burma (farmers, soldiers, workers, civil service administrative staff, the staff and proprietors of small enterprises, etc.), with a particular emphasis on the legal needs of women'.

<sup>140</sup> Ibid.

The prohibitive effect of a seven year sentence, or fine, or both, is an example of adverse impact to the ability of people in Burma to exercise their right to freedom of association and assembly. References to 'morality', 'security', and 'stability' are purposefully constructed and intended as vague, open-textured provisions, which allow the military regime to employ to capture a wide range of activities, including peaceful political activities. Both of these provisions seriously undermine Burmese citizens' ability to organise themselves in accordance with the rights to freedom of association and assembly.

The Unlawful Associations Act 1957 provided for sentences of up to five years for anyone who has been a member, given contributions to, or promoted or assisted any association which 'encourages or aids persons to commit an act of violence or intimidation or of which the members habitually commit such acts; or which has been declared unlawful by the President.' Human Rights Watch reports that the government had periodically published lists of unlawful associations, though it was done so irregularly that it is not always possible to know the legal status of any particular group.<sup>141</sup>

### *Trials of Burmese Citizens Exercising their Right to Freedom of Association*

The Assistance Association for Political Prisoners (AAPP) has provided unofficial translations of certain trials of individuals facing charges under the Unlawful Associations Act 1957 and the Emergency Provisions Act 1950. In one such trial in 2004, six activists were prosecuted for distributing political leaflets by the All Burma Federation of Student Unions (ABFSU), entitled 'The Plea to the People and All Ethnic Minorities'. The pamphlet allegedly criticised the 7 step Road Map of the Prime Minister and was therefore taken to 'harm the stability of the peace and development' of Burma.<sup>142</sup>

The subsequent approach and reasoning adopted by the Court shows the implementation of the policy of the Government of Myanmar: The following is an extract from the court's judgment:

Within the seized letter, it was written: 'We would like to plea to monks, students and all people to oppose the prime minister's seven-step political road map; let us fight against the terrorist regime hand in hand together with people from around the world.' On August 30, 2003, the Prime Minister Gen. Khin Nyunt made a speech and in that speech he clearly and thoroughly explained about the future policies for the seven-step political road map, for the modernization and development of the country. In order to establish this modernized and developed new democratic country step by step, the most important objectives stated were security of the state, stability of the state, and stability of the law and order of the state. After the 1988 uprisings, the military took responsibility to prevent the country from turning to chaos and set up three national policies. As all citizens are aware, under these three national policies, twelve objectives were set up and the military government is trying very hard to develop a modernized, new democratic country. Ignoring the national policies, the accused attempted to distribute these letters in order to encourage people to oppose the prime minister's political road map. The facts are clear that the anti-government leaflets were found and seized within their possession.<sup>143</sup>

The political-oriented rationale is made explicit in the judgment:

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<sup>141</sup> See Human Rights Watch, *World Report 1999* (HRW, New York 1999) 144-147.

<sup>142</sup> See District Court of Eastern Rangoon, Criminal Trial No. 6 of 2004, cited by The Assistance Association for Political Prisoners (Burma) (AAPPB) at [http://www.aappb.org/trial\\_nandasittaung\\_5J.pdf](http://www.aappb.org/trial_nandasittaung_5J.pdf) accessed 15 April 2008.

<sup>143</sup> *Ibid.*

If these anti-government letters were spread amongst people, it would encourage people to disrespect and misunderstand the government, and would harm or spoil the security of the state, law, order and restoration of the state. *Therefore, it is clear that they attempted to distribute the anti-government leaflets in order to encourage people to misunderstand and oppose the government.*<sup>144</sup>

All of the students were convicted and sentenced to seven years' imprisonment with hard labour, coupled with an order by the court that '[a]ll evidence and books shall be destroyed'.<sup>145</sup>

The government also routinely curtails access to technologies that would facilitate the organisation of public assemblies:

...in response to recent advances in telecommunications and internet access in Burma, the SPDC has ratified new laws to provide a system of control over these developing technologies to prevent the people of Burma from using them for opposition activities.<sup>146</sup>

Communication among individuals and groups is an obvious, immediate way by which people organise themselves. Government interference with communication technologies therefore also constitutes interference with freedom of assembly and association.

### **Conclusion: Freedom of Association and Assembly is not guaranteed in Burma**

The arrest and prosecution of individuals for disseminating political materials, for membership of political organisations and for peaceful protests and meetings evidenced above clearly breach the rights to freedom of association and assembly and the associated right of freedom of expression. There is a clear nexus between the restrictions placed upon freedom of expression and association, peaceful protests and assembly and imprisonment of political prisoners – a link made in this report.

## **Conclusion**

This part has identified eight major areas of concern, noting that the observations, reports and evidence of NGOs, governments, UN agencies and other observers on the ground strongly suggest the Myanmar Government is consistently violating international law through:

1. The use of, and failure to prevent the use of, **forced labour**;
2. The use of, and failure to prevent the use of, **torture and cruel, inhuman and degrading treatment or punishment**;
3. The **forcible displacement of civilians** in connection to the ongoing internal armed conflict;
4. The use of, and failure to prevent the use of, **child soldiers**;
5. The failure to provide **fair trial rights and due process guarantees**;

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<sup>144</sup> Ibid.

<sup>145</sup> Ibid (emphasis added).

<sup>146</sup> Aung Zaw, 'Why an Independent Media Matters in Burma': [http://www.irrawaddy.org/opinion\\_story.php?art\\_id=10782](http://www.irrawaddy.org/opinion_story.php?art_id=10782) (10 March, 2008). Aung Zaw's opinion was originally presented at a conference on 'Burmese Media: Present and Future', organized by the Democratic Voice of Burma, held in Bangkok (6-7 March 2008). See also, generally regarding media and communications censorship, Burma Media Association at [http://www.bma-online.org/BMW\\_2007\\_Jul\\_Sep.html](http://www.bma-online.org/BMW_2007_Jul_Sep.html) accessed 15 April 2008.

6. The resort to **arbitrary detentions** and **arbitrary interference with the person** and **involuntary disappearances**;
7. The failure to guarantee **freedom of expression**; and
8. The failure to guarantee **freedom of association** and **assembly**.

As noted, these rights are so widely recognised as to now constitute part of customary international law. Burma's failure, therefore, to sign and ratify important human rights treaties, like the ICCPR, does not absolve its government from having to provide and protect these fundamental rights. The next Part of this report explores ways in which, absent those mechanisms provided by human rights conventions, violations of these rights may nonetheless be remedied.

# PART II: INTERNATIONAL MECHANISMS TO REDRESS VIOLATIONS OF INTERNATIONAL LAW IN BURMA

## Overview

The following part analyses the mechanisms available for redress of the international law violations identified in Part I. The analysis focuses on the past use of these mechanisms, assessing the historical efficacy of the use of such mechanisms. However, we also consider mechanisms that are yet to be utilised and we explain reasons why these mechanisms have not been used and provide a brief assessment about their possible future use.

### *Distinction between State Responsibility and Individual Responsibility*

In considering the international mechanisms to redress violations in Burma, it is crucial to distinguish between the international responsibility of the *state* of Burma on the one hand, and the international criminal responsibility of the *individuals* on the other.

The international responsibility of Burma is governed by the rules of state responsibility, which are largely set out in the 2001 International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (ILC Articles). The state is responsible for the acts of its officials or other individuals acting on its behalf. Thus, when state officials or other persons acting on behalf of the state act in violation of the state's international obligations under customary law or treaty, the state is internationally responsible for that violation, since '[e]very internationally wrongful act of a State entails the international responsibility of that State'.<sup>147</sup> One of the principal means of holding the Myanmar Government accountable for human rights violations is through International Organisations (such as human rights treaty bodies), which are discussed in detail in Section 1 of this Part.

State responsibility is *not* a form of criminal responsibility. There has been no development of penal consequences for states for breaches of international norms. Instead, state responsibility gives rise to two principal secondary obligations on the part of that state: to cease the wrongful conduct and to make full reparation for the injury caused by that act.<sup>148</sup> Where appropriate, reparation may include the payment of damages, but the function of damages is essentially compensatory rather than punitive.<sup>149</sup>

Quite apart from the question of state responsibility, the international law violations considered in this report may constitute international crimes giving rise to the individual criminal responsibility of the persons involved. Indeed, as the International Military Tribunal stated in 1946, '[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'.<sup>150</sup> International crimes such as torture may be prosecuted in domestic courts or, in certain limited

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<sup>147</sup> International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (2001) (ILC Articles), art 1.

<sup>148</sup> ILC Articles, arts 30 and 31.

<sup>149</sup> In the *Velásquez Rodríguez*, Compensatory Damages case, the Inter-American Court of Human Rights held that international law did not recognize the concept of punitive or exemplary damages (Series C, No. 7 (1989)). See also *Letelier and Moffitt*, ILR, vol. 88, 727 (1992).

<sup>150</sup> International Military Tribunal (Nuremberg), judgment of 1 October 1946, reprinted in 41(1) *AJIL* (1947), p 221.

circumstances, in an international court or tribunal. More generally, the accountability of individuals for international crimes may also be pursued through a variety of transitional justice mechanisms, which are considered in detail in Part III of this report.

#### *Four Categories of Mechanisms*

This Part considers the principal mechanisms available for seeking both state responsibility and individual criminal responsibility. The mechanisms identified are divided into four categories:

1. Mechanisms within established international organisations (including treaty bodies established under human rights conventions);
2. Mechanisms available to states;
3. Mechanisms available to individuals;
4. Mechanisms available to a future democratic Burmese government.

The categories in this Part are organised around the entity or entities that are able to trigger the mechanism. Where possible, the specific violation(s) to which these mechanisms should respond – as identified in Part I – are listed within a discussion of the individual mechanisms.

Unfortunately, at present, there is very little that may be initiated by individuals: Burma is not a party to many of the major treaties, and has failed to sign the additional protocols to the treaties it has ratified; the UN Charter bodies and other international organisations provide no recourse for individuals; and Burma's domestic system offers no realistic remedies. As noted in the conclusion at the end of this Part, the most effective remedies – including Security Council action, unilateral state initiated measures and future international criminal prosecutions – lie within the preserve of state initiated action and, to a lesser extent, established international organisations.

## **1. Mechanisms Within Established International Organisations**

These are mechanisms governed by international organisations, or treaty bodies, that count Burma as a member. This includes those bodies – called 'UN Charter bodies' – to which membership is automatically conferred by virtue of being a member of the United Nations (like Burma). These mechanisms have been regularly used, yet, as noted in the conclusion at the end of this part of the report – and as evidenced by the continuing violations of international law in Burma – they have been of limited effect.

### **Human Rights Treaty Bodies**

Burma is not party to a significant number of the major human rights law treaties. This does not mean that actions taken by the Burmese authorities are not violations of international human rights law. Given the widespread ratification of the main human rights treaties, the rights enshrined in these conventions are considered customary law and therefore binding on all states. Many of the rights are in fact considered *ius cogens*<sup>151</sup> rules of international law. The violations identified in the first part of this report were all rules of customary international law (and in some

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<sup>151</sup> Principles of international law so fundamental that no nation may ignore them or attempt to contract out of them through treaties.



instances, *ius cogens*)– see, for example, forced labour (Part I, section (1)), torture and cruel, inhuman and degrading treatment or punishment (Part I, section 2), no access to a fair trial (Part 1, section 5), and forced internal displacement (Part I, section 3).

The treaties Burma has not ratified include:

- Convention Against Torture and Other Cruel Inhuman or Degrading Treatment of Punishment
- International Convention on Civil and Political Rights
- International Convention on Economic, Social and Cultural Rights
- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention for the Protection of All Persons from Enforced Disappearance
- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
- Convention on the Rights of Persons with Disabilities

The non-ratification of these treaties means that the respective treaty bodies established by these conventions are not competent to monitor, report or implement the protected human rights within Burma. So, for example, although Burma is in breach of a number of rights under the International Covenant on Civil and Political Rights (including failing to provide the right to a fair trial, freedom of assembly, and freedom of religion) the Human Rights Committee (established under Article 27 to monitor and adjudicate on such matters) has no power to address such violations, either on its own volition or in response to a complaint by an individual or third party state.

There is the future possibility of a human rights convention binding upon all Association of Southeast Asian Nations ('ASEAN') states. In November 2007 Burma and nine other Asian nations signed the Association of Southeast Asian Nations (ASEAN) Charter<sup>152</sup> - it is expected that all ten ASEAN members will ratify the Charter by 2008 ASEAN Summit in December this year. Article 14 of the Charter provides for the establishment of an ASEAN human rights body '(i)n conformity with the purposes and principles of the ASEAN charter relating to the promotion and protection of human rights and fundamental freedoms.'<sup>153</sup> The precise nature of the body is, however, unclear (including whether individuals or third party states will be allowed a role) – the Charter merely provides that the 'body shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meetings.'<sup>154</sup> It is unlikely that the body would have retrospective jurisdiction over human rights violations prior to the Charter's existence. The body may, however, become relevant to any future transgressions by the Myanmar government.

For the present, Burma is only party to two of the major human rights treaties: the Convention on the Rights of the Child<sup>155</sup> (CRC) and the Convention on the

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<sup>152</sup> (adopted 20 November 2007) < <http://www.aseansec.org/ASEAN-Charter.pdf> > accessed 28 February 2008.

<sup>153</sup> Ibid, art 14(1).

<sup>154</sup> Ibid, art 14(2).

<sup>155</sup> (adopted 20 November 1989, entered into force 2 September 1990) UN Doc. A/44/49 (1989).

Elimination of All Forms of Discrimination Against Women<sup>156</sup> ('CEDAW').

### ***Convention on the Rights of the Child ('CRC')***

Burma ratified the CRC on 14 August 1991. The Convention provides that State Parties must periodically report to the Committee on the Rights of the Child. Burma last reported to the Committee in 2004.<sup>157</sup>

#### *Past Action*

In its concluding observations on Burma's periodic report the Committee noted areas of critical concern. These focused, *inter alia*, on the very high number of children and their families who are internally displaced in Burma (and in many cases were forced to seek asylum in neighbouring countries owing to armed insurgencies); the use of children below the age of 15 years as soldiers by both governmental armed forces and armed groups; the 'extremely' widespread economic exploitation of children; the increasing number of child victims of sexual exploitation, including prostitution and pornography; and the large number of children being trafficked for their exploitation to neighbouring countries.<sup>158</sup>

The Committee strongly advised Burma to take various measures to address these violations of its obligations under the treaty. These included the demobilization of all military recruits under 18 years of age;<sup>159</sup> the development of a national plan to prevent child labour;<sup>160</sup> and strengthening of efforts to combat sexual exploitation and trafficking.<sup>161</sup>

#### *Future Action*

Burma's next report is due on 8 August 2008.<sup>162</sup> Presumably, the Committee will again make similar recommendations.

### ***Convention on the Elimination of All Forms of Discrimination Against Women ('CEDAW')***

Burma ratified the CEDAW on 22 July 1997.

#### *Past Action*

Burma made its first report to the Committee on the Elimination of Discrimination Against Women in June, 1999.<sup>163</sup> The Committee released concluding observations in 2000.<sup>164</sup> The observations expressed concern at the following: violations of women's human rights, in particular by military personnel; the situation of women in prison and police custody; the response of the government to the Towns Act and the Village Act that had authorised the government to extract forced labour from women; and the lack of comprehensive information about the trafficking of women and girls.<sup>165</sup>

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<sup>156</sup> (adopted 17 July 1980, entered into force 3 September 1981) UN Doc. A/34/46 (1980).

<sup>157</sup> Committee on the Rights of the Child (36<sup>th</sup> Session), 'Concluding Observations: Myanmar' (30 June 2004) UN Doc. CRC/C/15/Add.237.

<sup>158</sup> *Ibid.*, paras 15-17.

<sup>159</sup> *Ibid.*, para 67.

<sup>160</sup> *Ibid.*, para 69.

<sup>161</sup> *Ibid.*, para 71.

<sup>162</sup> *Ibid.*, para 83.

<sup>163</sup> UNCEDAW, 'Myanmar's First Periodic Report of States Parties to the Convention on the Elimination of All Forms of Discrimination Against Women' (1 June 1999) UN Doc. CEDAW/C/MMR/1.

<sup>164</sup> UNCEDAW, Concluding Observations: Myanmar (2000) UN Doc. A/55/38, [91]-[138].

<sup>165</sup> *Ibid.*

### *Future Action*

The Committee stated that information provided to it by Burma was inadequate. The Committee also strongly recommended that Burma take immediate action to address on-going violations. Burma's second report was due on 21 August 2002. Burma failed to meet this deadline but has since submitted jointly its second and third periodic report on 4 September 2007<sup>166</sup>. The Myanmar Government, in the 50-page report, asserts that it is in conformity with its obligations and has taken action to redress any violations. The Committee will consider the report at its 42<sup>nd</sup> Session in September this year and make recommendations.

### **Human Rights Council (previously *Commission on Human Rights*)**

The Commission on Human Rights was created in 1946, under Article 68 of the UN Charter, to monitor and publicly report on human rights situations in specific countries where violations of human rights law are alleged to be occurring. Its successor, the Human Rights Council, was established in 2006. The Council is made up of 47 member states, each elected by a majority in the General Assembly and serving three-year terms.

The Council is a subsidiary body of the General Assembly and its enforcement powers extend only to highlighting violations of human rights law and making recommendations to the General Assembly. There is provision for non-State entities, such as Non-government Organisations (NGOs), to work in consultation with the Council, including suggesting items for the provisional agenda, attend meetings, submit written statements and make oral presentations to the Council.<sup>167</sup> For example, at the Fifth Special Session of the Human Rights Council in October last year, addressing the situation in Burma specifically, NGOs who attended (and made statements) included: Amnesty International, Asian Forum for Human Rights and Development, Asian Indigenous and Tribal People's Network, Asian Legal Resource Centre, and Human Rights Watch.

### *Past Action*

Since 1992, the Human Rights Commission addressed a resolution toward Burma at every annual session.<sup>168</sup> The annual resolutions consistently expressed 'grave concern' at 'ongoing systematic violation(s) of human rights, including civil, political, economic, social and cultural rights, of the people of [Burma], in particular discrimination and violations suffered by persons belonging to ethnic minorities, women and children.' Resolutions cited, specifically,

extrajudicial killings, rape and other forms of sexual violence persistently carried out by members of the armed forces, continuing use of torture, renewed

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<sup>166</sup> UNCEDAW, 'Myanmar's Combined Second and Third Periodic Reports of States Parties to the Convention on the Elimination of All Forms of Discrimination Against Women' (4 September 2007) UN Doc. CEDAW/C/MMR/3.

<sup>167</sup> UNGA Res 60/251, Human Rights Council (3 April 2006) UN Doc. A/RES/60/251. See paragraph [11] stating that arrangements for consultation with *inter alia* NGOs 'shall be based on arrangements, including Economic and Social Council resolution 1996/31 of 25 July 1996 and practices observed by the Commission on Human Rights.' See UNESC Res 1996/31 (25 July 1996) UN Doc. E/RES/1996/31.

<sup>168</sup> See UNCHR Res 58 (1992) UN Doc. E/CN.4/RES/1992/58; UNCHR Res 73 (1993) UN Doc. E/CN.4/RES/1993/73; UNCHR Res 85 (1994) UN Doc. E/CN.4/RES/1994/85; UNCHR Res 72 (1995) UN Doc. E/CN.4/RES/1995/72; UNCHR Res 80 (1996) UN Doc. E/CN.4/RES/1996/80; UNCHR Res 64 (1997) UN Doc. E/CN.4/RES/1997/64; UNCHR Res 63 (1998) UN Doc. E/CN.4/RES/1998/63; UNCHR Res 17 (1999) UN Doc. E/CN.4/RES/1999/17; UNCHR Res 23 (2000) UN Doc. E/CN.4/RES/2000/23; UNCHR Res 15 (2001) UN Doc. E/CN.4/RES/2001/15; UNCHR Res 67 (2002) UN Doc. E/CN.4/RES/2002/67; UNCHR Res 12 (2003) UN Doc. E/CN.4/RES/2003/12; UNCHR Res 61 (2004) UN Doc. E/CN.4/RES/2004/61; UNCHR Res 10 (2005) UN Doc. E/CN.4/RES/2005/10.

instances of political arrests and continuing imprisonment and other detentions...forced relocation; destruction of livelihoods and confiscations of land by the armed forces; forced labour, including child labour; trafficking in persons; denial of freedom of assembly, association, expression and movement; discrimination and persecution on the basis of religious or ethnic background; wide disrespect for the rule of law and lack of independence of the judiciary; unsatisfactory conditions of detention; systematic use of child soldiers...<sup>169</sup>

Recent resolutions have focused on the fact that the current military regime had prevented the access of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in Myanmar, as well as the Special Envoy of the Secretary-General for Myanmar.<sup>170</sup> These resolutions called attention to the suppression of political dialogue, especially the

continued detention of [...] senior leaders of the National League for Democracy and of the leadership of other political parties or ethnic minorities, as well as the notoriously long house arrest of National League for Democracy General Secretary Aung San Suu Kyi and her deputy, Tin Oo.<sup>171</sup>

The Human Rights Commission consistently called upon the Myanmar Government:

- To restore the independence of the judiciary and due process of law;
- To eradicate the practice of forced labour by all organs of government, including the armed forces;
- To ensure safe and unhindered access for the United Nations and other international humanitarian organisation and to cooperate fully with all sectors of society, especially with the National League for Democracy and other relevant ethnic and community based groups;
- To cooperate with the Special Envoy of the Secretary-General for Burma and the Special Rapporteur in order to bring Burma towards a transition to civilian rule;
- To become a party to the ICCPR, the ICESCR, and the Convention Against Torture;
- To end conflict with all ethnic groups in Burma;
- To end the systematic violations of human rights;
- To lift all restraints on peaceful political activity of all persons, including former political prisoners by guaranteeing freedom of association and freedom of expression;
- To restore democracy and to release immediately and unconditionally the leadership of the National League for Democracy to allow them to play a full role in bringing about national reconciliation and the transition towards democracy; and
- To enter into a substantive and structured dialogue with Daw Aung San Suu

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<sup>169</sup> See, e.g. UNCHR Res 61 (2004) UN Doc. E/CN.4/RES/2004/61; UNCHR Res 10 (2005) UN Doc. E/CN.4/RES/2005/10.

<sup>170</sup> See, e.g. UNCHR Res 10 (2005) UN Doc. E/CN.4/RES/2005/10, 3.

<sup>171</sup> See e.g. UNCHR Res 10 (2005) UN Doc. E/CN.4/RES/2005/10, 3; UNCHR Res 61 (2004) UN Doc. E/CN.4/RES/2004/61, 3.

Kyi and other leaders of the National League for Democracy intended to lead towards democratisation and national reconciliation and to include other political leaders in these talks, including representatives of the ethnic groups.

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The successor to the Commission on Human Rights, the Human Rights Council, has continued to monitor and express concern about human rights violations in Burma. In October 2007 the Human Rights Council adopted Resolution S-5/1 expressing deep concern at the grave situation of human rights in Burma.<sup>172</sup> The Council

strongly deplor[ed] the continued violent repression of peaceful demonstrations in Myanmar, including through beatings, killings, arbitrary detentions and enforced disappearances...and urge[d] the Government of Myanmar to exercise utmost restraint and to desist from further violence against peaceful protesters.<sup>173</sup>

In Resolution S-5/1 the Human Rights Council requested the Special Rapporteur to assess the current human rights situation and to monitor the implementation of the resolution including by seeking an urgent visit to Burma and reporting back to the Human Rights Council.

