



MYANMAR

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International Center for Transitional Justice (ICTJ)

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Introduction

1. In 2008 and 2009, the International Center for Transitional Justice (ICTJ) conducted extensive research on impunity in Myanmar (previously known as Burma).¹ This submission is based largely on that research, as well as developments in the last six months. It addresses the record of impunity in Myanmar and analyzes the 2008 constitution as it relates to Myanmar's treaty obligations under the Convention on the Prevention and Punishment of the Crime of Genocide; Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Convention on the Rights of the Child (CRC); and ILO Convention 29: Forced Labour Convention, 1930 (the Forced Labour Convention). The new constitution, rather than being a true catalyst for lasting democratic change, perpetuates the existing culture of impunity through a blanket amnesty for serious human rights crimes committed by junta members. The constitution also aids impunity by denying victims the right to an effective remedy for such violations by giving the military disproportionate influence in the government and preventing crimes against civilians from being tried in civilian courts.

Historical Context

2. Following nationwide protests in 1988 against the regime that had ruled Myanmar since the 1962 coup d'état, another coup marked the commencement of the current regime (initially called the State Law and Order Restoration Council, or SLORC, and now called the State Peace and Development Council, or SPDC). The new regime promised to usher in democracy, and elections were held in 1990. However, the military rulers refused to allow the winning National League for Democracy party (NLD) to form a new government. Instead, they convened a national convention composed of handpicked delegates to draft a new constitution, claiming this would pave the way for a transition to democracy. After many delays, the convention completed a draft constitution on September 3, 2007.

3. During a popular uprising in 2007, former political prisoners (known as the '88 Generation Students group) and Buddhist monks led mass demonstrations calling for

¹ For more detail, see *Impunity Prolonged*, September 2009, available at www.ictj.org/static/Asia/Burma/ICTJ_MMR_Impunity2008Constitution_pb2009.pdf.

economic reform and national reconciliation. The military responded with ferocious force, arresting the protest leaders, raiding monasteries, and firing on crowds of peaceful protesters. Dozens of people were killed. Hundreds of protesters were detained and reportedly tortured, and some were sentenced to long prison terms.

4. In response to international criticism over the crackdown, the SPDC announced a national referendum on the new constitution for May 10, 2008, with elections to follow in 2010. One week before the referendum, Cyclone Nargis devastated Myanmar, and more than 130,000 people either died or were missing. The military rulers insisted on proceeding with the referendum despite the inaccessibility of some communities due to mass destruction and population displacement. They claimed that more than 92 percent of eligible voters had approved the new constitution. To date, the promised elections have not been held.²

Substantive Concerns

5. Serious human rights violations have occurred throughout Myanmar during the current regime's rule, but are most severe in rural ethnic areas. They are directly related to the military's attacks on the people it sees as supporting armed opposition. Because Burmese authorities handle cases of sexual violence—including rape—in an ad hoc way, official numbers are unavailable. Burmese women's organizations have documented 875 cases of rape from 1988 to 2006; they believe this is a mere fraction of the total number because of the difficulty in accessing communities under SPDC control and the fear and stigma that keeps women and girls from reporting rape. The scale of reported violations and the associated tolerance and impunity for them indicates the SPDC's acceptance of sexual violence as a legitimate part of the strategy to intimidate people in areas of armed conflict or potential resistance and to punish communities for appearing to support the government's opposition.³ These policies directly breach articles 2 and 5 of CEDAW.

6. Forced labor and child soldiering are also associated with areas of continuing armed conflict. The military has grown from 180,000 soldiers in 1988 to an estimated 300,000 in 2007. This expansion has forced commanders to rely on local communities to supply labor for building infrastructure and for portering. The pressure to fill recruitment quotas has led to a situation in which the Myanmar regime's armed forces constitute the only army in Asia to continue recruiting child soldiers, numbering in the thousands, if not tens of thousands.⁴ The number of cases of forced labor is likely to be at least that high. These practices are in contravention of Myanmar's obligations under the Forced Labor Convention and under Article 38 of CRC. In addition, customary international law has criminalized the recruitment and use of child soldiers at least since 1996.⁵

7. Impunity is reinforced by attacking those who complain, rendering meaningless the

² As of this writing, the government had not announced any date for the elections.

³ See *Crimes in Burma*, The International Human Rights Clinic at Harvard Law School, May 2009, available at www.law.harvard.edu/programs/hrp/documents/Crimes-in-Burma.pdf.

⁴ See "Questions and Answers," The Coalition to Stop the Use of Child Soldiers, available at www.child-soldiers.org/childsoldiers/questions-and-answers; and Briefing note to the UN Security Council Working Group on Children and Armed Conflict on the situation of Child Soldiers in Myanmar, Coalition to Stop the Use of Child Soldiers, June 23, 2009, available at www.child-soldiers.org/document/get?id=1