A Special Rapporteur, acting on behalf of the United Nations, has been mandated to monitor Burma since 1992. The Special Rapporteur reports regularly to the Human Rights Council and the General Assembly, as well as making regular statements to the international community regarding the situation. Until November of 2007, the Special Rapporteur had been denied access to Burma since November 2003.<sup>174</sup>

The Special Rapporteur's report of 7 December 2007 concluded that there were no 'significant signs that the Government [of Burma] is implementing the substantive demands as set out in Human Rights Council resolution S-5/1...'<sup>175</sup> The report focused on the violent and excessive response of the Myanmar Government to the peaceful protests of September 2007. These protests, he found, were staged to 'give expression to the socio-economics hardships that they [the Burmese monks] and the people were facing, rather than the pursuit of any political agenda.'<sup>176</sup> The Special Rapporteur declared that the use of lethal force 'was inconsistent with the fundamental principles reflected in basic international norms deriving from international customary law'.<sup>177</sup> The report drew attention to government's use of non law enforcement officials (e.g. USDA members and SAS militia) to suppress the protests, noting 'evidence that the Myanmar authorities have been complicit in the abuses perpetrated by these groups, or negligent in failing to intervene, punish or prevent them.'<sup>178</sup> The report further documents widespread cases of arbitrary arrest and detention;<sup>179</sup> disappearances;<sup>180</sup> deaths in custody;<sup>181</sup> cruel, inhuman and degrading treatment and torture;<sup>182</sup> and severe reprisals against peaceful

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<sup>172</sup> UNHRC, 5<sup>th</sup> Special Session, Resolution S-5/1 (2007) UN Doc. E/CN.4/RES/S-5/1.

<sup>173</sup> Ibid.

<sup>174</sup> UNHRC, 'Report of the Special Rapporteur on the situation in Myanmar' (12 February 2007) UN Doc. A/HRC/4/14, p 2.

<sup>175</sup> UNHRC, 'Report of the Special Rapporteur on the situation in Myanmar' (7 December 2007) UN Doc. A/HRC/6/14, para 74.

<sup>176</sup> Ibid, para 22.

<sup>177</sup> Ibid, para 37.

<sup>178</sup> UNHRC, 'Report of the Special Rapporteur on the situation in Myanmar' (7 December 2007) UN Doc. A/HRC/6/14, para 39.

<sup>179</sup> Ibid, paras 41 – 52.

<sup>180</sup> Ibid, paras 53-54.

<sup>181</sup> Ibid, para 55.

<sup>182</sup> Ibid, paras 56-57.

protestors.<sup>183</sup>

The report concludes that the State and its agents ‘failed to prevent these abuses but not using all available options [to negotiate a peaceful settlement] and not exercising restraint in policing the demonstrations.’<sup>184</sup> The Special Rapporteur calls on the Myanmar Government to *inter alia* ensure immediate access by the ICRC and other humanitarian bodies, to release political prisoners, to bring the perpetrators of human rights violations to justice and to invite an international commission of inquiry.<sup>185</sup>

The Myanmar Government responded to the Special Rapporteur’s report with a *note verbale* (dated 9 December 2007).<sup>186</sup> The government rejected the allegations made by the Special Rapporteur. In response to each of the Special Rapporteur’s recommendations the government stated that appropriate measures have already been taken – for example, in response to the recommendation that the government should invite an international commission of inquiry, the Myanmar Government stated that ‘the Investigation Body has been established in Myanmar and it has been conducting necessary investigations.’<sup>187</sup>

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At the most recent meeting of the Human Rights Council (the sixth session, December, 2007) Burma was again an item of key concern.<sup>188</sup> The Portuguese Observer, speaking officially on behalf of the European Union, noted that the Council of the European Union had recently appointed a Special Envoy to Myanmar, reflecting the EU’s concern at the ‘use of lethal force by law enforcement officials’ in Burma in September 2007. ‘Genuine peace, stability and democratization’ he stated, ‘could be achieved only through an all-inclusive political process and respect for fundamental rights and freedoms.’<sup>189</sup>

The Canadian observer noted the findings of the Special Rapporteur and stated:

The violent repression of peaceful protest by the Burmese authorities in September 2007, as well as persistent human rights violations in the form of forced displacements, rape by the military, extrajudicial executions, forced labour, the use of child soldiers, arbitrary arrest and detention and the persecution of ethnic minorities, has led [the Canadian] Government to announce its intention of imposing new sanctions against Burma, including a prohibition on all exports to the country, except for humanitarian equipment, and all imports.<sup>190</sup>

Other observer countries expressed similar sentiments, though only Canada announced the taking of such unilateral sanctions. Several countries, including China,<sup>191</sup> Russia,<sup>192</sup> Bangladesh, Malaysia<sup>193</sup> and Pakistan (on behalf of the Organization of Islamic Conference),<sup>194</sup> opined that no further punitive actions on behalf of the international community were needed at this stage, and there was no

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<sup>183</sup> Ibid, paras 58-62.

<sup>184</sup> Ibid, para 64.

<sup>185</sup> Ibid, para 76.

<sup>186</sup> UNHRC, ‘*Note Verbale* from the Government of Myanmar’ (10 December 2007) UN Doc. A/HRC/6/G/14.

<sup>187</sup> Ibid, para 31.

<sup>188</sup> UNHRC, Sixth Session (16 January 2008) UN Doc. A/HRC/6/SR.29.

<sup>189</sup> Ibid, paras 2-5.

<sup>190</sup> Ibid, para 9.

<sup>191</sup> Ibid, para 15.

<sup>192</sup> Ibid, para 34-36.

<sup>193</sup> Ibid, paras 22-23.

<sup>194</sup> Ibid, paras 13-14.

need for an international commission of inquiry.

### *Future Action*

The Human Rights Council continues to address the situation in Burma.<sup>195</sup> One possible step might be for NCUB to seek consultative status with the Human Rights Council, enabling it to attend meetings and make statements.<sup>196</sup> Aside from that, the ability of the Human Rights Council to effectively reprimand Burma lies predominately with both the states represented on the Council, who must devise and vote on appropriate resolution, and other states who are able to respond to those resolutions in their relations toward Burma.

### **Secretary-General of the United Nations**

In 1993 the Secretary-General was asked by the General Assembly to provide his good offices in facilitating national reconciliation and democratisation in Burma.<sup>197</sup>

### *Past Action*

The Secretary-General's efforts to engage with the authorities to address various concerns of the international community have been largely thwarted, however, by severe curtailment of access. The Secretary-General's previous Special Envoy, Tan Sri Razali Ismail, stepped down in January 2006 having been denied access to Burma for nearly two years since March 2004.<sup>198</sup>

### *Future Action*

Ibrahim Gambari was appointed to replace Tan Sri Razali in May 2007. Mr Gambari has visited Burma five times since the September 2007 protests to monitor the situation and to inform the Burmese government of the international community's strong condemnation of their actions.<sup>199</sup> On 5 October 2007, Mr Gambari told the Security Council that during his visit to Burma he had expressed to Burma's leadership the 'international community's deep concern about the most recent events and ma(d)e specific recommendations for immediate steps to de-escalate tensions.'<sup>200</sup> After his latest visit, in March 2008, Mr Gambari told the Security Council the visit 'did not yield any immediate tangible outcome' though '(t)he United Nations would continue to pursue dialogue and engagement so as to strengthen cooperation', noting that the United Nations remains Burma's 'preferred interlocutor'.<sup>201</sup>

### **International Labour Organisation**

Burma is a member of the ILO. The main aims of the ILO are to promote rights at work, encourage decent employment opportunities and enhance social protection.<sup>202</sup>

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<sup>195</sup> AFP, 'UN rights council condemns Myanmar's human rights record' (28 March 2008) <[http://afp.google.com/article/ALeqM5j14\\_d601asW2zB\\_zDL9hJhAKmhSA](http://afp.google.com/article/ALeqM5j14_d601asW2zB_zDL9hJhAKmhSA)> (accessed 01 April 2008).

<sup>196</sup> The conditions for obtaining consultative status with a UN body are set out in Economic and Social Council Resolution 1996/31, cited above.

<sup>197</sup> UNGA Res 48/150 (20 December 1993) UN Doc. A/RES/48/150.

<sup>198</sup> UNCHR, 'Report of Secretary General: The Situation of human rights in Myanmar' (27 February 2006) UN Doc. E/CN.4/2006/117, 2.

<sup>199</sup> Ibrahim Gambari, 'Briefing to the Security Council' (5 October, 2007) <<http://www.un.org/news/dh/infocus/myanmar/gambaricouncil.htm>> (accessed 28 February 2008).

<sup>200</sup> *ibid.*

<sup>201</sup> Security Council Department of Public Information, News and Media Division, 'Latest Visit to Myanmar Yielded No 'Immediate Tangible Outcome', Secretary-General's Special Adviser Tells Security Council' (18 March 2008) <<http://www.un.org/News/Press/docs/2008/sc9278.doc.htm>> (accessed 1 April 2008).

<sup>202</sup> International Labour Office, 'The ILO at a Glance' <<http://www.ilo.org/wcmsp5/groups/public>> accessed 1 March 2008.

The ILO achieves these aims by bringing together representatives of governments, employers, and workers to jointly shape policies and programmes. The ILO has also created a number of significant Conventions proscribing the use of forced labour.<sup>203</sup>

### *Past Action*

An inquiry carried out by the ILO released in early July 1998 found 'abundant evidence' of use of forced civilian labour in Burma (refer to Part I of this report).<sup>204</sup> In November 2000 the ILO issued a sanction on Burma – the first time the international body had done so under the provisions in its constitution.<sup>205</sup> The Myanmar Government, however, has persistently failed to report in substantive terms to the ILO on its application of Convention No. 87 despite repeated requests from the ILO supervisory bodies.

### *Future Action*

Without cooperation from Burma, the ILO is limited in means of redress. There are no avenues for individuals to seek redress within the ILO.

## **2. Mechanisms Available to States**

These measures include both multilateral (the General Assembly and the Security Council) and unilateral responses to breaches of the Geneva Conventions and sanctions. Individuals may utilise these mechanisms indirectly by pressuring states to act uniformly in response to Burma's violations of international law.

### **The Security Council**

In circumstances where the conduct of a state is such that the Security Council has determined that there exists a threat to the peace, a breach of the peace or an act of aggression, the Security Council has the power to take measures not involving the use of force. This power derives from Article 41 of the UN Charter. Matters internal to a state may still constitute threats to international peace where violence exceeds a certain level so as to impact neighbouring countries (e.g. refugees)<sup>206</sup> or where violations of human rights and the denial of domestic fundamentals can no longer be regarded as purely domestic matters.<sup>207</sup> These measures may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations. Furthermore, the Security Council is empowered to call upon member states to enforce such measures. Alternatively, the Security Council may take such other measures, as it deems necessary to restore or maintain peace and security.<sup>208</sup>

### *Past Action*

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<sup>203</sup> See e.g. Convention Concerning Forced or Compulsory Labour (ILO No.29) (entered into force 1 May 1932) 39 UNTS 55; Abolition of Forced Labour Convention (ILO No.105) (entered into force 12 January 1959) 320 UNTS 291.

<sup>204</sup> International Labour Office, 'Forced Labour in Myanmar (Burma)' (Report of the Commission of Inquiry to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29), 2 July 1998) <<http://www.ilo.org/public/english/standards/relm/gb/docs/gb273/myanmar.htm>> accessed 29 February 2008.

<sup>205</sup> ILO, Media Release, 'ILO Governing Body Opens Way for Unprecedented Action Against Forced Labour in Myanmar' (17 November 2000) UN Doc. ILO/00/44.

<sup>206</sup> See, for example, Security Council intervention during the 1990s in the former Yugoslavia, Sierra Leone and Somalia.

<sup>207</sup> Franck, Thomas 'Recourse to Force: State Action against Threats and Armed Attacks' (2002, Cambridge University Press) Chapter 2. See, for example, Security Council intervention in South Africa (1970s, 1980s); Rhodesia (now Zimbabwe) (1970s); and Haiti (1990s, and peacekeeping mission since 2004).

<sup>208</sup> UN Charter, arts 39, 42.



The Security Council has in recent times been unable to agree on appropriate measures to be taken with respect to Burma. In January 2007, for example, owing to the veto of China and Russia (with South Africa also voting against, plus 3 abstentions), the Security Council failed to adopt a draft resolution on Burma.<sup>209</sup> This resolution would have called on the Myanmar Government to cease military attacks against civilians in ethnic minority regions and begin a substantive political dialogue that would lead to a genuine democratic transition.<sup>210</sup> China's representative said that he would vote against the draft resolution as the matter was an internal affair of a sovereign State and did not pose a threat to international or regional peace and security.<sup>211</sup>

### *Future Action*

The Security Council has issued a number of press statements, including a strongly worded presidential statement,<sup>212</sup> censuring Burma over the violent repression of protests in September 2007.<sup>213</sup> In these statements the Security Council deplored the government's use of violence and called upon the Myanmar Government to release all political prisoners and open up political dialogue. These press statements alone, however, have no legal effect. Meanwhile, no resolution has been adopted. Without the support of China, the Security Council will continue to be unable to act on this matter.

### **The General Assembly**

The powers and functions of the General Assembly are set out in Articles 9 – 22 of the UN Charter, which bestow upon it broad powers of recommendation. It may make recommendations to member states, or to the Security Council, or both.<sup>214</sup> However, these wide powers are subordinate to the powers of the Security Council to the extent that while the Security Council is exercising in respect of any dispute or situation the functions assigned to it, the General Assembly shall not make any recommendations with regard to that dispute.<sup>215</sup> During the Cold War a mechanism was developed, under Resolution 377(V) (the 'Uniting for Peace' resolution), which enabled the Assembly to deal with a threat to or breach of the peace or act of aggression if the Security Council fails to act because of the exercise of the veto by a permanent member.<sup>216</sup> This resolution, however, has rarely been relied upon (the last

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<sup>209</sup> Security Council Department of Public Information, News and Media Division, 'Security Council Fails to Adopt Draft Resolution on Myanmar' (12 January 2007) <<http://www.un.org/News/Press/docs/2007/sc8939.doc.htm>> (accessed 04 March 2008).

<sup>210</sup> UNSC Res 8939 (vetoed 12 January 2007) UN Doc S/2007/14. Other provisions of the draft would have urged the Government to respond in a concrete, complete and timely manner to the Secretary-General's efforts to fully enable his 'good offices' mission. It would have also called on the Government to take concrete steps to allow full freedom of expression, association and movement by unconditionally releasing Daw Aung San Suu Kyi and all political prisoners, lifting all constraints on all political leaders and citizens, and allowing the National League for Democracy (NLD) and other political parties to operate freely.

<sup>211</sup> *Ibid.* The Chinese representative went on to say that while no one would dispute that Myanmar was faced with a series of grave challenges, similar problems existed in many other countries as well. The Council's involvement on the issue of Myanmar would not only exceed its mandate, but also hinder discussions by other relevant United Nations agencies.

<sup>212</sup> UN Department of Public Information, 'Security Council Deplores Violence Used Against Myanmar Demonstrators' (11 October 2007) UN Doc. SC/9139.

<sup>213</sup> UN Department of Public Information, 'Security Council Press Statement on Myanmar' (17 January 2008) UN Doc. SC/9228; UN Department of Public Information, 'Security Council Press Statement' (15 November 2007) UN Doc. SC/9171.

<sup>214</sup> Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 59 Stat. 1031 ('UN Charter'), art 11(1).

<sup>215</sup> *Ibid.*, art 12.

<sup>216</sup> UNGA Res 377(V) (3 November 1950).

such instance was in 1982, concerning Palestine); the end of the Cold War makes it unlikely that it will be used in the immediate future.

#### *Past Action*

The General Assembly has had a limited engagement with the Burma situation, addressing a resolution toward the situation on a semi-regular basis. For example, in December 2007 the General Assembly adopted a resolution on the situation in Burma.<sup>217</sup> By that text, it strongly condemned the use of violence against peaceful demonstrators and expressed grave concern about ongoing systematic violations of human rights and fundamental freedoms, including arbitrary detentions, repeated violations of international humanitarian law, discrimination suffered by persons of ethnic nationalities and the absence of genuine participation by representatives of the National League for Democracy (NLD) and other political parties.

#### *Future Action*

Member states may be pressured into passing further and stronger condemnations of the situation. The General Assembly itself may make recommendations to members of the UN or the Security Council as to steps that should be taken in Burma. Article 14 of the Charter states that the Assembly may 'recommend measures for the peaceful adjustment of any situation regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations.' Unlike the Security Council, it has no direct enforcement mechanisms.

### **The Geneva Conventions**

Burma ratified the four Geneva Conventions of 1949 in August 1992. As the previous section documents, the Myanmar Government has consistently violated provisions of the Geneva Conventions, violations that may be characterised as 'grave breaches' of Common Article 3 during a non-international armed conflict. See, for example, forced internal displacement, use of porters, and arbitrary detention.

#### *Past Action*

No action under the Geneva Conventions has been taken.

#### *Future Action*

Burma itself is under an obligation to refrain from perpetrating these violations, to legislate prohibitions in accordance with the Conventions, and to prosecute any persons within Burma that do breach the Conventions.<sup>218</sup>

Furthermore, every State is obliged to address 'grave breaches' of the Conventions. Article 1 of the Geneva Conventions obliges '(t)he High Contracting Parties ... to ensure the respect for the (Geneva) Convention(s) in all circumstances.' The International Committee of the Red Cross (ICRC) commentaries to the Geneva Conventions states that 'in the event of a Power failing to fulfill its obligations', under Article 1 'each of the other Contracting Parties (neutral, allied or enemy) *should*

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<sup>217</sup> UNGA Res 10684 (22 December 2007) UN Doc. A/62/439/Add.3. See also UNGA Res 60/233 (23 March 2006) UN Doc. A/RES/60/233; UNGA Res 56/231 (28 February 2002) UN Doc. A/RES/56/231; UNGA Res 55/112 (1 March 2001) UN Doc. A/RES/55/112; UNGA Res 54/186 (29 February 2000) UN Doc. A/RES/54/186; UNGA Res 53/162 (25 February 1999) UN Doc. A/RES/53/162; UNGA Res 52/137 (3 March 1998) UN Doc. A/RES/51/117; UNGA Res 50/194 (11 March 1996) UN Doc A/RES/50/194; UNGA 49/197 (9 March 1995) UN Doc. A/RES/49/197; UNGA Res 48/150 (31 January 1994) UN Doc. A/RES/48/150; UNGA Res 47/144 (18 December 1992) UN Doc. A/RES/47/144; UNGA Res 46/132 (17 December 1991) UN Doc. A/RES/46/132.

<sup>218</sup> Geneva Convention I art 49; Geneva Convention III art 129; Geneva Convention IV art 146.

endeavour to bring it back to an attitude of respect for the Convention'. The Commentary continues:

The proper working of the system of protection provided by the Convention demands in fact that the States which are parties to it should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that it is respected universally.<sup>219</sup>

Each of the 1949 Conventions also provides that '(e)ach High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.'<sup>220</sup>

At a minimum, this requires a state to take action against any Burmese national, who is alleged to have violated the Geneva Conventions, who enters into that state's territory. States should also consider undertaking other actions to remedy these breaches, and prevent further violations, in accordance with their Article 1 obligations. This obligation was highlighted by Jakob Kellenberger, President of the ICRC, in June 2006, when he extraordinarily

'urge[d] the government of Myanmar to put a stop to all violations of international humanitarian law and to ensure that they do not recur' and also 'remind[ed] all States party to the Geneva Conventions of their obligation, under Article 1, to respect and to ensure respect for the Conventions.'<sup>221</sup>

## Sanctions

The imposition of sanctions may be an effective remedy for violations of international law. Sanctions are the prerogative of a state's central government—directing pressure towards governments, particularly those with close links to Burma, is the best means for individuals to try to make use of this mechanism.

### Past Action

A number of states have taken unilateral action in reaction to Burma's continuing violations of international law. For example:

- **Australia** On October 24, 2007, the Australian government imposed financial sanctions under the *Banking (Foreign Exchange) Regulations 1959*, prohibiting the transfer of funds to 418 named individuals without the consent of the Australian Reserve Bank.<sup>222</sup>
- **Canada** In response to the September 2007 protests the Canadian government increased pre-existing sanctions. These now include a ban on all imports and exports to and from Burma, except for humanitarian goods, and a ban on new investment by Canadians and Canadian companies. Canada will also freeze assets in Canada of any designated Burmese nationals connected with the military junta Canadian-registered ships and aircraft are prohibited from docking or landing in the country.<sup>223</sup>

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<sup>219</sup> International Committee of the Red Cross, *Commentary to the Third Geneva Convention relative to the Treatment of Prisoners of War* (Geneva 1958), 26.

<sup>220</sup> Geneva Convention I art 49; Geneva Convention III art 129; Geneva Convention IV art 146.

<sup>221</sup> International Committee of the Red Cross, *News Release 29.06.2007 'Myanmar: ICRC denounces major and repeated violations of international humanitarian law'* (June 2007) <<http://www.icrc.org/Web/eng/siteeng0.nsf/html/myanmar-news-290607>> accessed 25 February 2008.

<sup>222</sup> Australian Department of Foreign Affairs & Trade Website, <<http://www.dfat.gov.au/un/unsanctions/burma.html>> accessed 27 February 2008.

<sup>223</sup> Special Economic Measures (Burma) Regulations P.C. 2007-1913 December 13, 2007.

- **European Union Member States** In October 2007 the EU added to existing measures by banning the import of timber, gemstones and precious metals from Burma, the export of equipment to these sectors, and a ban on new investment within these sectors. The EU has already frozen the funds and economic resources of 386 named individuals tied to the Burmese government.<sup>224</sup>
- **United States** On 26 February 2008, the United States imposed a new round of sanctions,<sup>225</sup> adding to existing measures. These include a ban on all imports from Burma, a freeze on the assets of certain Burmese financial institutions, visa restrictions and the designation of senior Burmese government officials subject to an asset block.<sup>226</sup>

### *Future Action*

Further and wider sanctions are possible. In response to the 'crack-down' on the September 2007 protests, Human Rights Watch released a report entitled *Crackdown: Repression of the 2007 Popular Protests in Burma*.<sup>227</sup> The report lists a number of recommendations,<sup>228</sup> the primary one being 'the imposition of sanctions on Burma by the United Nations Security Council or, should the council fail to act, multilateral or unilateral sanctions.' These '(s)anctions should be pegged to Burma meeting specific human rights conditions,' and should specifically include:

- a fully enforced embargo on all weapons and ammunition sales and transfers;
- financial and other sanctions targeted at leading officials who bear responsibility for abuses;
- financial sanctions targeted at companies owned and controlled by the Myanmar military, including the Myanmar government's Myanmar Oil and Gas Enterprise (MOGE);
- constraints on the ability of sanctioned Burmese individuals and entities to carry out transactions via third countries; and
- targeted sanctions on imports, exports, and new investment in sectors of Burma's economy that substantially benefit the military and/or are associated with serious human rights abuses.

Human Rights Watch identifies a number of countries in particular whose actions may have significant impact upon the Myanmar regime. These include regional powers:

- **China** As its powerful neighbour, and major investor and arms supplier, China has particular influence. Effective measures would include support for Security Council resolutions, especially ones adopting multilateral sanctions; an embargo on weapons transfers; and a ban on new investment in Burma.

<sup>224</sup> EU, 'Council Common Position 2007/750/CFSP of 19 November 2007 amending Common Position 2006/318/CFSP renewing restricting measures against Burma/Myanmar' (24.11.2007) *Official Journal of the European Union* L308/1.

<sup>225</sup> CRS Report for Congress, 'Burma: Economic Sanctions' (Updated January 30, 2008) <<http://fpc.state.gov/documents/organization/101738.pdf>> (accessed 27 February 2008).

<sup>226</sup> US State Department Website, 'Background Note: Burma' <<http://www.state.gov/r/pa/ei/bgn/35910.htm>> (accessed 27 February 2008).

<sup>227</sup> <<http://www.hrw.org/reports/2007/burma1207/>> (accessed 27 February 2008).

<sup>228</sup> *ibid*, Section IX. 'Recommendations'.

- **Japan** As the largest donor to Burma, Japan could use its relationship to exert more influence by publicly pressuring the Myanmar government and reviewing all of its aid projects.
- **India** The Indian government has pursued close ties with the Myanmar government. Effective measures would include issuing public condemnations; placing embargoes on weapon transfers; and pressuring the SPDC to end its repression of opposition.
- **Thailand** As its largest trading-partner, Thailand is in a unique position to exert influence to prevent payments made by Thai firms to the Myanmar military; prohibit business partnerships with the Myanmar military; suspend new investment in mining and oil projects; and utilise ASEAN to design a collective response to Burma's actions.

As Burma is a member of the WTO, the imposition of sanctions could possibly breach obligations of WTO member-states. However, there is reason to think that the upholding of human rights would provide a legitimate reason to impede free trade. The WTO has, in the past, addressed auxiliary issues that are affected by trade, such as the environment and health measures<sup>229</sup> -- the issue that has been in focus in these disputes is whether government action to advance such concerns is consistent with the state's WTO obligations. There have to-date been no meaningful litigation attempts within the WTO on the issue of human rights. However, Marceau notes that the WTO could be seised of a dispute in which human rights concerns arise in defence to claims member states have breached their WTO obligations. In such cases, Marceau argues, 'WTO provisions must evolve and be interpreted consistently with international law, including human rights law...a good faith interpretation of the relevant WTO and human rights provisions should lead to a reading of WTO law coherent with human rights law'.<sup>230</sup> In the case of Burma, states imposing trade sanctions in breach of their WTO obligations might argue that since the sanctions are imposed in response to human rights violations, a human rights consistent interpretation of WTO law would allow the measures to fall within one of the exceptions contained in GATT.

Possibly the best basis for a human rights exception is to argue that a WTO-inconsistent measure is authorized because it is 'necessary to protect human ... life or health' within the meaning of Article XX(b) of the General Agreement on Tariffs and Trade (GATT). More specifically to the situation in Burma, Alford suggests that the approach adopted by the Appellate Body in the *Shrimp Turtles* case (where the WTO recognised that environmental concerns could inform a country's trade policy towards another) could be similarly applied to the exceptions permissible under Article XX(e) of the GATT, which relates to the products of prison labour. To this extent, he argues that Burmese oil, for example, could be made subject to an import ban because it flows through pipelines constructed from slave labour, which are equivalent to prison labour.<sup>231</sup>

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<sup>229</sup> See e.g, Import Prohibitions of Certain Shrimp and Shrimp products, Appellate Body Report, UN Doc. WT/DS58/AB/R.

<sup>230</sup> Garbielle Marceau, 'WTO Dispute Settlement and Human Rights' (2002) 13 EJIL 753, 755.

<sup>231</sup> See *Opinio Juris*, Roger Alford, 'Human Rights and the WTO' (15 March 2007) <<http://www.opiniojuris.org>> accessed 1 March 2008. Alford also argues that human right sanctions can be justified as an exception under GATT, taking a human rights consistent meaning to several of the exceptions in Article XX, including Articles XX(a), (b), (e) and (g). Article XX of the GATT sets out the following general exceptions:

'Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this

### 3. Mechanisms Available to Individuals

As already noted, the reluctance of Burma to engage with the international community leaves few mechanisms accessible by individuals, either inside or outside of Burma. The two discussed here – criminal litigation in other states' domestic courts and use of the Alien Torts Claims Act ('ATCA') in the United States – have a number of limitations, not least the doctrine of state immunity whereby the current Myanmar regime is effectively protected.

#### Domestic Courts

Domestic courts of some nations have demonstrated willingness in recent years to exercise universal jurisdiction to prosecute crimes of non-nationals, even in some cases where there is no link between the prosecuting state and the crime, the accused or the victims.<sup>232</sup> In most instances, however, the exercise of such jurisdiction is predicated on the presence of victims, or the accused, on the territory of the prosecuting state.<sup>233</sup>

#### Past Action

No Burma-related litigation has been substantively addressed in a state's domestic criminal court.

#### Future Action

A significant bar to the exercise of universal jurisdiction is immunities in international law afforded to current heads of state, foreign ministers and other high-ranking officials.<sup>234</sup> Immunity is also attached to the perpetrator of 'official state acts'. Notably, acts considered criminal under international law will not be considered 'official state acts', and will therefore not have the latter type of immunity attach; the immunity afforded to heads of state, foreign ministers and other high-ranking officials, on the other hand, is absolute.

Where victims of the Burmese regime are present in a state that has universal jurisdiction, they may petition prosecuting authorities to investigate and bring charges against the perpetrators. Serious obstacles to a successful outcome will include the

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Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

- (b) necessary to protect human, animal or plant life or health;
- (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including ...;
- (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; ...'

<sup>232</sup> See e.g. Guatemala Genocide Case, Spanish Constitutional Tribunal, judgment of 26 September 2005, <<http://www.tribunalconstitucional.es/JC.htm>> accessed 1 March 2008.

<sup>233</sup> See e.g. Pinochet Case, French Tribunal de grande instance (Paris), judgment of 2 November 1998 in (1999) 93 AJIL 690, 696. See also Belgium – in the 1990s it was the world's premier forum for unfettered universal jurisdiction. For example, it tried and convicted four Rwandan accused in relation to the Rwandan genocide. Belgium also brought cases against the former Chadian president, Hissene Habre, as well as Israeli Prime Minister, Ariel Sharon. Under pressure from the United States (after cases were brought in Belgian courts against former President George Bush Snr, Vice-President Richard Cheney and Colin Powell regarding the first Gulf War, and General Tommy Franks in respect of the second Gulf War) the Belgian government recently amended their universal jurisdiction legislation. Immunity is now afforded to heads of state and foreign ministers and complaints will only be heard when the suspect is Belgian, or lives in Belgium, or the complainants are Belgian or have lived there legally for three years. The legislation also removes the ability for victims to initiate proceedings; that decision now rests with the state prosecutor.

<sup>234</sup> *The Case Concerning the Arrest Warrant of 11 April 2000* (DRC v Belgium) 2002 ICJ 3.

difficulty in properly investigating the alleged crimes and the difficulty in apprehending, arresting and/or extraditing the alleged perpetrators, notwithstanding the applicability of relevant immunities.

### Alien Torts Claims Act

The United States ATCA has provided an indirect means of remedying violation of human rights laws, in particular forced labour.

The ACTA, a part of the United States Judiciary Act, reads in its entirety: 'The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.' The 1980 case of *Filartiga v. Pena-Irala*<sup>235</sup> was the first successful use of the ATCA to provide a civil remedy for human rights violations. The case opened the door for other victims of human rights abuse, who are unable to obtain redress in their own courts.

However, the possibility for redress must not be overestimated: the ACTA is limited to a claim in tort law, and the court can only allow claims against defendants that have been served a summons, which must be served on the defendant whilst in the territory of the USA.<sup>236</sup> Moreover, state immunity is available as a defence to any state, or to any person acting in an official capacity for that state.<sup>237</sup>

### Past Action

The ATCA formed the basis of the case of *Doe v Unocal*.<sup>238</sup> The case arose out of the construction of the Yadana gas pipeline in Burma. Unocal was sued by Burmese villagers for its complicity in human rights atrocities committed by the Myanmar government and military during the construction of the pipeline.<sup>239</sup> The alleged atrocities included the use of violence and intimidation to relocate whole villages, the enslavement of villagers living in the area of the pipeline, theft of property, assault, rape, torture, forced labour, and murder. The case was eventually settled between the parties, but is illustrative of the possible legal and political effect such a claim might have, especially in providing protection for human rights, which is otherwise unavailable. Prior to settlement, substantial portions of the Plaintiff's case had withstood several summary judgment applications. In light of this, future plaintiffs seem to be on firm ground for pursuing corporations in federal courts under the ATCA for human rights abuses committed abroad.

### Future Action

There are advantages and disadvantages to pursuing a claim in terms of ACTA. Claims can be brought by individuals (assisted by groups such as NCUB) who have suffered human rights abuse abroad, regardless of their nationality, or that of the perpetrator. The obvious advantage is that the Act opens the US courts to plaintiffs who previously would have found the way blocked by jurisdictional requirements, such as nationality and territoriality. The disadvantages are that, although liability might be established, many perpetrators, such as heads of state, will be afforded immunity. The US courts have not been prepared to override such immunity. Jurisdiction can only be established in the few cases where the perpetrator is not protected by immunity, and is on US territory at the commencement of the proceedings. Accordingly, the greatest advantage to individuals or groups, such as NCUB and/or PILPG, is arguably the platform provided by such lawsuits to expose of

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<sup>235</sup> 630 F.2d 876 (2d Cir. 1980).

<sup>236</sup> Foreign State Immunities Act, 28 U.S.C s1602 – 1611.

<sup>237</sup> *ibid.*

<sup>238</sup> 403 F.3d 708 (9th Cir. 2005).

<sup>239</sup> *Doe v. Unocal*, 963 F. Supp. 880 (C.D. Cal. 1997) at 884-85.

human rights violation. The publicity generated by such claims is likely to capture the attention of the U.S. government and international media.<sup>240</sup>

#### 4. Mechanisms Available to a Future Democratic Burmese Government

The role of transitional justice is addressed in greater detail in the last part of this report. Here we consider one mechanism possibly available in the future as a means of redressing violations of international law: the International Criminal Court.

##### The International Criminal Court

The Rome Statute of the ICC<sup>241</sup> entered into force on 1 July 2002, marking the beginning of the Court's temporal jurisdiction. Of relevance to Burma's situation, the Court has jurisdiction over both crimes against humanity (which may be committed in times of both war and peace) and war crimes (which may be committed in both international and non-international armed conflicts).

##### Past Action

Burma signed the Rome Statute on 12 November 2001, but to-date, has not ratified its accession. Burma is therefore not yet a state party.

##### Future Action

Crimes committed within Burma may still come within the Court's jurisdiction. The Security Council is able to refer a situation to the ICC Prosecutor, even where it involves non-state parties.<sup>242</sup> For example, the Security Council has referred the situation in Darfur to the prosecutor of the ICC in accordance with Article 13 (b) of the Rome Statute.<sup>243</sup>

Burma may also at any time accede to the *ad hoc* jurisdiction of the Court by referring a particular situation to the ICC.<sup>244</sup> This provision may be particularly relevant for post-military ruled Burma as it is thought that such a mechanism may effectively operate retrospectively.

#### Conclusion

Mechanisms within UN charter bodies and other international organisations have been regularly used in recent years with respect to Burma. The effectiveness of their use alone is, however, questionable. Terry Collingsworth of the International Labour Rights Fund, labelled Burma the 'poster child' of the reality of ineffective soft pressure:

Any hopes for a remedy to human rights violations are generally left to the sometimes-influential but ultimately unenforceable mechanisms of moral persuasion and damning reports... The United Nations has sent a succession of special rapporteurs to [Burma], and a series of strongly worded UN resolutions has demanded that the current military regime stop murdering, torturing, imprisoning, and enslaving the population. Likewise, the International Labour Organisation's Committee of Experts has issued numerous annual reports documenting in great

<sup>240</sup> Crimes of War, 'The Tribunals' (May 2001), Anne-Marie Slaughter & David L. Bosco, 'Alternative Justice' <[http://www.crimesofwar.org/tribun-mag/relate\\_alternative\\_print.html](http://www.crimesofwar.org/tribun-mag/relate_alternative_print.html)> (accessed 8 March 2008).

<sup>241</sup> (adopted 17 July 1998, entered into force 1 July 2002) 37 ILM 999 (Rome Statute).

<sup>242</sup> *ibid*, art 13, read with arts. 12, 14 and 15.

<sup>243</sup> UNSC Res 1593 (31 March 2005) UN Doc/S/Res/1593 (2005).

<sup>244</sup> *ibid*, art 12.



detail the Burmese regime's violations of the fundamental conventions on free of association and forced Labour... Despite all of the international reporting and pronouncements, Burma, a charter member of the World Trade Organization, is still open for business.<sup>245</sup>

Collingsworth was writing in 2002. Since that time the level of activity of these charter bodies and UN organisations with respect to Burma has been maintained or increased. Yet, as the first part of this report makes clear, serious violations continue. The lack of response of the Myanmar regime to UN actions was noted by the Special Rapporteur, Paolo Sergio Pinheiro, in October 2007: 'What annoys me is that the repression had not stopped in a single moment, despite the universal appeal by the Human Rights Council, and the statement of the President of the Security Council...'<sup>246</sup>

Actions by States – unilateral and multilateral – may prove effective. The effectiveness of such actions will depend, however, on the willingness of key regional players – China in particular – to cooperate.

## Recommendations

From an individual's or NGO's point of view, possible means of utilizing mechanisms at the international level are:

- Pressuring states to act, both unilaterally in enforcing strong sanctions and adhering to Geneva Convention obligations, and multilaterally through the Security Council, General Assembly, and Human Rights Council;
- Seeking consultative status within the Human Rights Council on issues relating to Burma;
- Seeking to initiate criminal proceedings in a domestic court via universal jurisdiction;
- Initiating civil proceedings under the Alien Torts Claims Act in the United States, against individuals or companies in partnership with the Myanmar regime.

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<sup>245</sup> Terry Collingsworth, 'The Key Human Rights Challenge: Developing Enforcement Mechanisms' (2002) 15 *Harvard Human Rights Journal* 183.

<sup>246</sup> UN Department of Public Information, News and Media Division, 'Press Conference by Special Rapporteur on Human Rights Situation in Myanmar' (24 October 2007) <[http://www.un.org/News/briefings/docs/2007/071024\\_Pinheiro.doc.htm](http://www.un.org/News/briefings/docs/2007/071024_Pinheiro.doc.htm)> (accessed 1 April 2008).

# PART III: POTENTIAL OPTIONS FOR TRANSITIONAL JUSTICE IN BURMA

## Overview

Part I of this report identified a number of serious human rights violations that have been perpetrated in Burma, by both individuals acting in their capacity as state officials and by opposition groups. Part II analysed the mechanisms available for addressing both state responsibility and individual criminal responsibility for the international violations identified in Part I. This Part considers the mechanisms by which Burma might seek to address and remedy these violations through transitional justice mechanisms at the national level in Burma.

As an introductory measure this Part emphasises the need for constitutional compatibility and contextualisation of transitional justice within the Burmese state. We then detail five possible roles that transitional justice may play in a society emerging from a period of severe political repression and recommend a number of possible means through which these roles may be realized. The roles can be understood as follows:

- Transitional justice as a means to aid a negotiation process- we acknowledge the power relations inherent in negotiation and discusses the legal constraints on implementing amnesty.
- Transitional justice and meeting international obligations- we explore the engagement of the International Criminal Court and its potential value in providing positive signals to the international community.
- Transitional justice in consolidating democratic principles- the use of a Special Chamber is identified as a means to consolidate democratic principles through institutional vetting.
- Transitional justice as a mechanism for creating a historic record- we highlight the connection between truth commissions and criminal prosecution, drawing attention to the importance of the selection of the commissioners and the handling of evidence.
- Transitional justice and social cohesion- civil society is identified as a critical player in the current Burmese context and reparations are identified as means of addressing past abuse and contributing to future development.

This Part concludes with a summation of the recommendations in practically realising these roles as evidenced through the discussion. In illustration of how transitional justice has worked in practice, we provide detailed case summaries of how Argentina, Timor-Leste, South Africa, Uganda and Chile have implemented various transitional justice models (in Appendix A).

## Introduction

This section of the report provides a practical discussion of the role, value and possible means of implementation of justice for perpetrators of serious crimes in Burma, as the country pursues a transitional trajectory. Although diverse in analysis and approach, much of the existing literature defines transition in terms of a move to

democratic rule.<sup>247</sup> The discussion focuses on a continuum towards a 'consolidated democracy'.<sup>248</sup>

Some commentators argue that judicial or truth-telling processes should only be undertaken after democracy has been secured and state capacity has been built.<sup>249</sup> However, many states operate for a sustained period in the precarious middle ground between fully-fledged democracy and outright dictatorship<sup>250</sup> and within this space there is still a need for grappling with the realities of a history of previous state repression and human rights violations. In this Part we will explore some processes that engage these issues, adopting a wider and more nuanced understanding of transition.

The prelude to this discussion must be framed by the points from, and to, which Burma is experiencing transition.<sup>251</sup> Such a contextual setting requires a careful analysis of the functioning of the Myanmar government and the proposed structure of constitutional governance that will be pursued should the regime enter into a process of transitional governance.<sup>252</sup>

The current Burmese constitutional system is the initial hurdle to any discussion of a possible pursuit of justice. It is paramount that the proposed means of addressing human rights abuses within Burma is compatible with and possibly included in the agreements relating to the proposed constitutional structure. In light of the Myanmar government's initiation of a referendum scheduled for May 2008 on the draft constitution, such compatibility remains severely problematic. Although a comprehensive discussion of this draft constitution is curtailed, given that it is yet to be released, areas of concern would include the level of effective control that the military would retain over any civilian governing authority and the realistic possibility of using the state judicial apparatus to hold military personnel accountable.

However, this disjunction in constitutional compatibility does not exclude the value of the discussion regarding the role that transitional justice may play both in terms of justice as it is negotiated within elite political discourse and, of great importance, how it is conceived by organised civil society and the general population.

The significant caveat is that any inquiry into a transitional period is initially contingent on a country-specific contextualisation of that study. The reading of this analysis should be coupled with the awareness that such proposals for transitional justice remain delineated by factors such as Burma's state structure and the underlying economic, social, and institutional conditions and legacies.<sup>253</sup> The question that this report directly addresses is, given the complexities of the Burmese

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<sup>247</sup> RG Teitel, *Transitional justice* (Oxford University Press, New York ; Oxford 2000); SP Huntington, *The third wave : democratization in the late twentieth century* (Julian J Rothbaum distinguished lecture series ; 4, University of Oklahoma Press, Norman ; London 1991); DA Crocker, 'Transitional Justice and International Civil Society: Toward a Normative Framework' (1998) 5 (4) *Constellations* 492.

<sup>248</sup> JJ Linz and AC Stepan, *Problems of democratic transition and consolidation : Southern Europe, South America, and post-communist Europe* (Johns Hopkins University Press, Baltimore ; London 1996).

<sup>249</sup> J Snyder and L Vinjamuri, 'Trial and Errors: Principle and pragmatism in strategies of International Justice' (2003) 28 (3) *International Security* 5

<sup>250</sup> T Carothers, 'The End of the Transition Paradigm' (2002) 13 (1) *Journal of Democracy* 5.

<sup>251</sup> DA Crocker, 'Transitional Justice and International Civil Society: Toward a Normative Framework' (1998) 5 (4) *Constellations* 492

<sup>252</sup> The importance of coherence between the processes of constitutionalism and transitional justice was critically illustrated in the Sun City negotiations in South Africa relating to democratic transition in the Democratic Republic of Congo, where discontinuity with the agreed upon constitutional arrangement made the proposed justice mechanisms redundant.

<sup>253</sup> Carothers 17-18

political context and potential transitional period, what are the roles that transitional justice could play? This question connects closely to the discussion at the end of this report of how, in practice, other countries have employed certain transitional justice approaches and to what ends.

This Part details five possible roles that transitional justice may play in a society emerging from a period of severe political repression. Within this framework the role of transitional justice can be understood as a means to:

1. aid a negotiation process
2. demonstrate a willingness to meet international obligations
3. consolidate democratic principles
4. create a historic record
5. grapple with social cohesion and reconciliation.

In terms of the practical options available to Burma, this more generalised discussion will be followed by a number of detailed case studies<sup>254</sup> of how other countries have attempted to realise some of the articulated objectives through certain transitional justice mechanisms, while articulating the political constraints under which these players were operating.

## Transitional Justice in the Negotiating Tool Kit

The realist perspective purports that in the heightened political drama of regime change, the question of justice is dictated exclusively by actions that are in the best interest of the states or internal political parties involved. The decisions are solely contingent on what responses are possible in the given political environment.<sup>255</sup>

Transitional justice is then identified as one of a plethora of tools in a state's or political opposition's negotiating kit. Within this framework, Huntington argues that the method of transitional justice will be dictated by the means through which political power is acceded in a country such as Burma. Broadly speaking, Huntington identifies three possible routes for transitional justice:

1. Transformations: in this instance the authoritarian regime takes the lead and plays the decisive role in the move toward a democratic system. It is suggested that this occurs in instances where, at the start of the transitional processes, the opposition is markedly weaker than the government. It is important to note that particular reference is made to established military regimes in which the government controls the ultimate means of coercion.
2. Replacements: in these cases, democratisation results from the opposition's gaining strength until it is capable of overthrowing the existing regime.
3. Transplacements: these instances are characterised by the combined actions of government and opposition and often take the form of a negotiated regime change.<sup>256</sup>

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<sup>254</sup> Refer to 'Annexure A' attached.

<sup>255</sup> For a detail discussion of this position refer to GJ Bass, *Stay the hand of vengeance : the politics of war crimes tribunals* (Princeton studies in international history and politics, Princeton University Press, Princeton, N.J. ; Oxford 2000). Snyder and Vinjamuri J Elster, *Closing the books : transitional justice in historical perspective* (Cambridge University Press, Cambridge 2004).

<sup>256</sup> SP Huntington, 'The third wave: Democratization in the late twentieth century' in NJ Kritz (ed) *Transitional Justice: How emerging democracies reckon with former regimes* (United States Institute of Peace, Washington 1991)

Such an approach to transitional justice has been applied specifically in the context of Burma. Sarkin suggests that there is a strong likelihood that regime change in Burma would take the form of transition as identified in Huntington's first or third points. Applying Huntington's diagnosis, Sarkin argues that, 'the critical determinant is the level of power retained by the old order.'<sup>257</sup> The acknowledgement of the power relations inherent in negotiations is central to assessing options of transitional justice. The importance of political calculations must be established at the outset; however, they may not be as deterministic or at least not as identifiably determinate at the outset of the transitional process as Huntington and others suggest.

If consolidation of democratisation is the goal, then such an objective may best be served by pursuing politically expedient forms of justice and possibly curtailing prosecution. This perspective brings to the fore the use of amnesty as a political bargaining tool that may aid the process of the junta's relinquishing of effective control of the state.

Scholarly opinion around international criminal law suggests that, 'there is not yet any general obligation for States to refrain from enacting amnesty laws'.<sup>258</sup> However there are strong indices of a shift in state practice away from amnesty. One such indicator is seen in the report by the then Secretary General Kofi Annan in 2004, where in discussion of transitional justice and the rule of law, he explicitly states that the practice of the ad hoc tribunals reflects 'a growing shift in the international community, away from a tolerance for impunity and amnesty and towards the creation of an international rule of law.'<sup>259</sup> This shift is similarly discussed in the case study of Argentina. In addition, a national amnesty does not necessarily prevent the prosecution of such international crimes should the perpetrator be in the custody of another state. Some scholars argue this may differ depending on the context in which such amnesties operate, contrasting blanket amnesties which may well be enacted by the incumbent power prior to stepping down, with amnesties pursued as an aspect of the truth process in the pursuit of reconciliation.<sup>260</sup>

The international validity of a blanket amnesty has been questioned, particularly since the advent of the International Criminal Court (ICC). This is most clearly illustrated in the French courts' interpretation of the principle of complementarity as laid down in the ICC Statute. The position held by the domestic court was that laws of amnesty may not be relied upon for crimes falling under the ICC's jurisdiction. The application of this to Burma, depends on the establishment of ICC jurisdiction and the enactment of complementary national legislation, the details of this are discussed in the subsequent section.<sup>261</sup>

Within the scope of amnesty negotiations there is potential for the implementation of structural limitations. The junta may accept a limited and conditional amnesty rather than a blanket amnesty because of a growing legal consensus that the latter is void and unenforceable. A critique of a model of amnesty, its judicial mechanisms and political context is applied in the case studies of Argentina and South Africa.

Such an approach does allow for the important recognition of the role of political players within the choice of transitional justice mechanisms; a crucial component in the assessment of the methods of justice applied in the key identified case studies.

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<sup>257</sup> J Sarkin, 'Dealing With Past Human Rights Abuses: Promoting Reconciliation in a Future Democratic Burma' (2000) 7 *Legal Issues on Burma Journal*

<sup>258</sup> A Cassese, *International criminal law* (Oxford University Press, Oxford 2003)

<sup>259</sup> K Annan, *The rule of law and transitional justice in conflict and post-conflict societies* (Report of the Secretary-General 2004) 23

<sup>260</sup> Cassese 315

<sup>261</sup> *Ibid*

However, is such an approach morally acceptable<sup>262</sup> or does it, as Teitel suggests, conflate the descriptive account with its normative conclusions?<sup>263</sup> What emerges is a need to discuss transitional justice within a normative framework. One route to initiating this discussion is to explore the effect of increasingly established international norms.

## Transitional Justice and International Legal Obligations

An international legal obligation for a state to prosecute human rights abuses is not indisputably established.<sup>264</sup> As has been suggested from the discussion of the use of amnesty, the options of transitional justice remain within the discretionary power of the nation state. However, there is a growing body of decisions and treaty law in support of criminal prosecution of perpetrators of human rights abuses.<sup>265</sup>

It is important to note that the establishment of the case law and the growing influence of the ICC, to which 105 countries are now party<sup>266</sup>, does not crystallise a universal jurisdiction within international law for prosecution of human rights abuses, including those defined as genocide, crimes against humanity and war crimes.<sup>267</sup> There remains scope for a state's discretionary inclusion of prosecutorial mechanisms both national and international when exploring specific transitional justice mechanisms.

However, in an initial discussion of international prosecutorial mechanisms, the ICC Statute now provides an exemplary articulation of growing consensus on prosecutorial obligations. The engagement of the Court could potentially play a significant role in signalling to the international community the NCUB's willingness to engage fully with international norms of criminal justice and to directly challenge the established culture of impunity in Burma.

This discussion relates to the role of the ICC as a particular transitional justice mechanism that may be selected by the state of Burma. It does not explore the role that the Court may play as an international mechanism for peace and security initiated through a Chapter VII Security Council General Resolution,<sup>268</sup> as this has been covered in the earlier section.

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<sup>262</sup> Crocker suggests that such an approach is morally defective as it fails to give both perpetrators and victims their due refer to DA Crocker, 'Transitional Justice and International Civil Society: Toward a Normative Framework' (1998) 5 (4) *Constellations* 492

<sup>263</sup> Teitel.

<sup>264</sup> Antonio Cassese suggests that 'no general international principle can be found that might be relied upon to indicate that an obligation to prosecute international crimes has crystallized in the international community' refer to Cassese

<sup>265</sup> As has been discussed in earlier sections the extent of a state's obligations to address human rights abuses under customary international law has been addressed through a number of international legal mechanisms, including regional human rights courts in cases such as *Velasquez Rodriguez* (Inter-Amer. Ct. H.R., Ser. C, No. 7, 1990); *Barrios Altos* cases (Inter-Amer. Ct. H.R., Ser. C, No. 75, 2001); *X and Y v The Netherlands*, case No.16/1983/72/110, 25<sup>th</sup> (1985), *McKerr v United Kingdom*, Application No. 28883/95, at para. 133 (2001). These cases afford persuasive authority to the obligation of prosecution, in relation to certain offences, including torture and extrajudicial killing. This is coupled with the influence of a growing body of treaty law, as exemplified in the Geneva Convention. Cassese summarises such developments in the following way: 'there now exists a customary obligation specifically concerning grave breaches: it is the obligation to search for, and bring to trial (or extradite) the alleged perpetrators of grave breaches of the Conventions'

<sup>266</sup> <<http://www.icc-cpi.int/asp/statesparties.html>> accessed 15 April 2008.

<sup>267</sup> W Schabas, *An introduction to the International Criminal Court* (3rd edn, Cambridge University Press, Cambridge 2007). 60-61. It is worth noting that there is significant evidence to suggest that the activities of the junta and associated military action would constitute crimes against humanity.

<sup>268</sup> This means that such involvement would be triggered under Article 13 (a) and 14 of the Rome Statute with the terms for referral of a 'situation' by a State Party being set out in the latter.

The development of the ICC as a realistic mechanism capable of addressing civil conflict, human rights abuses and state repression is evidenced through the ratification of the Statute by a large number of countries that have experienced violent conflict and atrocity in recent years, including Fiji, Sierra Leone, Cambodia, Macedonia, the Democratic Republic of Congo, Bosnia and Herzegovina.<sup>269</sup> Established by an international treaty, the ICC is created and governed by the Rome Statute. As a result the interpretations of the provisions are guided by the Vienna Convention on Treaties and created with the consent of the states that are themselves subject to its jurisdiction.

Given its consensual basis, the jurisdiction of the Court is subject to states' being party to the treaty.<sup>270</sup> Article 12 of the Statute stipulates that the ICC may exercise jurisdiction over crimes committed within the territory of a State Party or by a national of a State Party.<sup>271</sup> Burma is not currently a Party to this Statute. Excluding the possibility of Security Council involvement, in order for it to actively participate as an agent of transitional judicial mechanisms the Burma would have to accept the jurisdiction of the court.

This requires careful consideration of the means by which jurisdiction may be established. Ordinarily under Article 126, temporal jurisdiction can only be established after the entry into force of the Statute with respect of that State. As Burma is not currently a State Party, this does not establish jurisdiction. This highlights the prospective nature of the Court, as it cannot exercise jurisdiction over crimes committed prior to the entry into force of the Statute. However it is possible for Burma, as a non-Party, to make an *ad hoc* declaration of jurisdiction over specific crimes under Article 12 (3) of the Statute, which would by their nature be retroactive. Such a declaration could establish temporal jurisdiction over crimes committed after 1 July 2002. Critically in the current Burmese situation, this would call for accountability of actors involved in the September 2007 crackdown. Such an establishment of jurisdiction was illustrated through the 2004 Ugandan state referral in relation to crimes committed by the rebel group, the Lord's Resistance Army, where temporal jurisdiction was established by the entry into force of the Statute.<sup>272</sup>

In the Burmese instance, given the duration of the military regime, the involvement of the ICC would provide a limited temporal mandate. While a useful mechanism for immediate accountability of the current incumbent, this may ultimately be of limited value regarding the historical account that trials may offer. However in terms of potential *ex ante* involvement of the ICC, accession to the jurisdiction of the Court may potentially be used as a mechanism for broadly grappling with the entrenched culture of impunity in Burma.

In an unexpected trend, the option of state referral of criminal situations to the ICC constituted three of the first four triggers for instituting the jurisdiction of the Court.<sup>273</sup> Interestingly, in all of these instances the referral related to a 'situation' within the state's borders. From an optimistic perspective, the unforeseen trend of these 'self-referrals' may indicate that the ICC is playing a far greater role as a mechanism of transitional justice than initially anticipated by scholars within the area:

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<sup>269</sup> Schabas. 63

<sup>270</sup> This differs substantially from the formation of the ad hoc tribunals of the ICTR and ICTY which were constituted under a Security Council Resolution.

<sup>271</sup> Schabas. 62

<sup>272</sup> This is discussed in more detail in the related case study in 'Annexure A'.

<sup>273</sup> Uganda and the Democratic Republic of Congo were state referrals, followed by the Security Council referral of Darfur and the state referral by Central African Republic.

Before and during the Rome negotiations, no one - neither states that were initially skeptical about the viability of an international criminal court nor states that supported it - assumed that governments would want to *invite* the future court to investigate and prosecute crimes that had occurred in their territory.<sup>274</sup>

This process of self-referral may be a possible option for Burma in conjunction with an *ad hoc* declaration of temporal jurisdiction or ratifying as State Party with a declaration of enforcement from 1 July 2002.

Having followed the route of entering into the Treaty, the ICC may provide Burma with legal resources and a level of external objectivity that may be more difficult to obtain at a domestic judicial level in the immediate wake of a shift in military control.

Another important consideration is the implications that the promotion of state referrals has for the enactment of the principle of complementarity. Complementarity establishes the ICC as subsidiary or complementary to national courts. Cassese suggests that such an approach was used to both encourage domestic prosecution of international crimes and to embed within the supra institution a level of a respect for state sovereignty.<sup>275</sup> A succinct summary of the inclusion of this principle is supplied:

Complementarity is laid down in paragraph 10 of the Preamble as well as in Article 1 of the Statute (whereby the ICC 'shall be complementary to national criminal jurisdictions') and is spelled out in Articles 15, 17, 18 and 19. In short, the Court is barred of exercising its jurisdiction over a crime whenever a national court asserts its jurisdiction over the same crime.<sup>276</sup>

Schabas takes a more robust interpretation, advocating that when read in light of the Preamble of the Statute which declares that 'it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,' there is initially and principally an obligation on State Parties to pursue such prosecution.<sup>277</sup>

This means that even if Burma were to become a Party to the Statute it would still retain judicial autonomy and the right to embark on national prosecutions. However, should such national prosecution prove impossible given internal curtailment of judicial mechanisms, the ICC may provide a means of holding high level perpetrators accountable.

For domestic jurisdiction over the international crimes as envisaged in Article 5 of the ICC, it is possible to follow the route of the United Kingdom, which, in promulgating

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<sup>274</sup> M Arsanjani and M Reisman, 'The Law-in-Action of the International Criminal Court' (2005) 99 *The American Journal of International Law* 385

<sup>275</sup> Cassese 351

<sup>276</sup> *ibid* 352

<sup>277</sup> Schabas. 151 and Cassese. 354 Its is interesting to look at when Article 17 comes into effect; the State has jurisdiction under its national law;

- (i) the case is being duly investigated or prosecuted by its authorities or these authorities have decided, in proper manner, not to prosecute the person concerned;
- (ii) the case is not of sufficient gravity to justify action by the Court.

In addition under subsection c of Article 17 and Article 20, the Court may not prosecute and try a person who has already been convicted of or acquitted for the same crimes, if the trial was fair and proper. This is offset by two provisos under which the Court can exercise its jurisdictions;

- (i) when the State is unable or unwilling genuinely to carry out the investigations or prosecutions or has demonstrated this through its decision not to prosecute;
- (ii) the case is of sufficient gravity to justify the exercise of the Court's jurisdiction.

What constitutes an 'unwillingness' or 'inability' is further expounded in Article 17(2) and (3). Effectively this means that the ICC steps in only when such courts prove unable or unwilling to do justice, and provided the case 'is of sufficient gravity' to justify action by the Court.



the International Criminal Court Act 2001, provided for national jurisdiction over all crimes envisaged in the Court's Statute and committed by British nationals either at home or abroad.<sup>278</sup> The promulgation of new legislation to facilitate national prosecution has been suggested as one of the possible means of transitional justice within Uganda. In addition the case study of the current domestic prosecution in Argentina provides an important practical example of this.

## Transitional Justice in Consolidating Democratic Principles

Given the objectives of NCUB in this instance it is important to note the connection of transitional justice with the establishment of substantive democracy. Many theorists advocate the position that in the heightened level of uncertainty during the transitional period, law becomes an important instrument in communicating a practical and symbolic break with the past and in increasing societies' capacity to transform.<sup>279</sup>

As mentioned, this closely aligns any form of transitional justice with the agreed constitutional framework of the state. The discussions of accountability and institutional reform are critical to decisions over agreed constitutional principles. Institutional reform is central to the process of consolidating democratic principles particularly within policing and judicial institutions.

A major area of accountability for past crimes lies in the design of new institutions and/or reform of existing institutions. Such reform would necessarily be coupled with, and in the case of the judiciary may also facilitate, a process of vetting. In practical terms vetting involves the removal of individuals responsible for corruption or human rights abuses from positions of power (including national police/security forces) and/or preventing these individuals from being promoted or hired. Such a process must be pursued in an open and transparent way if it is to constructively contribute to democratic reform.

In recent discussions of the transitional justice mechanisms available to Kenya<sup>280</sup>, judicial institutional reform has been suggested as the primary step to facilitate domestic criminal prosecution before pursuing other transitional endeavours concerning truth telling.<sup>281</sup> Accountability necessitates the construction of a separate judicial institution that operates alongside or in conjunction with existing judicial structures. Domestically driven and staffed, this new judicial mechanism would be facilitated through external international support in the form of funding, salaries and ancillary personnel. The new institution would be charged with directly investigating and prosecuting human rights abuses, state coercion and instances of corruption.

The effectiveness of such institutional reform depends intrinsically on reconstituting the judiciary and undergoing a process of vetting and careful selection of those judges who would sit in the new chamber. This process would have to be included within the constitutional parameters. The new chamber would then allow for a transparent and accountable means of vetting of other state bodies, including police services. In the Kenyan context this is particularly pertinent, as police officers have been accused by human rights groups and others of direct involvement and

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<sup>278</sup> Cassese

<sup>279</sup> Teitel.; FN Aoláin and C Campbell, 'The Paradox of Transition in Conflicted Democracies' (2005) 27 Human Rights Quarterly 172.

<sup>280</sup> The disputed re-election of incumbent President Kibaki's in late December 2007 sparked political and ethnic violence that continues to flare up across the country and has at the time of writing resulting in over 1 000 deaths and more than 300 000 internally displaced persons.

<[http://www.mg.co.za/articlePage.aspx?articleid=333409&area=/breaking\\_news/breaking\\_news\\_africa](http://www.mg.co.za/articlePage.aspx?articleid=333409&area=/breaking_news/breaking_news_africa) accessed 15 April.

<sup>281</sup> <<http://hrw.org/english/docs/2008/02/15/kenya18082.htm>> accessed 15 April 2008.

complicity in the violence, especially in the Rift Valley region, and the use of excessive force against civilians.<sup>282</sup>

In terms of comparative trends it is important to note that, in calling for mechanisms to challenge impunity within the Democratic Republic of Congo, Human Rights Watch has called for the establishment of a Special Chamber of the Supreme Court as a means of reforming the judiciary and excluding from public office those responsible for human rights abuses and/or corruption.<sup>283</sup> This call follows the similar establishment of the Special Chambers of the Supreme Court of Kosovo, established under Section One of UNMIK<sup>284</sup> Regulation 2002/13. However these processes of specific judicial or prosecutorial mechanisms to combat impunity are not without problems, particularly their possible curtailment by political pressure.<sup>285</sup>

Within Burma, if such a court structure were to be used in fulfilling a role of entrenching democratic principles within state institutions, it would have to be given a currently unprecedented level of autonomy and to deal directly with the criminal liability of military personnel. In the face of the major obstacles to current prosecutions and state institutional vetting, it remains imperative to explore the other roles for transitional justice within a divided society.

### Transitional Justice as a Method of Creating a Historical Record

'Transitions are vivid instances of conscious historical production,'<sup>286</sup> given the often uncertain social, political and religious situation during periods of transition, certain legal forms and practices can play a pivotal role in shaping social memory.<sup>287</sup> Judicial or quasi-judicial processes can be assessed, understood and undertaken as a method of historical record production.

International and national criminal trials operate within the context of an adversarial legal system and often involve competing historical accounts. The criminal trials of Nazi leaders at Nuremberg and the Argentinean trials of the military junta are remembered for 'their role in creating a lasting record of state tyranny.'<sup>288</sup> In her critique of Adolf Eichmann's trial Hannah Arendt writes; 'For it was history that, as far as the prosecution was concerned, stood in the center of the trial.' This was later exemplified in the prosecutor's endeavour to get the 'general picture,' despite the introduction of such evidence falling outside of the scope of the indictment.<sup>289</sup>

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<sup>282</sup> <<http://hrw.org/english/docs/2008/01/13/kenya17731.htm>> accessed 15 April 2008.

<sup>283</sup> Discussions relating to this issue were introduced by the Human Rights Watch senior researcher, Anneke Van Woudenberg at a seminar session of the Oxford Transitional Justice Research Group on 19 February 2008.

<sup>284</sup> United Nations Interim Administrative Mission in Kosovo (UNMIK), pursuant to U.N. Security Council Resolution 1244.

<sup>285</sup> In South Africa, the National Prosecuting Authority was created under Section 179 of the 1996 Constitution (Act No. 108 of 1996) and under its auspices in 2001 the Directorate of Special Operations (DSO/Scorpions) became operational with the mandate to deal with corruption and organised crime. The DSO drew large-scale media attention in relation the high-profile court cases of corruption brought against police National Commissioner Jackie Selebi and the ruling party African National Congress president Jacob Zuma. Such activities, although functioning within a broadly speaking robust judicial structure came under severe political strain culminating in a statement by the Safety and Security Minister Charles Nqakula, that 'The Scorpions will be dissolved and the organized crime unit of the police will be phased out and a new amalgamated unit will be created.' The proposal for this disbandment is still to be brought before parliament before any action is taken.

([http://www.mg.co.za/articlePage.aspx?articleid=332698&area=/breaking\\_news/breaking\\_news\\_national/](http://www.mg.co.za/articlePage.aspx?articleid=332698&area=/breaking_news/breaking_news_national/)) and (<http://www.npa.gov.za>)

<sup>286</sup> Teitel. 69

<sup>287</sup> Ibid. 71

<sup>288</sup> Ibid. 73

<sup>289</sup> H Arendt, *Eichmann in Jerusalem : a report on the banality of evil* (Faber and Faber, London 1963).

Individual criminal trials for human rights abuses purport to mediate between the antinomies of the individual and the collective through constructs in the law of motive and policy. This is derived from exploring individual agency against a background of systemic policy.<sup>290</sup> However, the force of trials in shaping collective memory is dependant on the extent to which it is these records that shape 'the social constructions of knowledge in these periods.'<sup>291</sup> In writing about the use of criminal trials in establishing social history, Hayner argues, 'it is true that the [International Criminal Tribunal for the former Yugoslavia's] decisions have included long descriptions of the historical context of each case, thus helping to officially establish the historical record, but unfortunately these decisions are neither easily accessible nor widely read, especially within Bosnia.'<sup>292</sup>

This failure of dissemination provides a powerful critique against the role of international criminal trials in the formulation of a more nuanced historical account. As Teitel suggests, 'consensus on the history produced is predicated on the truth's dissemination and acceptance in the public sphere'.<sup>293</sup> Further to the restricted access of the competing historical accounts that are canvassed within the confines of the courtroom, the use of criminal trials as a mechanism for historical production is problematic insofar as such processes concern only issues of individual criminal responsibility. It is this distinction that underlies Hayner's argument for the concurrent role of truth commissions and criminal prosecution.

Judicial proceedings focus on individual liability for specific acts, whereas truth commissions through investigations and reporting aim to both identify broad patterns of criminality and highlight specific events.<sup>294</sup> Within this understanding, truth commissions are not construed as a second best option when 'real' justice is not possible, but rather as an individually justifiable endeavour.

The concurrent operation of criminal prosecution and a truth commission allows for the acknowledgement that the sheer magnitude of the wrongs denies the capacity of the criminal justice system to alone provide a holistic historical account. It also lays a basis for the value of truth seeking within Burma even if prosecutorial measures remain politically contested. As illustrated through their initial development in Latin America in instances of bureaucratic murder, truth commissions provide an institutional counterpart, a response that can capture a more holistic understanding of the real nature of a system of large-scale persecution.

Particular arguments have been presented for the value of truth commissions in the wake of repressive regimes such as Burma's current political order. Teitel writes:

In the shifts out of military rule, the pivotal contested truth goes to the very characterization of the violence of prior rule. In the standard military account, the violence perpetrated was 'war', the disappeared were 'guerrillas', and the repression was justified as the 'war against subversion'. It is to these representations that transitional truth reports explicitly respond, substituting successors truth for the account of prior regimes.<sup>295</sup>

While the need for this establishment of a historical report is acute, several practical concerns should be highlighted. The first concerns the selection of personnel constituting the truth commission. The functioning of the process draws on two types

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<sup>290</sup> Teitel. 75

<sup>291</sup> Ibid. 74

<sup>292</sup> PB Hayner, *Unspeakable truths : facing the challenge of truth commissions* (Routledge, New York ; London 2002). 208

<sup>293</sup> Teitel. 83

<sup>294</sup> Hayner. 88

<sup>295</sup> Teitel. 85

of narrators; the populace and a moral elite. Truth commissioners are drawn from the latter and tend to be prominent citizens chosen for their integrity and position as opinion leaders. The moral legitimacy of these members of the community is critical to the functioning of the process.<sup>296</sup>

The victims and perpetrators participating in the process fulfill the role of the second narrator and thus become 'the stewards of the nation's newfound history.' The effectiveness of historical clarification processes depends on the connection between these narrators, as the 'testimony of victims and other witnesses is deftly reconstructed by commissioners into a unified story of state repression.'<sup>297</sup>

The intimacy of this relationship is captured by South African TRC commissioner and author, Pumla Gobodo-Madikizela. In describing the process of hearing and drawing together the narratives, she writes:

The testimonies were hard to take in, and one couldn't help wondering; If the experience was emotionally heavy for us, the listener, how much more so must it be for the people for whom the trauma was embedded in their identity?<sup>298</sup>

She goes on to explore the value of the voice of the second narrator:

[the] narratives brought into focus the painful, daily invasion of traumatic memory in their lives.<sup>299</sup>

On a personal level, she then links this back to her role as both transcriber and consolidator of this newfound history:

The writing distanced me from having to feel the pain of those who came to tell their stories to the commission, as if this would keep my own feelings at bay.<sup>300</sup>

This illustrates the essential relationship between these principal actors in the process.

The practical implications of a failure to establish the legitimacy of the first and second narrators is exemplified by the recent attempted implementation of a truth and reconciliation commission in the Democratic Republic of Congo. The commissioners lacked political, moral and popular support within the community and the whole process gained little credence among its constituents. It has been suggested by practitioners working in the area that this has completely undermined any use that a truth commission may play within the Congolese context.

Furthermore, the case of the failed DRC truth commission illustrates how the success of such processes relies on widespread popular participation, as discussed in the subsequent case study on South Africa. In its theoretical construction, the South African TRC provided an important example of the use of reparations and amnesties to create positive incentives for participation. The TRC's failure to deliver such reparations and the lack of effective prosecution of failed amnesty applicants have called some of these much lauded approaches into question.

The second practical point of contention regarding truth commissions applies specifically to their operation alongside criminal trials. It relates to the differing standards of evidence within the two processes, highlighting the danger of conflicting

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<sup>296</sup> Ibid. 81

<sup>297</sup> Ibid. 82

<sup>298</sup> P Gobodo-Madikizela, *A human being died that night: Forgiving Apartheid's Chief Killer* (Portobello Books, London 2004). 82

<sup>299</sup> Ibid. 86

<sup>300</sup> Ibid. 94

findings of fact. The El Salvador truth commission, in drawing from standards employed in historical or journalistic narratives, applied a standard of 'sufficient evidence,' calling for corroboration of information by at least two sources.<sup>301</sup> This would be considered a lower standard for admission of evidence than applied in a criminal trial.

It should be noted, however, that, within the application of the Rules of Procedure and Evidence, the admission of hearsay evidence before the ad hoc tribunals for Rwanda and the former Yugoslavia has been one of the main features signifying a break with domestic criminal law practice. In application of Rule 89 relating to the admission of evidence, a Trial Chamber has the discretion to admit hearsay evidence, even when it cannot be examined at its source and when it is not corroborated by direct evidence.<sup>302</sup> The rationale for greater scope for admission links back to the role that criminal trials may play in establishing a fuller historical record, acknowledging the need for the contextualisation of the actions of the individual accused.

These aspects of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) decrease the gap between the processes of evidence gathering by courts and truth commissions. However, in terms of fact-finding, it should be noted that in final deliberations the weight or probative value to be afforded to hearsay evidence will usually be less than that afforded to a witness who has testified under oath and been cross-examined.<sup>303</sup> This is supported by the earlier jurisprudence of the ICTY.<sup>304</sup>

However, if the different roles are clearly delineated, with a truth commission fulfilling the role of recording narratives to create an understanding of the perceived history of the systemic abuse and criminal prosecution of a more rigorous contestation of fact in rejection of a culture of impunity then both processes may play a positive role in the establishment of a historic record.

Regarding the role of the ICC, Hayner highlights an area of possible complementarity between truth commissions and criminal prosecutions. Hayner's proposition runs as follows: the Prosecutor is likely to collect information that is never revealed during the case, as it does not pertain to the legal issues associated with the individual criminal liability of the accused. Therefore,

to take advantage of this wealth of information, and to contribute to a broad public understanding of a conflict or a period of authoritarian rule, it could be useful for the office of the prosecutor to release a summary report of its findings after it has concluded all cases pertaining to a particular country or situation.<sup>305</sup>

Such reports could then feed into the wider truth commission process. This suggests that trials and truth commission may work in conjunction in pursuit of a more nuanced historical record. While this is important in terms of the general understanding of the central debates around transitional justice, the current Burmese context remains

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<sup>301</sup> Teitel. 83

<sup>302</sup> *Prosecutor v Rwamakuba*, No. ICTR-98-44C-T, *Judgement* (20 September 2006) at para. 34

<sup>303</sup> *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Oral Motions for Exclusion of Witness XBM's Testimony, for Sanctions Against the Prosecution, and for Exclusion of Evidence Outside the Scope of the Indictment* (20 October 2006) at para. 17

<sup>304</sup> *Prosecutor v Kordic & Cerkez*, No. IT-65-14/2-A, *Judgement* (17 December 2004) at para.787

<sup>305</sup> Hayner. Van Woudenberg and Mattioli make a similar argument in relation to the DRC situation – arguing that the ICC prosecutor could deliver the overflow of evidence from the ICC's prosecutions to domestic criminal courts, although they give the caveat that the ICC would also want to be careful of aiding flawed/corrupt domestic processes. Gr Mattioli and A van Woudenberg, 'Global Catalyst for National Prosecutions? The ICC in the Democratic Republic of Congo' in N Waddell and P Clark (eds) *Courting Conflict? Justice, Peace and the ICC in Africa* (The Royal African Society, London 2008)

poignant and such debates around historical records and truth commissions may require some precursory steps towards social cohesion.

## Transitional Justice and its Role in Social Cohesion

The aforementioned discussions of the possible roles of transitional justice are conceived of and operate predominantly at the state level. As expressed, due to their dependence on quite radical political reformation, which remains severely curtailed in the context of a long established military dictatorship, these considerations may be a long way from practical application. However, this does not dispel the need for a positive engagement with potential transitional justice mechanisms.

During transition, a gap often exists between justice as it is discussed and negotiated around politicians' tables and justice as it is delivered. While it is necessary to establish an informed and realistic basis for the discussion around the table, it is also vital to lay the groundwork for the delivery of justice. A focus on delivery calls for the judicial or quasi-judicial processes pursued in regard to human rights abuses to engage more readily with the people they are designed to serve. In this way transitional justice can be engaged with from a perspective of facilitating social cohesion or reconciliation.

The pursuit of social cohesion may be the first and most realistic role that transitional processes can play. Burma is both an extraordinarily diverse and deeply divided society. It appears that one of the interesting developments may be within the Burmese civil society,<sup>306</sup> particularly within the border regions as the establishment of civil groups amplifies the voice of the varied communities on the ground. Examples of such groups include the Shan Women's Action Network,<sup>307</sup> the Karen Human Rights Group,<sup>308</sup> the Free Burma Rangers, and those operating outside of the country including Assistance Association for Political Prisoners.<sup>309</sup>

Although across the country there are countless organisations, projects and groups that fall under the broad banner of civil society, many of these have an ethnic or religious affiliation that guarantees membership and, to a certain extent, resources. The links between these groups are tenuous and often regionally specific. For example, within the Kachin State, the Kachin Baptist Convention and the Shalom Foundation have played a strong civic role but this does not extend to the rest of the country.

Nevertheless, the growth of support for these grassroots organisations suggests that

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<sup>306</sup> In defining civil society within the Burmese context, David I. Steinberg makes the following comment; 'For purposes of definition in the case of Burma/Myanmar, civil society is best more narrowly defined. Here it is used as composed of those non-ephemeral organizations of individuals banded together for a common purpose or purposes to pursue those interests through group activities and by peaceful means. These are generally non-profit organizations, and may be local or national, advocacy or supportive, religious, cultural, social, professional, educational, or even organizations that, while not for profit, support the business sector, such as chambers of commerce, trade associations, etc' This denotes an understanding of civil society in terms of the ability of citizens to gather together in groups to express their common concerns

<sup>307</sup> This group provides a good example of the many small groups that actively pursuing a human rights agenda inside Burma, but based across the border in Thailand. [www.shanwomen.org](http://www.shanwomen.org)

<sup>308</sup> The Karen Human Rights Group (KHRG) was first formed in December 1992 to help villagers in rural Burma to get their story to the outside world by translating their stories and testimonies into reports for worldwide distribution, accompanied by supporting photos and documentary evidence of the human rights situation. [www.khrq.org](http://www.khrq.org)

<sup>309</sup> <http://www.aappb.org/>

they may provide an initial step in building a process of national discourse. Such discourse lays the critical groundwork for any transitional justice programs in the future. Steps should be taken to initiate and facilitate contact and dialogue among these parties, providing a basis for reconciliation through engagement.

It is important to avoid employing an idealised lens when considering the potential role of civil society in transitional justice. The reality of life on the ground inside Burma suggests that most membership organisations are subject to imposed government limitations. At the national level, every organisation, whether a group of teachers, students, nurses or journalists, has been co-opted by the government to one degree or another. That said, there remain some spaces of 'creative ambiguity' that emerge particularly around religious organisations and in minority areas, although these spaces expand and contract unexpectedly. Nonetheless, engagement with such groups, and more importantly among such groups, still provides a possible initial route towards transitional justice.

Within the Burmese context, there currently appears little possibility of state-driven transitional justice processes. Therefore, it is important to explore arguments for 'bottom-up' transitional justice in which, precisely because of the problems of state legitimacy within communities, the processes of truth telling and building towards social cohesion are driven by opinion leaders within the communities rather than beyond.<sup>310</sup>

An understanding of transitional justice in terms of social cohesion centres around a restorative justice framework which is premised on reaching agreement through dialogue and negotiation, with the ultimate goal of reintegration of participants into a community violated by crime.<sup>311</sup> At a practical level, restorative justice processes aim to assemble all of the parties affected by the crime in order to achieve an agreed resolution of the issues.<sup>312</sup> The focus of restorative justice is the mending of damaged relations among the victim, perpetrator and community. Ideally it aims to engage more holistically with these three agents.<sup>313</sup> This type of engagement can and possibly should be developed and pursued through facets of civil society within the country.

In understanding the role of such a process, it is useful to note that some proponents of restorative justice align the origins of the practice to established indigenous justice practices in New Zealand, Australia, Canada and elsewhere.<sup>314</sup> This interest in local practice is largely mirrored in the current trend within transitional justice scholarship and practice relating to community justice and reconciliation initiatives. As discussed in the case studies of both Rwanda and Uganda, the use of community mechanisms of conflict resolution has gained increasing credence and featured prominently in relation to dealing with past conflicts and human rights abuses.

The initial step toward fighting impunity and challenging the human rights abuse within Burma currently remains the documentation and recording of such events with the view to creating a basis for future investigation, truth telling and possible

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<sup>310</sup> K McEvoy, 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice' (2007) 34 (4) *Journal of Law and Society* 411nd K McEvoy and A Eriksson, 'Restorative justice in transition- Ownership, leadership and 'bottom-up' human rights' in D Sullivan and L Tiftt (eds) *Handbook of restorative justice : a global perspective* (Routledge, Abingdon 2006).

<sup>311</sup> DJ Louw, 'The African concept of *ubuntu* and restorative justice' in D Sullivan and L Tiftt (eds) *Handbook of restorative justice : a global perspective* (Routledge, Abingdon 2006)

<sup>312</sup> A Ashworth, 'Social control and 'anti-social behaviour': the subversion of human rights?'[2004] 120 *Law Quarterly Review* 28

<sup>313</sup> G Johnstone, *Restorative justice : ideas, values, debates* (Willan, Cullompton 2002).

<sup>314</sup> C Cunneen, 'Reviving restorative justice traditions?' in G Johnstone and DW Van Ness (eds) *Handbook of restorative justice* (Willan, Cullompton 2007).

prosecution processes. In terms of the objective of social cohesion, an equivalent step is that of advocating methods of community justice grounded in an endeavour to build bridges between existing community organisations. Such groups will be critical in driving future processes of justice and reconciliation.

These arguments concerning restorative justice suggest that the questions about the objectives of transition should be framed in terms of individual and communal relations. The objectives of the process relate to the complex issues of rebuilding relationships between parties previously in conflict. Such articulated objectives included notions of reconciliation, peace, justice, healing, forgiveness and truth. The focus in this instance is the understanding of these objectives, primarily from the perspective of the population. Such engagement with community-based grassroots transitional justice is seen in the recent work around the Rwanda *Gacaca* courts.<sup>315</sup>

The intimate engagement with the perceptions of the people directly involved in the process raises another of the central questions regarding the available roles for transitional justice; that of determining and providing reparations. While this moves into the realm of speculation, if Burmese civil society groups were to gain increasing influence over economic considerations within Burma, reparations may provide a principal mechanism for state involvement in transitional programmes aimed at facilitating social cohesion.

The restorative justice approach calls both the victim and the perpetrator to the fore of the transitional discussion. Social cohesion or co-existence depends on the direct relationship between these actors. This introduces one of the central roles of reparations: focussing the efforts of redress on providing direct assistance to the victims of the abuse.

The definition of what constitutes reparations is not settled, and to an extent this allows a degree of flexibility in application that may be useful within the Burmese context. In a broad sense reparations may refer to all types of redress, and as such, to include practices such as restitution, compensation and rehabilitation. Frequently, the term is used in a narrower sense to refer to direct economic 'compensation' specifically intended to redress specific harms suffered.

The broader understanding of reparation is useful insofar as it highlights that such recourse is not only individual but also communal. In recent qualitative work undertaken by the United Nations Office of the High Commission for Human Rights regarding popular perceptions of reparations in the Northern Ugandan regions of Acholi, Lango and Iteso, an important trend was a continued popular emphasis on a communal conception of reparations. There was also a trend towards reparations that connected directly with poverty relief and infrastructural development such as commemorative schools, hospitals or vocational training centres.<sup>316</sup>

If a similar correlation between community justice and processes of poverty alleviation were explored within Burma, this may provide an accessible and constructive means of engaging with restorative reparation. The dire socio-economic conditions within Burma suggest strongly that if the discussion of reparations is to play a meaningful role in terms of social cohesion, then it should be aligned with infrastructural development within the country.

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<sup>315</sup> P Clark, *Justice Without Lawyers- The gacaca courts and post-genocide justice and reconciliation in Rwanda* (University of Oxford 2005).

<sup>316</sup> UN Office of the High Commissioner for Human Rights, *Making Peace Our Own- Victims' Perceptions of Accountability, Reconciliation and Transitional Justice in Northern Uganda* (Office of the United Nations High Commissioner for Human Rights, United Nations, 2007)



## **Recommendations**

In summary this Part of the Report connects the five roles identified with a number of recommendations. The decision on which role is preferable to pursue is up to the informed discretion of the NCUB.

### **1. Transitional Justice and Social Cohesion**

The initial recommendation of this report is that the NCUB should attempt to connect with the Burmese civil society, particularly within the border regions as the establishment of these civil groups has amplified the voice of the varied communities on the ground. The growth of support for these grassroots organizations suggests that they may provide an initial step in building a process of national discourse. 'Bottom-up' transitional justice initiatives that are based within existing community structures can be cultivated through making connections and building networks with opinion leaders on the ground.

If, as has been speculated, Burmese civil society groups gain increasing influence over economic considerations within Burma, reparations may provide a principal mechanism for state involvement in transitional programmes aimed at facilitating social cohesion. Such reparations would focus the efforts of redress on providing direct assistance to the victims of the abuse.

The dire socio-economic conditions within Burma suggest strongly that such reparations should be aligned with infrastructural development within the country. Collaboration with the United Nations High Commission for Human Rights who have undertaken similar work in Northern Uganda or the United Nations Development Programme may provide some initial avenues of funding of these grassroots network initiatives.

### **2. Transitional Justice in Creating a Historic Record**

OPBP recommends the use of a truth commission at a latter stage in the transitional process as a means to create a more widely accessible and disseminated historic record. In establishing a truth commission, the moral legitimacy of the members of the community who take on the role of Truth Commissioners is critical to the functioning of the process. In addition a public advocacy campaign is highly recommended as the success of the processes relies on widespread popular participation. Due to current limitations on available resources it is critical that this process is designed around current civil society drawing on the expertise of existing civil society groups.

### **3. Transitional Justice as a Means to Aid a Negotiation Process**

If the principle role of transitional justice for the NCUB is to use it as a tool in the negotiating process should the junta enter into discussions of power sharing, the use of amnesty may provide a useful political bargaining chip. In this instance there is not yet any general obligation for States to refrain from enacting amnesty laws.

However, a growing shift in the international community away from a tolerance for blanket amnesty means that OPBP recommends that should Burma wish to pursue such an option structural limitations such as the conditional amnesty applied in South Africa will be necessary.

### **4. Transitional Justice and Meeting International Obligations**

If the NCUB wishes transitional justice to play its most significant role in signalling a willingness to meet international obligations it is recommended that it engage with the International Criminal Court.

As a non-Party Burma may accede to the jurisdiction of the Court through ratification of the Statute with a declaration of enforcement from 1 July 2002 or an *ad hoc* declaration of temporal jurisdiction. The involvement of the Court could then be triggered through self-referral under Article 13 (a) and 14.

In the Burmese instance, given the duration of the military regime, the involvement of the ICC would provide only a limited temporal mandate. However, critically it would call for accountability of actors involved in the September 2007 crackdown. In terms of potential *ex ante* involvement of the ICC, accession to the jurisdiction of the Court is recommended as a means for broadly grappling with the entrenched culture of impunity in Burma.

### **5. Transitional Justice in Consolidating Democratic Principles**

In regard to realizing the objective of consolidating democratic principles OBBP recommends that judicial institutional reform could facilitate broad institutional vetting. The construction of a separate judicial institution or a Special Chamber that operates alongside or in conjunction with existing judicial structures should be used to then vet and hold accountable other state actors. Domestically driven and staffed, this new judicial mechanism would be facilitated through external international support in the form of funding, salaries and ancillary personnel. The new institution would be charged with directly investigating and prosecuting human rights abuses, state coercion and instances of corruption.

However in order to function effectively it would have to be given a currently unprecedented level of autonomy and to deal directly with the criminal liability of military personnel. This creates a severe constraint on this recommendation

## CONCLUSION

Justice in Burma cannot, of course, come quickly enough for the millions of people who have suffered under the military's repressive rule. There is a widespread expectation, since the protests of September 2007, that it is only a matter of time before a new system of government is put in place. Of course, the precise nature of any new system remains uncertain. Electing a democratic government that gives voice to the disparate aspirations of the people will only be only one part of a longer process. Consideration must also be given to creating a system in which internationally recognised human rights are protected and in which past human rights violations might be dealt with.

It is with these key conclusions and recommendations that this report hopes to make a contribution to a democratic future for the people of Burma.

### **Potential Violations of International Law by the SPDC in Burma**

The SPDC has committed a broad range of violations of international law, which give rise to both individual and state responsibility. Specifically, the SPDC is found to have violated the prohibitions on forced labour, torture and CIDT, forcible displacement of civilians and the use of child soldiers. Further, the SPDC is shown to have violated internationally recognised rights to fair trials and due process, to be protected from arbitrary detention, freedom of expression, association and assembly. It should also be noted that the prohibition on the use of child soldiers has also been violated by opposition groups in Burma.

In anticipation of the forthcoming elections in Burma, repression of civil and political rights necessary for democratic participation such as freedom of expression and freedom to peacefully assemble and associate – and the connected violations of these rights with arbitrary detention of political prisoners – are of particular concern. The clear policy and practice of the military regime in Burma to arrest or impose penalties upon those who exercise these freedoms to express their political opposition to the government has serious implications for the upcoming elections in Burma and for the prospects of a transition to democracy. The international community must be cognisant of these connections and the implications the violations identified in this report.

Consideration of the violations perpetrated by the SPDC in this report has been limited to serious violations of customary international law and civil and political rights. However, the suffering of the Burmese population under the present military regime goes well beyond the rights considered in this report. International organisations indicate that a far broader range of rights are systematically violated by the SPDC. The limited nature of the consideration provided here highlights the need for a systematic assessment of human rights violations in Burma, including consideration of economic, social and cultural rights.

### **International Mechanisms for Accountability and Redress for Violations of International Law Committed in Burma**

The available international mechanisms for accountability and redress that can be engaged by Burmese citizens in relation to the violations identified in Part I are

limited. This is due to Burma's failure to ratify many of the most important human rights treaties and the fact that UN charter bodies and international organisations provide no recourse for individuals. Mechanisms for accountability and redress for violations of international law committed by the SPDC therefore lie within the preserve of states. If the SPDC is to be held accountable for its actions, the international community or a future democratic Burmese government must take action.

States can initiate mechanisms within UN charter bodies and other international organisations. However, Part II demonstrates that these mechanisms have been regularly used in recent years with respect to Burma, but they have had little effect. Ongoing human rights abuse in Burma highlights the ineffectiveness of using soft pressure to encourage the Myanmar government to respect and protect human rights.

However, actions by States – unilateral and multilateral – may yet prove effective. States could initiate multilateral action through the Security Council or the General Assembly to take action against Burma. Alternatively, states might act unilaterally to impose trade sanctions, bans on investment or the freezing of Burmese assets within the state's jurisdiction. Unilateral sanctions which are targeted against the SPDC in protest against ongoing human rights abuse might act as a deterrent and encourage the SPDC to refrain from future violations.

The effectiveness of such actions – whether multilateral or unilateral – will depend on the willingness of key regional players, China in particular, to cooperate. So long as China exercises its veto in Security Council decisions and continues to trade with the SPDC and conduct business in Burma, sanctions will have little effect on the military regime.

However, individuals and NGOs may seek to utilise international mechanisms – albeit indirectly – by placing pressure upon individual states and the international community as a whole – to initiate action against the individuals responsible for violations or against the Burmese state. For example, individuals, the NCUB and NGOs might consider:

- Pressuring states to act, both unilaterally in enforcing strong sanctions and adhering to Geneva Convention obligations, and multilaterally through the Security Council, General Assembly, and Human Rights Council;
- Seeking consultative status within the Human Rights Council on issues relating to Burma;
- Seeking to initiate criminal proceedings in a domestic court via universal jurisdiction;
- Initiating civil proceedings under the Alien Torts Claims Act in the United States, against individuals or companies acting in partnership with the Burmese regime.

### **Options for Transitional Justice**

If Burma successfully makes the transition to democracy, it will be emerging from a period of severe political repression. As identified in Part I of this report, the SPDC has systematically violated the human rights of Burmese citizens throughout its rule. However, violations of international law – such as the use of child soldiers – have

been perpetrated by both government and opposition forces in the conflict in Burma. Transitional justice and consideration of potential transitional justice mechanisms which might be employed by Burma to provide justice for perpetrators of serious crimes, to provide justice to victims and to allow Burmese society to come to terms with this history of abuse, will be important as Burma pursues transition to democracy.

Transitional justice can play several important roles in Burma's transition to democracy, as identified in Part III of this report.

- **Transitional justice as a means to demonstrate commitment to international obligations:** In light of the international violations identified in Part I, pursuing transitional justice – through the ICC or domestic prosecutions – the NCUB or any future democratic government will signal to the international community its willingness to meet international obligations arising from these violations. Pursuing transitional justice mechanisms has potential value in signalling Burma's commitment to observing its international obligations and to the protection of human rights.
- **Transitional justice as a negotiating tool:** Transitional justice may be employed by the NCUB in the negotiation process should the junta enter into discussions of power sharing. The use of amnesty may provide a useful political bargaining chip. While there is not yet any general obligation for States to refrain from enacting amnesty laws, there is a growing international consensus against the use of blanket amnesties. If amnesty is to be used as a negotiating tool, OPBP recommends that Burma pursue conditional amnesties, such as those used in South Africa, that include structural limitations.
- **Transitional justice as a means to consolidate democratic principles:** The implementation of transitional justice mechanisms such as institutional reform and vetting – particularly in the judiciary and state security services – will contribute to the development of democracy and the rule of law in transitional Burma.
- **Transitional justice as a mechanism to create a historic record of abuse:** Creation of a record of the history of abuse in Burma may assist Burmese society in developing a shared and common understanding of Burmese history, which will enable societal healing and cohesion. The use of a truth commission at a latter stage in the transitional process is an important means of creating a widely accessible and disseminated historic record.
- **Transitional justice and a mechanism to encourage social cohesion:** Burma is an extraordinarily diverse and deeply divided society and has suffered a long history of internal conflict between ethnic and political opposition groups. Transitional justice aims to achieve reconciliation, peace, justice, healing, forgiveness and truth, which all contribute to social cohesion, and will be important for a smooth transition to democracy in Burma.

Steps should be taken to initiate and facilitate contact and dialogue among these parties, providing a basis for reconciliation through engagement. Developing a common understanding of this history is integral to encouraging social cohesion and reconciliation. Restorative justice mechanisms, which aim to assemble all parties affected by the crime in order to achieve an agreed resolution, mend damaged relations among the victim, perpetrator and community and reintegrate perpetrators of violence into the communities affected by crime, may play an important role in this context. Reparations for victims – whether restitution, compensation or rehabilitation – should also be considered.

An understanding of available options can best be observed through constructive outlines of systems adopted in other countries experiencing democratic transition. Accordingly, this report provides detailed case summaries of how Argentina, Timor-Leste, South Africa, Uganda and Chile have implemented various transitional justice models in order to aid the NCUB and any future democratic Burmese government on potential options and their respective benefits. OPBP emphasises the need for any transitional justice mechanisms to be appropriately tailored to the socio-political context in Burma and the new constitutional and political structures to be adopted by Burma.

OPBP reiterates that decisions on the precise role for transitional justice in Burma's transition are for the people of Burma, to be determined by the informed discretion of its elected leaders. It is hoped this overview of the potential roles of transitional justice and the experience of transitional democracies elsewhere in the world will assist in informing future decisions relating to transitional justice in Burma.

## APPENDIX A: INSIGHT THROUGH EXPERIENCE: TRANSITIONAL JUSTICE CASE STUDIES

In outlining a number of potential roles that transitional justice may fulfil, it is necessary to emphasise that such roles are not always complementary. They may in fact conflict with one another and at times pursue mutually exclusive paths of implementation. Tensions exist within possible approaches; the advocates of political realism may neglect the increasing dominance of legalist expectations within the international community. Meanwhile, tensions exist within and among the objectives, as concepts of truth and history remain highly contested. It is therefore critical that the NCUB engages with these varying objectives and ranks them in terms of their and the population's priorities, as Burma moves down what is hoped to be a constructive path of transition.

In establishing a particular process of transitional justice, the identification, ranking and critical discussion of the objectives allows for the outlining of not only what is hoped will be achieved, but also what is to be avoided. Subsequently it becomes critical, in a broad sense, to discuss what a practical system of transitional justice would look like.

An understanding of available options can best be observed through constructive outlines of existing systems. The proviso remains that a model of transitional justice is highly context-specific. This report does not attempt to transpose to the Burmese context all of the complexities apparent in each case study. It merely outlines the processes by which transitional justice was pursued. This is done on the premise that models make reductive assumptions and such assumptions often fail.

A judicial system, whether a permanent fixture within the state structure or specifically introduced in response to severe human rights abuses or political repression during a previous regime is a system that can only be understood by analysing how it has worked and continues to work. The following case studies do not represent ideal ways of facilitating transitional justice but rather possible options that may resonate in particular ways in the specific Burmese context.

The case studies included in 'Appendix A' follow a common format in order to provide easily accessible points of reference. As an introductory measure the judicial mechanisms are placed within their broad historic setting, this is then deepened by a more nuanced political contextualisation, followed by a discussion of implementation of the transitional justice mechanisms. The conclusion focuses on recommendations identifying both the problems and virtues of the process.

Each highlights areas that may be of specific interest;

- Argentina illustrates the effect of political evolution and the ongoing nature of transitional justice process as well as illuminating current judicial engagement with amnesty laws.
- Timor-Leste offers a detailed discussion of the critical work of the Commission for Reception, Truth and Reconciliation while offering critical historic context that provides comparative geo-political insight for Burma

- South Africa provides an interesting engagement with the practical implementation of both amnesty and a truth commission.
- Uganda illustrates the current intersect of various actors during the negotiation processes leading up to the implementation of a transitional justice mechanism.
- Liberia addresses a number of the problems of practical implementation of truth commission.
- Chile looks at the ongoing challenge of addressing impunity and highlights the need for continual engagement with post-transitional justice issues.



# Case Study 1: Argentina - The Winding Path of Transitional Justice

- Par Engstrom\* -

## Introduction

This case study provides a brief overview of the ways in which the question of how to deal with past human rights abuses has been dealt with in Argentina since the transition to democratic rule in 1983. It is worth noting that twenty-five years have passed since the country returned to democratic rule, but still a consensus surrounding many issues relating to transitional justice remains elusive. The bulk of this case study traces – in summary form – the evolution of transitional justice over the course of the last twenty-five years before briefly referring to the more recent developments surrounding the prosecution of individuals for past human rights abuses in Argentine courts.

## Background- contextualising the transitional process

The context of transitional justice in Argentina was shaped by the political circumstances of the transition to democratic rule following the collapse of the military regime that had been in power since the coup in 1976. After taking power, the military junta unleashed a repression of the different leftist groups in the country employing clandestine practices of forced disappearances and extra-judicial killings. Estimates of the number of the disappeared at the hands of the military during the period of the 'Dirty War' range between around 9000 and 30,000. The following are the key factors in explaining the fall of the military regime:

- The military defeat to the UK in the Malvinas/Falklands war in 1982;
- The mishandling of the economy by the military government and its civilian allies which was compounded by widespread corruption;
- Gradual shift away from the general acquiescence among many sectors of the population over the alleged necessity for repressive policies to deal with 'subversion'. This was accompanied by a growing momentum behind the domestic human rights movement that received considerable international attention, and that succeeded in attracting progressively forceful international condemnation of the military regime's human rights record.

In sum, the context in which a civilian government came to power following the election in 1983 was characterized by:

- Demoralised and considerably weakened military forces but that nevertheless were in control of the State's coercive apparatus;
- Economic turmoil; and
- Popular demands for accountability for human rights abuses committed under the military regime.

## Mechanisms of Transitional Justice- a chronological discussion

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### *Transitional Justice during the Raúl Alfonsín government (1983-89)*

Key mechanisms of transitional justice adopted:

- The **overturning of the military's auto-amnesty** that was passed shortly before handing over power to the newly elected civilian government;
- The creation of the **National Commission on the Disappeared** (CONADEP) with a mandate to investigate the nature and level of the forced disappearances practiced by the military regime and that issued a report – 'Nunca Más' or 'Never Again' – that documented the human rights violations committed by the military regime.
- Information gathered by the CONADEP, together with the records of various human rights organisations, formed the basis of the **prosecution and conviction of the military leaders** in unprecedented trials held in 1985 by the Federal Court of Appeals of Buenos Aires.<sup>317</sup>
- **Institutional and legislative reform** that was designed to transform draconian criminal legislation enacted by previous governments, elements of the military jurisdiction, and that, moreover, established a human rights secretariat in the Ministry of Interior (now moved to the Ministry of Justice and Human Rights) and was aimed at – *inter alia* – reforming the country's educational system.
- Another important dimension to Alfonsín's efforts to address the human rights legacies of the Dirty War period was his policy to **sign up to international human rights instruments** with the intention to safeguard domestic human rights policies.

The immediate transitional period in Argentina was marked by issues relating to establishing the truth about what had happened to the vast number of disappeared people during the military regime, and to implement measures aimed at holding individuals to account for their role in the human rights violations under the past regime. Against this background, Alfonsín developed a political strategy and policies of how to approach popular demands without jeopardizing the delicate political balance in which Argentina found itself in the wake of the fall of the military regime. With little historic guidance the restored civilian and legal institutions turned to the issue that would dominate the first year of civilian rule: the prosecution of the military.

The military establishment continued, moreover, to wield significant political power over the government. Three military rebellions (in 1987, 1988, and 1990) took place during Alfonsín's term in office. The structural legacy of the military as established through the Process of National Reorganization under the military regime throughout the armed and security forces, intelligence organizations, and the judiciary remained largely intact. Gradually this situation led to a scaling down of the Alfonsín government's policies. In December 1986, Alfonsín announced the legislation known as 'Punto Final' ('Full Stop'), which placed a 60-day limit on penal action against those reported to have participated in human rights violations during the military regime. As a result, only 450 cases against generals, leaders, officers, subofficers, and police were permitted.

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<sup>317</sup> In a highly criticised move Alfonsín initially intervened in cases against particular military officers that had amassed before civilian courts shortly after the fall of the military junta and transferred the cases to the Supreme Council of the Armed Forces (the highest appellate tribunal of the armed forces). Alfonsín argued at the time that the military itself should be given the opportunity to redeem itself and to judge its own people, but after considerable delays and stalling on the part of the military tribunals Alfonsín transferred the jurisdiction back to civilian courts.

Rather than calming the military, Punto Final contributed to increased military resistance and rebellion. In response, Alfonsín pushed the 'Obediencia Debida' ('Due Obedience') law through Congress, gaining its approval in June 1987. Due Obedience made all leaders and officials who had actively participated in the 'anti-subversive struggle', up to the level of lieutenant colonel, exempt from responsibility and excused them from all charges, including kidnapping, torture, and homicide. The exemption was based on defining the actions as having been taken by obeying orders from superiors. Of the 1195 military personnel who had been processed for abuses of human rights, 730 benefited from Punto Final and 379 were exempt from prosecution as a result of the Due Obedience law. Another 43 people were similarly removed from the Supreme Court role.

#### *Transitional Justice at an Impasse: Carlos Menem government (1989-99)*

Key **mechanisms of transitional justice** adopted:

- Menem issued two **general pardons** to military personnel who had been charged; some were awaiting trial, and some had already been convicted. As a result, by 1990, only 10 people had been convicted, and all were pardoned and released. These presidential pardons extended even to the main officers responsible for organizing the military machine of repression. The official justification behind these pardons was to reconcile the different sectors of the 'Argentine family'.
- The issue of economic assistance for victims emerged under Alfonsín and **laws on reparation** were approved starting in the early 1990s under the Menem administration.
- Driven by demands from human rights organizations, in 1992 Menem established the **National Commission on the Right to Identity** (CONADI) which centralized the search for missing children born to mothers in military detention who were then stolen and illegally given away for adoption. Initially military officials were charged individually for the stealing of children. However, in 1999 the courts started investigating a systematic plan by the military regime to steal children and have charged many high-ranking military officials for their participation.
- During the Menem period, a number of military officers came forward with confessions of responsibility for violations committed – confessions that in turn generated intense public pressure for the reopening of human rights trials. A number of prominent human rights organizations called for '**truth trials**' in court, arguing that citizens had the right to know what happened to their relatives. Consequently, under considerable societal pressure, the Courts – having the power to subpoena people suspected of crimes to appear and testify, yet without being able to charge or convict them – established the principle that even though laws may be passed to prevent the prosecutions of those responsible for crimes, judicial investigations may continue. Judicial action was therefore limited to investigation and documentation, and there was no possibility of prosecution or punishment.
- It also should be noted that Menem managed to **neutralise the military** as a political actor in large part by drastically reducing its budget.

Many observers remain highly critical of Menem's record on transitional justice, accusing him of inaction – at best – and for being responsible for impunity at worst. Without venturing into such a debate, overall it is fair to say that the Menem administrations of the 1990s were predominantly characterised by drastic economic reforms imposed on Argentine society and in this context human rights were generally seen as inconvenient distractions.

Apart from the measures mentioned above a few developments during Menem's presidential mandates could be noted however that would prove important under the subsequent government.

- The **constitutional reform** in 1994 that incorporated international human rights treaties into the Argentine Constitution. These international treaties were given legal superiority over national laws and subsequently provided legal activists with a stronger basis for demanding the nullification of the amnesty laws – an issue that achieved significant successes near the end of the 1990s.
- **International human rights mechanisms** proved increasingly helpful in the 1990s. Not only did the Inter-American human rights system continue to offer important support, but prosecutions conducted by non-Argentine courts for abuses that state agents committed in Argentina increased during the 1990s. Countries such as Spain, Italy, Sweden, France, and Germany began demanding the extradition of various military personnel to be tried for the disappearances of their citizens, and also held trials *in absentia* (in Italy and France).

Argentina's Supreme Court has denied the legitimacy of these *in absentia* trials, stating that they violate due process guarantees in the Argentine Constitution, particularly the right to a defense. The Argentine government's response to these cases was somewhat mixed. While it initially appeared to offer some support to the litigants (financial support in the form of airfares etc.), the government was less forthcoming with official support. In 1994, when Italian judges attempted to obtain evidence, Menem passed an executive decree against collaboration with foreign judges. However, as can be seen below, the work done by human rights NGOs in both national and foreign courts was about to converge in important and interesting ways.

#### *Transitional Justice during Néstor Kirchner (2003-07)*

In 2001, the Argentine economy faced an economic meltdown that led to the resignation of President Fernando De la Rúa (Menem's immediate successor) and three subsequent presidents in a matter of two weeks. By December 2001, much of the country was brought to a standstill as Argentina went into default on its foreign debt.

There were continual violent protests and general unrest, and a popular demand for the 'cleansing' of Argentine politics rattled the country's political elite. Hence, Néstor Kirchner was elected in 2003 in the context of one of the most severe economic crises in modern Argentine history that saw the proportion of the population under the poverty line reaching figures well above 50%.

Key **mechanisms of transitional justice** adopted:

- Governmental support to **memory projects** promoted by the traditional human rights movement, which has resulted in the construction of a number of memory sites to commemorate the disappeared.
- Legislative and judicial measures to **overturn the amnesty laws**.
- Renewed **trials** of alleged perpetrators of human rights violations during the military regime.

Expectations of any advances on the transitional justice front were very low following the election of Kirchner in 2003. Yet, Kirchner gave the question of accountability for past human rights abuses a prominent position on his government agenda. In part, this could be explained by the fact that the Kirchner administration was caught by the momentum built up by judicial proceedings in Argentina and before foreign courts and international judicial instances as alluded to above.

In particular, in March 2001 Federal Judge Gabriel Cavallo ruled in case that involved the theft of a child who was abducted with her parents in 1978 that the amnesty laws put in place under Alfonsín were unconstitutional and that international law and treaty obligations take precedence over domestic laws in Argentina. Judge Cavallo's ruling was subsequently upheld by the Federal Court of Appeals for Buenos Aires, and in June 2005 Argentina's Supreme Court declared that the amnesty laws were unconstitutional. In addition, President Kirchner supported the court decisions when he led Congress in August 2003 to vote in favour of nullifying the amnesty laws.

### *The New Phase of Transitional Justice in Argentina: Court Prosecutions*

The Supreme Court ruling opened the legal floodgates and almost three years afterwards around 900 individuals are being processed in the Argentine judicial system for alleged human rights violations committed during the military regime (for updates, see [www.juicios.cels.org.ar](http://www.juicios.cels.org.ar)). A few features of the trials need to be emphasised:

- The relevant figures of the trials give an indication of their **scale and scope**: according to CELS (one of the most prominent Argentine human rights NGO involved in the trials), 898 military and police officials and civilians are implicated in cases before the courts, but only 40% of them are being processed and barely 8 have been convicted as of date. There are 203 cases open in different courts around the country.
- Given the scale and scope of the trials: (1) there are clear **problems of coordination** among the different judicial instances involved; (2) a general **lack of coherence** among the different trials in terms of litigation strategies (i.e. between State prosecutors and legal representatives), charges brought, treatment of evidence etc.; (3) considerable **pressure** being exerted **on the judiciary** to deal with the cases being presented and doing so swiftly hence raising concerns of juridical security and judicial independence; (4) some evidence of **resistance** to the trials – on both ideological and practical grounds – among some sectors of the judiciary; and (5) criticisms directed towards the State for **lack of institutional support**.

### **Recommendations- what can be learnt from the process**

In lieu of a conclusion, how could the Argentine experience inform our understanding of transitional justice? A few inter-related points should be underscored:

- **Time**: transitional justice is quite clearly a moving target. Most obvious perhaps, political circumstances change as power balances shift and consequently actors' incentives. But more subtle changes also occur over time in the normative environment in which actors operate. In other words, both what is possible and desirable is prone to change over time. Hence, although human rights claims have a tendency to persist over time, timing is important, rendering what may seem as a morally desirable sequencing of transitional justice mechanisms difficult to implement. In sum, transitional

justice is – as is the case with most human endeavours – subject to moral luck.

- **Actors:** as could be seen in the Argentine case, many actors are involved in processes of transitional justice. And, yes, civil society activity and activism is important, but the Argentine experience also demonstrates that this is not sufficient. For advances to take place, there also need to be considerable support among political elites, and in particular by the State. For instance, for reasons that are far too complex to venture into here – President Kirchner upon being elected in 2003 adopted the discourse of the traditional human rights movement in Argentina as his own. He opened the doors to prominent human rights activists, gave some advisory roles and even appointed some to political office. These types of strategic alliances never come, however, without political costs as civil society actors are confronted with the demands of political compromise and negotiations.
- **Mechanisms:** the Argentine experience also shows that it is often not a simple matter of choosing between different transitional justice mechanisms. In Argentina, a wide variety of mechanisms have been employed – investigations to establish the truth and identify perpetrators, reparations programmes to the victims of human rights violations (financial and symbolical in terms of memory sites), institutional measures to establish mechanisms to prevent recurrence of violations, and of course prosecutions and trials. To explain why some mechanisms took precedence at certain conjunctures – and understand what may be possible *and* desirable – a range of factors covered under Time and Actors above need to be considered.
- **Visions, effects and outcomes:** what objectives do and should transitional justice mechanisms accomplish and for whom? In terms of visions of transitional justice there are some hard questions that need to be addressed: what is it for, what social and political functions should the particular approach adopted fulfil and what actors are – and should be – the beneficiaries? Does the specific mechanism actually deliver what it is set out to deliver; for example, does it bring the citizenry together (reconciliation) or in fact divide or further polarize the population between the beneficiaries and supporters of the ancien régime and its victims? Do trials more than combat impunity and establish accountability actually satisfy that powerful human instinct – revenge? Moreover, what are the institutional implications of court prosecutions for a judiciary that may already be under considerable institutional strain and political pressure? That is, do the policies on transitional justice strengthen or debilitate public and democratic institutions? These issues must be clarified before embarking on any transitional justice process.

## Case Study 2: Timor-Leste – Occupation and State Repression

- Rosara Joseph\* -

### Introduction

A series of events in Timor-Leste in 1999 was the immediate prompting for the decision to pursue a process of transitional justice. A former Portuguese colony, Timor-Leste was forcibly annexed by Indonesia in 1975 and occupied by the Indonesian military for 24 years. After the fall of General Soeharto's regime, Indonesia accepted a referendum being held in East Timor on the territory's future.

In 1999, the United Nations organised this referendum and 78 percent of the people of Timor-Leste voted for independence. The Indonesian National Army and pro-Indonesian Timorese militias responded with a campaign of violence against the people and infrastructure of Timor-Leste. Over a two-month period in September and October 1999, an estimated 1400 Timorese civilians were killed and more than 200,000 fled or were forced into Indonesian West Timor. The need for a call for justice was clear.

### Background- Contextualising the Process

On 7 December 1975, Indonesia launched an invasion of Timor. This started a war that lasted for 24 years. Indonesia sought to legitimise its annexation of Timor-Leste. The Popular Representative Assembly, composed of hand-picked Timorese, met in May 1976 and approved a petition calling for integration with Indonesia. On the basis of this, the Indonesian Parliament passed a law declaring Timor-Leste to be a province of Indonesia. The UN did not recognise this process as constituting an internationally acceptable act of self-determination by the Timorese people, and the UN Security Council condemned the invasion and called for withdrawal of Indonesia troops in December 1975 and again in April 1976. The UN General Assembly passed a motion supporting self-determination for Timor-Leste every year until 1982, when the matter was referred to the UN Secretary-General.

Other key states did little to challenge Indonesia's occupation of Timor-Leste and seemed to appease Indonesia as a dominant power in the South-East Asia region. This situation was compounded by the lack of understanding or knowledge of what was actually happening in Timor-Leste, as Timor-Leste was a closed territory for the first 13 years of the Indonesian occupation.

The Commission for Reception, Truth and Reconciliation in East Timor (CAVR) Report, characterised the period of occupation in the following manner:

- The 1970s- years of large-scale military operations aimed at destroying the armed Resistance led by Fretilin. Large numbers of the civilian population lived in the interior with the Resistance, and suffered directly from these military operations.
- The end of the 1970s to early 1980s- the armed Resistance was shattered. The civilian population were forced out of the interior, the Indonesian military

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pursued a strategy of separating the civilian population from the armed Resistance by holding tens of thousands of surrendered civilians in detention camps and resettlement villages with disastrous consequences for the people of Timor-Leste, who suffered terrible famine in the late 1970s and early 1980s.

- The 1980s- the Resistance reorganised into a guerrilla force, supported by a growing clandestine movement in towns and villages. The Indonesian military extended its territorial reach to all villages in Timor-Leste, including a smothering intelligence and paramilitary presence made up largely of Timor-Lesteese. This resulted in the severe curtailment of the political, civil, economic, social and cultural right of the Timor-Lesteese civilians.
- Late 1980s- Indonesia claimed to have 'normalised' the province of Timor-Leste, and partially lifted its ban on access to the territory. Increasing attendance at universities in Indonesia saw the clandestine movement increasingly being driven by this new generation.
- 1989- as the Cold War ended and foreigners trickled into the newly opened province of Timor-Leste, the young generation were in the front line of a new Resistance strategy in which demonstrations against the occupation were a core component. The response was swift and ruthless.
- 1991- the infamous Santa Cruz Massacre of young people by the Indonesian security forces took place in Dili. Unlike previous massacres, this one was filmed by a foreign journalist and images of the carnage reached the outside world. This had a profound effect on understanding of the situation in Timor-Leste worldwide, and renewed international efforts to seek a solution to 'the question of Timor-Leste'.

In the 1990s the increased international attention on Timor-Leste and the end of the Cold War led to increasing international pressure on Indonesia. The fall from power in 1998 of President Soeharto prompted a shift. The UN increased its activities and in May 1999, brokered the 5 May Agreements that led to the Popular Consultation of 30 August 1999, a referendum in which Timorese voted for independence. In response, the Indonesian National Army and the pro-Indonesian Timorese militias began a campaign of violence and arson against the people of Timor-Leste in September and October 1999.

On October 25 1999, the United Nations Transitional Administration in Timor-Leste (UNTAET) was created by the United Nations Security Council, with a mandate to provide transitional administration of the territory and prepare it for independence. The initial priority was to tackle the humanitarian emergency caused by the violence of September and October 1999. As the initial demands of that crisis diminished, the UNTAET shifted its focus to the establishment of necessary institutions, including institutions responsible for dealing with past violations and crimes. There were concerns that the violence could re-ignite, particularly as the perpetrators of crimes were enjoying virtually complete impunity. There was also a concern about establishing a culture of respect for human rights and the rule of law.

### **Mechanisms of Transitional Justice**

Four separate institutions were established, by different institutions and at different times, in the transitional justice process:



1. Ad Hoc Human Rights Court, established by the Indonesian government.
2. Serious Crimes Investigation Unit (SCIU), established in 2000 by UNTAET to investigate and prosecute cases in the District Court of Dili.
3. Commission for Reception, Truth and Reconciliation in East Timor (CAVR), established in 2002.
4. Commission of Truth and Friendship, a bilateral agreement between the governments of Indonesia and Timor-Leste (2005)

### *1. Ad Hoc Human Rights Court*

Under international pressure, the Indonesian government established an ad hoc human rights tribunal to try those responsible for the violence and human rights violations committed in 1999. The Court was part of the Indonesian judicial system and was created pursuant to legislation and Presidential decrees. Its procedure had three stages. The first stage was conducted by the Commission of Inquiry into Human Rights Violations in Timor-Leste (KPP HAM), which produced a report as to the alleged crimes, individuals and institutions involved, and evidence. The second stage was conducted by the Attorney-General, who considered the report, and then made further investigations and initiated prosecutions if deemed necessary.

The Attorney-General indicted 18 individuals from the list of around 22 suspects, which included individuals from the military and police who were directly in command of Timor-Leste at the time. The Attorney-General declined to prosecute other high-ranking suspects listed in the KPP HAM report. The third stage was a trial, conducted by the Ad Hoc Human Rights Court. Eighteen defendants were trialled, and all but one were acquitted.

Serious deficiencies in the procedure of the Ad Hoc Human Rights Court were identified by the Commission of Experts appointed by the UN Secretary-General. The Commission concluded that the prosecutions before the Ad Hoc Court were 'manifestly inadequate' and ineffective in delivering justice. A number of problems were identified.

- A lack of commitment by the prosecution
- A lack of expertise and experience in the subject matter
- Deficient investigations
- Inadequate presentation of inculpatory material at trial
- Unsatisfactory selection of prosecution witnesses
- Inadequate support and protection of victim-witnesses
- The courtroom atmosphere and the conduct of the judges did not inspire confidence. For example, accused were allowed to sit next to victims in court; there was insensitive and disrespectful treatment of witnesses; and members of militia groups and soldiers wearing uniforms and carrying weapons were permitted to attend court proceedings in large numbers.
- Scant respect for or conformity to relevant international standards.

The Commission of Experts concluded that the procedure of the Ad Hoc Court was not effective in delivering justice and failed to investigate and prosecute the defendants in a credible manner. It recommended that the accused be re-tried, in accordance with procedure that complied with relevant international standards.

### *2. Serious Crimes Investigation Unit (SCIU)*

The SCIU was established by UNTAET in 2000 to investigate and prosecute cases in the District Court of Dili. Its investigations were concluded in 2004 and its mandate formally terminated in 20 May 2005. At the time of its termination, a number of indictments were still outstanding. The SCIU laid charges against a number of individuals who allegedly committed serious human rights violations in 1999, many of whom remain at large and outside the jurisdiction of Timor-Leste, including the former Indonesian Minister of Defence and Commander of the Indonesian National Military and the former Governor of East Timor.

The Commission of Experts identified a number of problems faced by the SCIU. These included:

- Insufficient resources (money, research facilities, access to internet, etc).
- The Office of the Attorney-General did not function independently from the government of Timor-Leste (for example, the Attorney-General did not pass on selected arrest warrants to Interpol because of political considerations).
- Lack of access to evidence and suspects in Indonesia. There was no extradition agreement between Indonesia and Timor-Leste, which seriously hindered prosecutions, as most of the SCIU suspects were living in Indonesia. The Indonesian government refused to extradite accused. The Commission noted the frustration among the people of Timor-Leste about the inability of judicial process to bring justice to people outside Timor-Leste's jurisdiction.
- There was a lack of a consistent prosecution strategy or focus. For example, the SCIU initially worked on low-level suspects, rather more serious alleged crimes. This improved in 2002, when an executive decision was made to investigate those military and political leaders who were allegedly the architects of the serious crimes.
- There was a lack of political will or support on the part of the Timor-Leste government to take responsibility for the serious crime process. The government was concerned that if they were seen as taking the lead in efforts to bring high-level perpetrators to justice, it would harm the immediate and long-term relationship of Timor-Leste with Indonesia.

### *3. Commission for Reception, Truth and Reconciliation in East Timor (CAVR)*

On 7 March 2000, at a conference of its *Comissao Politica Nacional* (National Political Commission, NPC), the CNRT (*Conselho Nacional da Resistência Timorese*) decided to form a commission for reconciliation. In June 2000 the CRNT Reconciliation Commission conducted a workshop with support from Uppsala University (Sweden) and the Human Rights Unit of UNTAET. Participants included members of political organisations, human rights activists and members of the Catholic church. They discussed the idea of establishing an independent truth and reconciliation commission to investigate past violations and promote reconciliation. The idea was endorsed by the first National Congress of the CRNT in August 2000. The CRNT Congress adopted the following definition of reconciliation:

Reconciliation is a process, which acknowledges past mistakes including regret and forgiveness as a product of a path inherent in the process of achieving justice; it is also a process which must involve the People of Timor-Leste so that the cycle of accusation, denial and counter-accusation can be broken. This process must not be seen only as a conflict resolution or mere political tool which aims at pacification and reintegration of individuals or groups in the context of their acceptance of independence and sovereignty of Timor-Leste but, above all, must be seen as a process where truth must be the outcome.

The Congress unanimously recommended the establishment of a 'Commission for Reception, Truth and Reconciliation' (CAVR). The Congress established a Steering Committee to conduct consultations to determine whether the idea was acceptable to the broader Timorese community. The Steering Committee included representatives from CRNT, Timorese human rights NGOs, women's groups, youth organisations, the Commission for Justice and Peace of the Catholic Church, the Association of ex-Political Prisoners, Falintil, UNTAET and UNCHR. The Committee conducted community consultations throughout Timor-Leste and with Timorese refugees in West Timor and other parts of Indonesia, with the purpose of collecting information as to the attitudes of Timorese people on issues relating to reconciliation. The Human Rights Unit of the UNTAET mission assisted in this process. The consultation process involved visiting all 13 districts, holding public meetings at district, sub-district and village level, and consulting political parties, jurists and human rights organisations and victims' groups. There was overwhelming community support for a truth and reconciliation commission.

Following the consultation, the Steering Committee drafted legislation to establish the commission. UNTAET and the International Center for Transitional Justice (ICTJ) provided technical assistance. The draft legislation was referred to the National Council which represented Timorese political parties, religious communities and civil society. A new committee was formed specifically to deal with the draft regulation and to allow for detailed discussion. After one month of deliberations, the full National Council approved the draft regulation on 13 June 2001 and the Transitional Administrator promulgated the regulation as law on 13 July 2001.

The commission's establishment was supported by political leaders across the spectrum, non-governmental organisations, the Catholic Church, the UN mission, the UN Office of the High Commissioner for Human Rights, other international organisations and donor countries.

The regulation establishing CAVR provided for the Transitional Administrator to appoint between five and seven National Commissioners, at least 30% of whom should be women, on the advice of a Selection Panel which included representatives of the major political parties and civil society groups. The Commission held its first meeting in February 2002. It identified among its principles and mission the following:

- Investigation of human rights violations committed by all parties to the political conflict, including those committed during the internal conflict of 1974-76. This was different from the mandate of the Ad Hoc Human Rights Court and the SCIU, which focussed on human rights violations committed in 1999.
- It accepted that reconciliation could not be achieved without justice and that establishing the truth and accountability for past human rights violations was a necessary step towards achieving justice and restoring the dignity of victims. This put them at odds with the Timor-Leste government, which focussed on reconciliation through acknowledging the 'truth' and seeking friendship with Indonesia, rather than on seeking justice.
- CAVR placed heavy emphasis on community involvement in and support for the work that they did. CAVR took the view that reconciliation, comprehensive truth-seeking and effective victim support could be achieved only if it established a presence across the territory.

CAVR focused on three core areas: truth-seeking, community reconciliation and victim support. It followed the same operational strategy in each of the country's 65

sub-districts, concentrating its resources on one sub-district for three months before moving on to the next one. During the first six weeks in a sub-district, the teams held meetings and consultations with local leaders and communities, to explain the Commission's mandate and its programme of work.

Following this initial period, the Commission and district teams then focused on the three core areas: truth-seeking, community reconciliation procedures and victim support activities. These were organised separately and implemented by different teams. The final event of the three-month sub-district programme was a Victim's Hearing organised by Regional commissioners and the district team, and attended by a National Commissioner, local administrative, traditional and church leaders and police officers.

### *Truth-seeking Programme*

The goal of the truth-seeking programme was to document human rights violations committed by all parties to the political conflicts between April 1974 and October 1999. The procedures used in advance of this goal were systematic statement-taking from individuals in each sub-district, focussed research and public hearings. Individual statements were taken from victims of human rights violations and also from some perpetrators. 7824 statements were collected in total. Individuals gave their statements in narrative form, telling their story in their own words, rather than being guided by a series of questions. This procedure was chosen because it encouraged individuals to give a more detailed account of the violations and surrounding circumstances and because it was less intimidating than an official questioning session. All statements were gathered in the national office, checked, coded and entered into the database

The second aspect of the truth-seeking programme was focused research. The Research Unit undertook research focused on ten identified topics of particular importance, including famine and forced displacement, detention and torture, killings and enforced disappearances, the role of international actors in the self-determination process and massacres. The Unit interviewed perpetrators, victims and individuals who had significant leadership roles in events, and gathered primary and secondary documentation.

The third aspect of the truth-seeking programme was public hearings. Public hearings involved participants from local communities, national leaders, expert witnesses, key international figures and witnesses and victims of human rights violations.

### *Community Reconciliation Programme*

The Commission's work in community reconciliation was based on the premise that reconciliation required a commonly-accepted account of historical events. The 'truth-seeking' activities of the Commission aimed to provide a history of events based on objective information, that could open the way to admission of responsibility, acceptance and forgiveness.

The 'Community Reconciliation Procedures' was the main programme in the Commission's reconciliation work. Its objectives were to offer a legal resolution of 'less serious' crimes committed during the conflict, help perpetrators re-integrate into their communities and rebuild relationships between victims, perpetrators and their communities. 'Less serious crimes' included acts such as burning houses, looting and beatings, but excluded 'serious' crimes, such as murder, rape and torture.

Serious crimes were referred to the SCIU. Less serious crimes were dealt with by a panel, composed of local leaders chaired by a Regional Commissioner, which led a hearing in the victim's community.

The Community Reconciliation Procedure combined principles of arbitration and mediation and aspects of criminal and civil law. The community consultations conducted by the Steering Committee showed that it was important to include other elements also, such as local spiritual practices, confession and forgiveness and participation by local leaders. Victims were also offered the opportunity to address perpetrators directly and perpetrators were obliged to admit and apologise to victims and their communities. After the hearing, the panel would broker an agreement, which would require the perpetrator to complete certain 'acts of reconciliation', including community service and the donation of money, animals or other objects to the victims. The perpetrator received immunity from criminal and civil liability once s/he had completed the required acts.

Assessments conducted by CAVR indicated that the Community Reconciliation Programme made a significant and positive contribution towards reconciliation. The hearings provided an opportunity for the entire community to explore and clarify what had happened in their community during the political conflict and helped to re-integrate perpetrators into their community.

#### *Victim Support*

The Reception and Victim Support Division sought to develop and implement practical ways of supporting victims of human rights violations and increasing others' recognition and respect for them. Some of the procedures employed by the Commission included healing workshops that focussed on the personal needs of victims, supporting victims who participated in the Commission's other programmes, helping victims with urgent needs and providing financial assistance.

#### *4. Commission of Truth and Friendship*

The Commission of Truth and Friendship is a bilateral agreement between the Indonesian and Timor-Leste governments. Its stated purpose is to seek truth and promote friendship, rather than the prosecutorial process.

The Commission of Experts found that some of the provisions in the terms of reference contradict international standards on denial of impunity for serious crimes. It reiterated that the UN does not condone amnesties regarding war crimes, crimes against humanity and genocide. The Commission noted that the government of Timor-Leste believed that if Indonesia acknowledges the truth, this process may itself bring a sense of resolution as Indonesia confronts its past. The Timorese government was therefore focussed on reconciliation, rather than seeking justice. The Commission expressed concern that those who bear the greatest responsibility for serious violations of human rights have not been brought to justice, and advised that justice must be sought, even if it slows down the reconciliation with Indonesia.

#### **Recommendations- what can be learnt from the process**

The results and effectiveness of these institutions has been mixed. In 2005, a Commission of Experts was appointed by the UN Secretary-General to investigate the prosecution of serious human rights violations committed in 1999 (S/2005/458). The Commission assessed the effectiveness of the Indonesian Ad Hoc Human Rights Court and the SCIU. It concluded that the investigations and prosecutions

conducted by the Ad Hoc Human Rights Court were manifestly inadequate. The Commission concluded that the work of the SCIU in general complied with international standards. However, it expressed concern that those who bear the greatest responsibility for serious violations of human rights in Timor-Leste have not been brought to justice.

The Commission observed that the Timor-Leste government has focused on reconciliation and developing a relationship with the Indonesian government, rather than on bringing to justice human rights violators (in particular, those perpetrators who were allegedly the architects of the serious crimes). The Commission of Experts noted the frustration and anger of the people of Timor-Leste that the people responsible for the most serious crimes and violations of human rights had not been brought to justice.

CAVR released a final report to the Timorese President in late 2005, which was made public in January 2006. It showed that CAVR did important work in truth-finding, community reconciliation and the processing of less serious crimes. The Commission of Truth and Friendship focuses on reconciliation and reparation and has been criticised for provisions that contradict international standards on denial of impunity for serious crimes

## Case Study 3: South Africa

- Yvonne Malan\* -

### Introduction

The South African Truth and Reconciliation Commission (TRC) was established in 1995 following the country's transition to democracy in 1994.

The possibility of a truth commission was discussed following the release of Nelson Mandela and the unbanning of the African National Congress (ANC) in 1990. This paved the way to the multiparty negotiations in Kempton Park, which in turn led to the country's first democratic elections in 1994.

### Background- Contextualising the Process

The National Party had ruled the country since 1948. Its apartheid policies included not merely racial segregation, but several other pieces of legislation which were needed to keep it in place. This included pass laws, forced removals, detention without trial and states of emergency. Prominent activists such as Steve Biko died in police custody, while other opponents of the regime such as David Webster and Griffiths Mxenge were assassinated.

The ANC and allied movement had, following years of passive resistance, engaged in an armed struggle since the 1960s. At first government buildings and installations were targeted. By the 1980s, however, civilians (so-called 'soft targets') were increasingly targeted. The late 1980s and early 1990s were also marked by increasing violence between the ANC and Zulu-dominated Inkhata Freedom Party (IFP). In some cases, the apartheid government aided the IFP in attacks on ANC members.

Given the violence committed during the apartheid years, there was a call for the establishment of a commission to examine the past. On the hand there were also calls that those who had sanctioned or committed human rights violations be tried in 'Nuremberg-style' hearings. This would be fraught with difficulty for a number of reasons. First, the ANC had not defeated the NP government and was in no position to demand 'victor's justice'. Second, there was the fear that the security establishment and right-wing groups would take up arms against the new government if they faced the possibility of prosecutions. Third, a high number of criminal trials would put immense strain on the legal system (which was not trusted by all South Africans) and would be financially costly. Fourthly, there was the problem of evidence. Since 1990 several metric tons of documents were destroyed by NP government and the security structures.

In short, the TRC was a compromise between criminal prosecutions and blanket amnesty for all perpetrators.

### Timeline

1990: Unbanning of the ANC and allied groups

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1993:	Drafting of the Interim Constitution, which made provision for amnesty
1994:	First democratic elections; ANC comes to power and Nelson Mandela becomes president
1995:	Legislation establishing the TRC is passed President appoints 17 TRC Commissioners
1996:	TRC begins holding its first hearings
1998:	Final Report handed to President Mandela
2003:	Amnesty Committee completes its work
2005:	10 <sup>th</sup> anniversary of the establishment of the TRC sees renewed calls for reparations
2006:	National Prosecuting Authority drafts guidelines for possible post-TRC prosecutions of perpetrators who did not apply for or did not receive amnesty; public disclosure is not a requirement
2008:	Possibility of new amnesties is raised

### **Mechanisms of Transitional Justice- Implementing Amnesty**

The TRC was founded on an amnesty deal between the NP and ANC – the main parties in the negotiation process. Unlike most of the agreements that shaped the South African constitution and democratic structures, this deal was made behind closed doors and involved only those two parties. The agreement was reached so late in the negotiation process that it had to be added as a ‘postamble’ to the interim constitution.

The general understanding is that NP favoured blanket amnesty, while the ANC wanted prosecutions. Yet there is evidence that ANC leaders – specifically those in the armed wing of the ANC – were not opposed to the notion of blanket amnesty.

The past, however, had to be dealt with in some way. In the early 1990s several conferences were held to discuss the possibility of a truth commission. There were two substantial influences on these debates. First, there was the example of the Latin American truth commission, specifically Chile and Argentina. These commissions were hamstrung by amnesty deals and therefore focused their energy on giving a detailed account of the past. Second, the debate – and later the Commission – was hugely influenced by the rhetoric of reconciliation. It favoured reconciliation (never clearly defined) as the national project.

After the 1994 elections Parliament tasked the Justice Portfolio Committee to draft legislation to establish a truth commission. This was an important difference from previous commissions: it was established by Parliament and not a presidential decree. The Committee received a number of submissions. Two important aspects should be kept in mind. First, the Commission would be built on the foundation of the amnesty deal. The founding reason for the Commission was not reconciliation, despite all the rhetoric, but to find a mechanism to dispense amnesty. The South African version of amnesty was novel in that it was the first time a truth commission would be involved in dispensing amnesty. Second, it was not blanket amnesty. In an important departure from previous amnesty provisions, perpetrators (from both the liberation movements and the previous government) had to apply for amnesty individually for acts of gross human rights violations. They had to meet certain requirements in order to receive amnesty, for example, they had to have committed the act with a political objective, and they had to make a full disclosure of their acts. Those who did receive amnesty would receive immunity from both criminal prosecution and civil suits. Those who failed to meet the amnesty criteria – or who did not apply for amnesty – faced the possibility of prosecution.



The amnesty provision was unsuccessfully challenged by the families of some prominent victims of the apartheid regime. The Constitutional Court upheld amnesty on the grounds that it would further reconciliation, preserve democracy (by preventing a backlash from the former security establishment) and that it was the best mechanism to uncover the truth about the past.

Once the legislation establishing the Commission had been passed by Parliament (the Promotion of National Unity and Reconciliation Act), the Commissioners who would lead the TRC had to be appointed. Commissioners were nominated and interviewed in a public and relatively transparent process. The final decision was made by the President and he did appoint two Commissioners (there were seventeen in total) who did not take part in the public process. The Commissioners were appointed in 1995 and Truth and Reconciliation Commission (TRC) began it holding hearings in 1996.

The TRC was the largest truth commission in the world to date. It had – on paper – far reaching investigative powers. These powers, however, were never used to full effect. This is partly because institutions like the national intelligence agency remained impenetrable. Another factor was that the TRC was hesitant to antagonise any groups (for example, the failure to force former apartheid president PW Botha to testify) or parties (for example, the IFP).

Another important aspect that should be kept in mind is the TRC's rhetoric of reconciliation. With a figure like Desmond Tutu in charge of the Commission, speaking in terms of Christian forgiveness, reconciliation was the notion that dominated the process. For the Commissioners it was a useful tool to try shift the emphasis away from demands for justice (criminal trials, reparations) and truth (thorough investigations, which were beyond the Commission's capabilities). For politicians it became an even more useful way out of deeply complex political problems. In short, the political compromise that was the TRC was increasingly portrayed in terms of moral triumph. This is deeply problematic for a number of reasons, most importantly, that victims were not spoken of in terms of human rights, but in terms of virtues such as forgiveness, sacrifice and reconciliation. This severely limited the TRC's contribution to establishing a culture of human rights and (also due to amnesty) a respect for the rule of law.

The TRC had three sub-committees: the Human Rights Violations Committee (HRVC), the Amnesty Committee (AC) and the Reparations and Rehabilitation Committee (RRC).

### *1. Human Rights Violations Committee*

The HRVC hearings were the most public part of the Commission's work and the one which received the most media attention (most TRC hearings were open to the public and media). The hearings began in April 1996 and lasted approximately six months and were held at several venues all over the country. It was covered live on national radio and daily television news programs included a summary of the day's events. Never before had a truth commission received so much media attention.

The HRVC dominated the early days of the TRC. Roughly 22 000 victims gave statements. 'Victims' were defined as individuals who were victims of gross human rights violations (murder, torture, abduction, severe assault). This meant, in other words, people who were victims of political violence. Although millions of South Africans were victims, for example, of forced removals and detention without trials,

these were not included in the Commission's mandate. Initially the victim statements placed the emphasis on the narrative section. Gradually the focus shifted until the statement form largely became a checklist for factual information (e.g. type of human rights violations, where it was committed etc).

An estimated 10% of those who gave statements were selected to appear before the TRC. According to the TRC, victims were selected to be representative of the area of where the hearing was held as well as different types of human rights violations. Only those who appeared at hearings had their testimony included in the TRC's Final Report, created a hierarchy of victims. Victims who testified did not receive counselling. This led to many being re-traumatised by the hearings. Furthermore, there was little or no follow up communication from the Commission.

The TRC also held a number of so-called institutional hearings. The sectors which were invited to make (voluntary) submissions included business, the judiciary, the medical establishment, the media and faith communities. Secondly, the TRC also held special themed hearings, for example, children/youth, conscripts, prisons, and women.

Another distinct set of hearings was the political party hearings. Following tense behind the scenes talks, political parties agreed to make submissions. The TRC would then draft a number of questions which the parties would answer at a second set of hearings. The ANC made a relatively detailed submissions and admitted responsibility for targeting civilians during the armed struggle. Given the ANC's enormous popularity and majority in Parliament, it could afford to acknowledge such acts. In contrast the NP failed to take responsibility for the past, leading to a great deal of tension with the Commission. Ironically, both ANC and NP leaders would attempt to block parts of the TRC's Final Report. Thabo Mbeki, who succeeded Mandela as ANC and national president, tried to block the Final Report on the grounds that it equated actions of the armed forces of the liberation movements with that of apartheid security establishment. The matter was settled out of court. FW de Klerk, leader of the NP and former president, successfully had sections of the Final Report removed which found him responsible for certain human rights violations.

## *2. Amnesty Committee*

The AC began holding hearings mid-way though 1996 and this committee would continue its work long after the other structures of the TRC had closed its doors. Unlike the TRC, the AC's members were appointed directly by the President and were not subjected to public interviews. Two Commissioners were members of the AC, but the majority were judges and lawyers appointed because the AC was a quasi-legal process.

The AC began holding its hearings in mid-1996. Perpetrators of gross human rights violations – which included both members of the former security establishment as well as liberation forces – had to apply for amnesty individually and meet certain requirements. It was hoped that this 'carrot' would encourage perpetrators to come forward with information. Although the number of amnesty applications (just over 7000) sounds high, the vast majority were rejected on technical grounds, for example, the acts were not human rights violations, incorrect paperwork etc. Of those roughly 1600 who did qualify, the vast majority did receive amnesty.

All applicants were entitled to legal representation, although the quality of representation differed. Those applicants who could afford it or who were members of the apartheid security establishment had access to better legal expertise. A

second problem was that the AC often did not have the means to challenge a perpetrator's version of events (and hence whether they had in fact made a full disclosure): there were often no witnesses left alive, evidence had been destroyed and the TRC's Investigation Unit did not have the means to investigate all cases in great detail.

### **3. Reparations and Rehabilitation Committee**

The RRC did not hold hearings. It did organise a number of workshops about the issue of reparations. The TRC could only make recommendations about reparations – which were largely ignored by the government – and the RRC played a largely symbolic role in the process.

The TRC's Final Report was handed to President Mandela in October 1998. Although the TRC had closed its doors, the AC continued its work until 2003.

### **Basic Structure Of The TRC**

- 17 Commissioners, appointed by the President, following a public nomination and interview process
- Three sub-committees: Human Rights Violations Committee, Amnesty Committee, Rehabilitation and Reparation Committee
- Other important structures: Investigation Unit, Research Department
- Four provincial offices with the headquarters in Cape Town

### **Recommendations – Lessons from the Process**

Although the TRC is widely praised a model for truth commissions, there were some serious flaws. Some of these problems relate to structure of the Commission, others to restraints that were produced by the political context:

1. The limited role of NGOs: NGOs played a limited role in the establishment of the TRC. Once the Commission began its proceedings it was reluctant to interact with NGOs because it did not want to be accused of political bias. Secondly, there were no strong victim lobby groups (Khulumani, the most prominent victim rights group, only gathered momentum after the process had been completed).
2. Lack of reparations: The TRC could only make recommendations about reparations – recommendations which the government largely ignored. More than a decade after the TRC began its work, few payments have been made to victims. Despite continued calls for reparations, the national government has failed to respond.
3. Lack of post-TRC prosecutions: Despite the largely symbolic trial of apartheid-era cabinet minister Adriaan Vlok, perpetrators who did not apply for or who did not receive amnesty have not been prosecuted.
4. Amnesty: The TRC was founded on the amnesty deal. The 'victim-friendly' process claims come much later and was not at the heart of the TRC process. The AC committee functioned according to legal requirements, while the HRVC operated within a framework of reconciliation rhetoric.
5. Selection of witnesses: Of the roughly 22 000 victims who gave statements to the TRC, only 10% were selected to testify before the Commission. This created a hierarchy of victims.
6. Full disclosure: Given the amount of evidence that was destroyed, the lack of witnesses and the TRC's limited capacity to investigate cases, it was not always clear whether perpetrators had indeed made full disclosures. Wilson

(2002) and Pigou (2001) list a number of cases where it is highly doubtful that a full disclosure was made, yet perpetrators receive amnesty

7. Victim/perpetrator binary: Both these concepts were defined in terms of gross human rights violations and political violence. This not only severely narrowed the Commission's scope of investigation, but also led to the notion of beneficiaries (of great importance in the South African context) not being investigated.
8. Problem of rhetoric: The emphasis that the TRC's rhetoric placed on reconciliation prevented a rigorous debate on human rights. Instead the focus was placed on vague and ill-defined values such as forgiveness and reconciliation.
9. The Final Report: As Pigou (2001) and others have argued, few victims were indeed provided with new information. The Final Report was a disjointed account of the past, with no clear structure.

## Case Study 4: Uganda

- Lydiah Bosire\* -

### Introduction

While Uganda had commissions of historical inquiry in both 1974 and 1986,<sup>318</sup> this case study focuses on the most recent negotiation of transitional justice, since 14 July 2006. This process is yet to be implemented: for that reason, this section is a discussion of the transitional justice provisions on paper in the Agreements.

For over two decades, Northern Uganda has been the location of massive human rights abuses. According to research conducted by the UN Office of the High Commissioner for Human Rights in 2007, violence has been extensive and wide-reaching, and has included abduction of children rape, forced marriage, murder, and a range of other atrocities. While much violence has come from the Lord's Resistance Army (LRA), there are also extensive accounts of violence perpetrated by the Ugandan People's Democratic Forces (UPDF).<sup>319</sup>

In December 2003, the Government of Uganda referred the case of the LRA to the International Criminal Court. This opened discussions about accountability and justice. Subsequently, and hastened by changing political and military dynamics in southern Sudan, the LRA and the government started peace talks in Juba, mediated by the Vice President of Southern Sudan, Riek Machar, and overseen by the UN-appointed facilitator, former Mozambican President Joaquim Chissano. An Agreement on Accountability and Reconciliation was signed on 29 June 2007, and an Annexure on February 19, 2008.<sup>320</sup>

### Background – Contextualising the Process

Throughout the peace talks, the transitional justice discussion has centred around two notions: the interest of justice and the interest of victims.<sup>321</sup> The reason for the debate relates to whether the ICC can legitimately regard its legal framework independent of political considerations. In other words, there is a question as to whether the reason to proceed with a prosecution or not ought to be based on evidence, or on potential political outcomes, such as impact on a peace process. This divide, simply termed as 'peace vs justice'<sup>322</sup>, has been central to the discussion of transitional justice in Northern Uganda.

The immediate impact of this debate was an upsurge of discussions about alternatives for justice, the meanings of justice, and the tensions between peace and

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<sup>318</sup> Hayner, Priscilla B. *Unspeakable Truths: Facing the Challenge of Truth Commissions*, New York: Routledge, 2001

<sup>319</sup> Clark

<sup>320</sup> Government of South Sudan, Agreement between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement signed on 29<sup>th</sup> June 2007 ( henceforth Principal Agreement)and Government of South Sudan, ,Annex to the Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement (Annex to June 29 Agreement), Juba, Sudan, June 29, 2007, February 19, 2008 (Henceforth Annexure)

<sup>321</sup> Rome Statute Art 53

<sup>322</sup> G Simpson, 'One among Many: The ICC as a Tool of Justice during Transition' in N Waddell and P Clark (eds) *Courting Conflict? Justice, Peace and the ICC in Africa* (The Royal African Society, London 2008)

justice. Through this debate, various interests became apparent. Those in support of the ICC included advocates for international law and justice, who hailed the referral as a landmark for international justice and accountability, and an end to impunity. A second camp consisted of the advocates of traditional justice, either because it was more compatible with the Acholi sense of justice as a process of restoring social relations, or because it was deemed to be the only route that could deliver both peace and justice.

### *Political Interests Shaping Transitional Justice*

#### *LRA*

Early in the negotiation, the LRA produced a position paper advocating justice in terms of locally grown mechanisms for accountability.<sup>323</sup> The traditional justice, they argued, weighed against ICC justice because it would be more quickly accessible and beneficial to the population affected. 'The end result of ICC prosecution seems to only be prison terms if conviction is obtained. That would certainly justify the justice standard of the international community to prove its case against impunity. But what would be the victims' take on it?'<sup>324</sup> With that, the paper proceeded to recommend traditional mechanisms with appropriate, codified benchmarks, two truth commissions (national level and inter-tribal level), and a compensation fund.

Following a lengthy negotiation process, the two parties signed Agenda Item 3, which is a section of the peace agreement that deals exclusively with accountability and reconciliation. Subsequent to the signing, the parties held public consultations to discuss the contents thereof with the public, and to get views on how to operationalise the commitments. For the LRA, the public consultations included public apologies on behalf of rebel leader Joseph Kony, and dominated by discussions about the undesirability of international trials. During the LRA consultation, it was apparent that the overriding goal was to avoid, as much as possible, any formal accountability for the LRA leadership.

#### *The Government*

Analysis of the interests behind this referral has been mixed. Some scholars and commentators have argued that the referral was inherently political, that the Government, having refused to acknowledge the LRA as an armed opposition with legitimate political claims, has instead criminalised it by making the referral. Another reading is that the referral was part of the awareness of the Ugandan government of the current normative movement against impunity and the potential for mobilising it for the purposes of domestic politics. Whatever the impetus, the current debate on peace and justice has placed great scrutiny the government's own conduct during the war, which has been documented as abusive of human rights. The scrutiny of government conduct appears to be potentially embarrassing, and it has contributed to a very quick acquiescence – very early in the peace process – that national and traditional mechanisms could indeed be used, that the ICC could be pushed to the side if it was necessary.

#### *The ICC*

The ICC issued arrest warrants for the LRA, and was immediately accused of one-sidedness in a conflict that implicates both the government and the LRA. The ICC

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<sup>323</sup> LRA Position Paper, August 2006 (on file)

<sup>324</sup> LRA position paper, 2

has responded to the charge by stating that its warrants were issued with regard to the gravity of LRA crimes. Nonetheless, the ICC is thought to have underestimated the challenge of Northern Uganda, and is said to have picked a case whose complexity was not fully appreciated.

The interests of the ICC will come under close scrutiny in the next phase of the peace talks: given the distrust that has underlined LRA government relationships, the Parties find themselves in a new stalemate with the ICC as the final negotiating chip. The parties have signed everything but the final peace agreement. The LRA demands that arrest warrants be lifted before it can sign the final agreement. On its part, the government states that it can only start the process of lifting the warrants after the final agreement is signed. Analysts suggest that the government sees value in keeping the ICC arrest warrants in place, as a negotiating chip to get the LRA to sign. The LRA, on its part, is demanding the deferral of those warrants in advance of signing, perhaps counting on the normative value of the 'interest of victims.' The pragmatism employed to address this situation will convey important messages to all parties involved, and to future states parties considering referrals to the ICC.

### **Mechanisms of Transitional Justice**

Given this political context, the Agreement and the Annexure have an ambitious agenda for transitional justice. For the purposes of the agreement, 'victims' are defined as persons who 'individually or collectively have adversely suffered harm as a consequence of crimes and human rights violations committed during the conflict.' From the outset, the agreement promotes 'alternative justice' processes through national structures, which can be modified if necessary.

#### *Prosecutions*

The ICC, having been initially the default transitional justice mechanism instigated by the Ugandan government's referral, is sidelined in the current agreement. Instead, the agreement refers to the ICC only to the extent that it recalls the commitment of the parties to the agreement to 'preventing impunity and promoting redress in accordance with the Constitution and international obligations, and recalling, in this connection, the requirements of the Rome Statute of the International Criminal Court (ICC).'<sup>325</sup>

Instead, Article 7 of the Annex affirms the commitment to the establishment of a national prosecutions process, in the form of a special division of the High Court.

Within the Principal Agreement, there are provisions for rights to fair hearing, due process, legal representation of victims before accountability proceedings and impartiality.<sup>326</sup> This unit of the court will operate under the Director of Public Prosecutions and will have a registry, and a capacity for protection and participation of witnesses. According to Article 13, this unit will:

Seek to identify individuals who are alleged to have planned or carried out widespread, systematic, or serious attacks directed against civilians;  
Reflect the broad pattern of serious crimes and violations committed during the conflict;

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<sup>325</sup> Annex to June 29 Agreement, Preamble

<sup>326</sup> Principal Agreement Article 3.3

Give particular attention to crimes and violations against women and children committed during the conflict.<sup>327</sup>

However, a number of challenges arise, the first being that, according to Human Rights Watch, 'neither war crimes nor crimes against humanity are crimes under existing Ugandan domestic law.'<sup>328</sup> This means that domestic law would have to be modified appropriately to be able to address the crimes that the court proposes to address. Further, the Principal Agreement stipulates that 'state actors' (meaning the army) will be subject to existing processes and not these special procedures agreed in the Agreement. This seems to imply different processes, some public and some private, and it has drawn criticism from activists on the ground as detrimental to a project of national reconciliation.

### *Truth-Telling*

Article 4 of the Annex considers truth-telling and historical clarification. While there is no precise timeline in place for such an inquiry, the Annex includes provisions for public hearings, witness protection, and due process. The Truth Commission will also 'make recommendations for the most appropriate modalities for implementing a regime of reparations,'<sup>329</sup> and release a public report. Issues of gender, moral standing of commissioners are also addressed. The challenge in truth telling relates to the different treatment of the UPDF stipulated in Article 4.1 of the Principal Agreement arises, since it implies that the UPDF will undergo different measures from others. The impact of such a differentiation at a symbolic moment of national healing is concerning.

### *Reparations*

In the implementation Annex, it is stipulated that 'The Government shall establish the necessary arrangements for making reparations to victims of the conflict in accordance with the terms of the Principal Agreement.'<sup>330</sup> The implementation Annex proceeds: 'Prior to establishing arrangements for reparations, the Government shall review the financial and institutional requirements for reparations, in order to ensure the adoption of the most effective mechanisms for reparations.'<sup>331</sup>

The challenges for reparations are several: availability of funding, the acceptability of political decisions with regard to definition of victims and beneficiaries, and the implication restitution claims are unresolved. For a population that overwhelmingly feels victimised for having been subjected to forceful encampment, restoration of a sense of citizenship and trust, ostensibly the goal of transitional justice, will be difficult. Nonetheless, the processes seem to point in hopeful directions.

### *Traditional Justice*

A theme on which the Annex makes extensive recommendations is traditional justice. The government intends to consider the mechanisms available in the regions affected by the conflict, 'with a view to identifying the most appropriate roles for such mechanisms.'<sup>332</sup> People have expressed worry that traditional mechanisms may not

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<sup>327</sup> Annex to June 29 Agreement Article 13

<sup>328</sup> Analysis of the Annex to the June 29 Agreement on Accountability and Reconciliation - Human Rights Watch's Fourth Memorandum on Justice Issues and the Juba Talks February 2008

<sup>329</sup> Principle Agreement, Article 4j

<sup>330</sup> Annex to June 29 Agreement, Article 16

<sup>331</sup> Annex to June 29 Agreement, Art. 17,

<sup>332</sup> Annex to June 29 Agreement, Art 20,



be appropriate for dealing with sexual violence crimes, and they may also perpetuate the gender inequalities in the community. Further, their 'traditional-ness' is questionable, given that many such practices have fallen out of use or been greatly disrupted by the upheaval of conflict and life in the IDP camps. Nonetheless, traditional practices may offer a pragmatic solution out of a difficult problem.

### **Recommendations – Lessons from the Process**

There are two readings of this decision in the agreement for Accountability. One is that, by pushing aside the ICC, the national courts are strengthened, an outcome in positive complementarity. On the other hand, most international human rights organisations distrust the Ugandan national process, and consider that, by marginalising the ICC, Uganda is resorting to the flawed national process which may eventually amount to a pardon for serious perpetrators. At this stage it is too early to tell which of these readings will most closely reflect the reality in Uganda. What is hopeful is that the debate on peace and justice has created a broader constituency for accountability. Given the emphasis on public consultations during the Juba process, it is also hoped that whatever transitional justice measures are implemented, they will be more attuned to the needs of victims.

## Case Study 5: Liberia – The Challenges of Implementation

- Chelsea Payne\* -

### Introduction

In 2005, the Republic of Liberia established a truth and reconciliation commission with a mandate to address serious crimes and other gross human rights violations committed against civilians between 1979 and October 2003.

### Background- Contextualising the Process

Following more than fifteen years of conflict, and encompassing two phases of civil war, a *Comprehensive Peace Agreement* between the Government of Liberia, and the rebel groups, Liberians United for Reconciliation and Democracy (LURD) and Movement for Democracy in Liberia (MODEL), was signed on 18 August 2003. The Economic Community of West African States (ECOWAS)-brokered Agreement was a transitional arrangement establishing a two year National Transitional Government of Liberia (NTGL), including representatives from the various armed groups, with a mandate to oversee the peace process, leading up to presidential and legislative elections in October 2005. By that Agreement, the parties also requested the United Nations to deploy a force to Liberia under Chapter VII of the Charter of the United Nations.

### Mechanisms of Transitional Justice

*The Comprehensive Peace Agreement* of 2003 provided for the formation of a truth and reconciliation commission (TRC). Article XIII of the Agreement states:

A Truth and Reconciliation Commission shall be established to provide a forum that will address issues of impunity, as well as an opportunity for both the victims and perpetrators of human rights violations to share their experiences, in order to get a clear picture of the past to facilitate genuine healing and reconciliation.

In the spirit of national reconciliation, the Commission shall deal with the root causes of the crises in Liberia, including human rights violations.

This Commission shall, among other things, recommend measures to be taken for the rehabilitation of victims of human rights violations.

Membership of the Commission shall be drawn from a cross-section of Liberian society. The Parties request that the International Community provide the necessary financial and technical support for the operations of the Commission.

The result of a brokered peace agreement, it is clear that the transitional justice provisions were a negotiated compromise, acceptable to both the Government and rebel factions, in an environment in which many major political figures and a high proportion of the population had committed war crimes and human rights abuses. The provisions are non-committal in respect of prosecution, have a heavy emphasis on rehabilitation and reconciliation, and place considerable responsibility on the international community in respect of financial and technical support.

In January 2004, the newly formed NTGL, led by Chairman Gyude Bryant, appointed eight commissioners for the envisaged truth and reconciliation commission.

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According to an interview with a senior United Nations official, appointments were made without consultation or guidance of any form. A Commission was established without any clear mandate, governing legislation or framework. As a result of concern among civil society, including local and international NGOs and United Nations agencies, the Transitional Justice Working Group, a coalition of Liberian NGOs, was formed and following the application of pressure upon government and the appointed commissioners, proceeded to work with the United Nations Mission in Liberia (UNMIL) and the United Nations Development Programme (UNDP) in undertaking national consultation and drafting appropriate governing legislation for an acceptable truth and reconciliation commission.

A limited number of consultative workshops were hosted by UNMIL Human Rights and Protection Section and the International Center for Transitional Justice (ICTJ) in April 2004, resulting in the drafting of a governing act. Two particular components of the draft legislation caused contention at the internal government level: opposition to the proposed inclusion of international TRC commissioners resulting in limited powers on the part of such commissioners; and a desire on the part of the NTGL appointed commissioners and their supporters in government for them to retain their positions, bearing in mind the former rebels and alleged war criminals included in the transitional government, and indeed in the present democratically elected government. The Act to Establish the Truth and Reconciliation Commission of Liberia was enacted in June 2005.

The Act to Establish the Truth and Reconciliation Commission of Liberia (TRC Act) provides for a commission mandated to address serious crimes and other gross human rights violations committed against civilians, and violations of international humanitarian law between 1979 and October 2003. The TRC is one of the first commissions to have included within its mandate economic crimes, 'such as the exploitation of natural or public resources to perpetuate armed conflicts.'<sup>333</sup> The TRC is to be composed of nine commissioners, including no fewer than four women, appointed upon recommendation of an ECOWAS-coordinated selection panel.<sup>334</sup> The Commission is to gather information and receive evidence from victims and perpetrators in relation to experiences during the identified period, and conduct both public and private hearings. Under the Act, the Commission enjoys full independence, powers of subpoena, and the ability to recommend amnesties in appropriate cases.<sup>335</sup>

Responsibilities of the Commission include the preparation of a comprehensive report of findings, including the making of recommendations to the Head of State with regard to reparations, legal, institutional and other reforms, the need for continuing investigations, and the need for the prosecutions.<sup>336</sup> The work of the Commission is to be undertaken within two years, with the possibility of an extension of time of up to one year, and was to be fully established within three months of the enactment of the law.<sup>337</sup>

### **Recommendations – Lessons from the Process: Problems and Virtues**

The work of the Commission has been a stalled process, evidencing financial, operational and relational difficulties in the early days of its establishment. By April

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<sup>333</sup> TRC Act s4(a).

<sup>334</sup> TRC Act ss7-11.

<sup>335</sup> TRC Act ss26-27.

<sup>336</sup> TRC Act ss44-45.

<sup>337</sup> TRC Act s5.

2007, the Commission had had the funding support of a number of donors withdrawn, major program operations including the public awareness campaign and statement taking suspended, and salary cuts of commission staff effected. An EU-commissioned *Institutional Assessment Report* highlighted difficulties including disagreement with donors over the original work plan, considered unrealistic and deficient both in substance and budget, a vacuum in the monitoring and evaluation of TRC activities and staff performance, lack of financial accountability, and mismanaged professional relationships both internally and with donor partners. Additional problems in the early days of the Commission's operation included:

- The Commission was slow to act upon its responsibilities in respect of the protection of witnesses, victims and perpetrators, for a long time lacking a professional security and protection management plan, and collecting many statements before draft rules of procedure were agreed, and policies regarding security, psychological support and protection of women and children were formulated. This evidenced poor organisation and a lack of consideration of procedural fairness.
- There was arguably inadequate consultation in the establishment of the Commission, and subsequent shortcomings in local awareness efforts.
- Although required by its governing act to establish a national secretariat to 'render technical, professional, administrative and clerical assistance', until April 2007, no functioning secretariat was in place, with Commissioners themselves assuming administrative roles.
- The Commission claimed to have been let down by a lack of international support. There is, however, some dispute over the connection between the souring of relations with donors, and alleged mismanagement and inactivity of the Commission at the beginning of its work. The government and four donor institutions have supported the establishment of the TRC: the Government of Liberia is the principal funder, in addition to the European Commission, the Open Society Initiative for West Africa, UNDP and the ICTJ.

Despite early problems in its establishment and operation, the Commission in 2008 outlined a full schedule of public hearings, further statement taking, and public awareness efforts. Of particular note:

- The Commission has launched a diaspora program in United States and surrounding states, working in conjunction with local human rights organisations. This is one of the first TRCs to do so at a formal institutional level.
- The Commission has expressed high hopes in respect of its reconciliatory goals, which it argues are a great benefit to a truth and reconciliation process, as opposed to prosecutorial approaches.

A significant long-term challenge for the Commission will be the measurable outcome of its work. The TRC is empowered to make a wide range of recommendations including prosecution, amnesty, reparations, and legal and governmental reform measures. The potential difficulty for the Commission will be the financial and political restraints placed upon recommendations to government and the need for significant financial and political support from the international community.<sup>338</sup>

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<sup>338</sup> The research upon which this summary note is primarily based was undertaken in Liberia in April 2007

## Case Study 6: Chile

- Gustavo Barros de Carvalho\* -

### Introduction

Between September 1973 to March 1990, Chile suffered one of the bloodiest military dictatorships in Latin America. With the transition to democracy, the challenge of understanding of what happened during the years of the Augusto's Pinochet regime became central in Chilean politics. In that regard, Chile was one of the first countries to adopt a truth commission that would serve as a model to many other commissions around the world.

### Background – Contextualising the Process

In order to understand the establishment of mechanisms of transitional justice in Chile, it is important to understand how the military regime worked and how the transition was performed. The military regime in Chile had a significant support from important sectors of the population.<sup>339</sup> In that context, the same sectors of the population that supported the government increasingly created political pressure in the 1980s for genuine transition to be enacted, culminating in the 1988 referendum that would decide whether Pinochet would continue in government for another eight years. Pinochet's defeat in the referendum created the momentum for transition. In this new democratic environment, Pinochet guaranteed his presence as the commander of the Army for another eight years (until March 1998), after which he was granted the position of senator-for-life, as afforded to former presidents under the Chilean constitution.

Politically, a clear cleavage in Chilean society emerged between those demanding justice and those claiming that the country needed to simply 'move on.' On the one side, sectors of the population that supported the return to democracy and those linked to the victims of the human rights violations advocated strongly for a process of understanding the truth and a process of judging the perpetrators. On the other side, the supporters of the military regime, including the armed forces, stated that this process could generate more conflicts in the Chilean society.<sup>340</sup> Critically, the transition to democracy gave only a partial loss to the military which continued to have important and powerful presence in the state framework.

### Mechanisms of Transitional Justice

Acknowledging the challenges in instituting a judicial process to judge the perpetrators, especially due to the 1978 amnesty law which gave immunity to members of the armed forces for the crimes they had committed, the new Chilean government established in 1990 the National Commission of Truth and Reconciliation, also known as Commission Rettig. The commission, sponsored by the government, aimed to achieve 'justice as far as possible.'

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339 Rial, Juan, La clausura del pasado: los conflictos del cono sur de America. *Revue de Civilisation Contemporaine de l'Université de Bretagne Occidentale*, available at: [www.univ-brest.fr/amnis](http://www.univ-brest.fr/amnis) 11

340 Azocar, Patricio (2007) La Comisión chilena sobre verdad y reconciliación. *Ius et Praxis*, vol.13, no.1 Available at: [http://www.scielo.cl/scielo.php?script=sci\\_arttext&pid=S0718-00122007000100014&lng=es&nrm=iso](http://www.scielo.cl/scielo.php?script=sci_arttext&pid=S0718-00122007000100014&lng=es&nrm=iso). Accessed on March 1 2008

The commission was mandated to do the main following activities:

- disclose the truth and provide a complete framework regarding the human rights violations, their circumstances and antecedents;
- recommend measures of reparation to the victims and their families

With this plan approved by parliament, the commission called the families of possible victims to present their cases about past crimes. In doing so, the commission received strong support from Chilean civil society organisations. Around 3500 cases were made and in February 1991 the detailed final report was delivered. This report not only presented a detailed framework on past abuses but also recommended reparations to the victims and measures that would ensure that these abuses would not occur again.<sup>341</sup> Lienbenberg affirms that the reports did not name the perpetrators, causing great discontent among human rights activists and Chilean civil society.<sup>342</sup>

### **Recommendations – Lessons from the Process: Problems and Virtues**

The Chilean case is seen by many as partially successful. On the one hand, it incorporated an important mechanism to elucidate what happened in Chile under Pinochet, particularly the nature of ‘disappearances’ and murder for which the state and armed resistance groups were principally responsible. It proved to be a very valuable tool not only to the families of the victims but also to the overall Chilean population. It brought important examples to other truth commissions that were created, particularly in terms of disclosing the truth and in reparation perspectives.

The process also highlighted the importance of symbolic reparation to the victims, for example when Chilean President Patricio Aylwin formally apologised to the victims and their families on behalf of the State and the Army and when a monument was erected in Santiago Central Cemetery, listing the names of all those who had disappeared or been killed. While having a strong focus on reconciliation, these moments suggested a shared and comprehensive vision of the past and future, mutual healing and restoration, and perhaps even mutual forgiveness.<sup>343</sup>

On the other hand, many challenges were evident in the TRC in Chile, principally that the political atmosphere in the country did not allow the punishment of many perpetrators of violence. The TRC had a limited scope to investigate specific human rights violations, and did not include survivors of imprisonment and torture. Avruch and Vejarano state that the Chilean case underscores a paradigmatic challenge of transitional justice: how to obtain justice given the constraints of amnesty laws and presidential pardons.<sup>344</sup>

In addition, the Chilean case shows many of the constraints of democratic transition in Latin America and expresses the difficulties of delivering justice that much of the population deems necessary, in terms of creating an effective transitional justice

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341 Avruch, Kevin and Vejarano, Beatriz (2002), *Truth and Reconciliation Commissions: A Review Essay and Annotated Bibliography*, OJPCR: The Online Journal of Peace and Conflict Resolution, 4.2, 71

342Lienbenberg, Ian (1996) *The Impact of the TRC on the Military: Pressures, Problems and Imponderables*, ISS Occasional Paper No. 13. Available at [www.iss.co.za](http://www.iss.co.za), accessed on 5 March 2008.

343 Crocker, David, Truth Commissions, Transitional Justice and Civil Society. Online Document available at <http://www.puaf.umd.edu/faculty/crocker/RotbergPaper.PDF> accessed on 5 March 2008

344 Avruch, Kevin and Vejarano, Beatriz (2002), op. Cit , p. 42

process.<sup>345</sup> While there was an attempt in Chile to respond to popular demands for the truth and justice, the country had to confront the political reality that the military retained immense power in the new government, preventing the widespread prosecution of cases of past human rights abuses.

Chile continues to undergo a process of political and societal evolution, highlighted by complex post-Truth Commission developments. In 1997, Pinochet's arrest in London increased debate both domestically and internationally regarding the challenges of transitional justice in Chile. Since then, the number of human rights cases in Chilean courts has increased considerably. Many of the cases presented by the truth commission are being used as tools to prosecute perpetrators, aided greatly by the diminished role of the military within the country since 2003.

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345 Lienbenberg, Ian (1996) *op. cit*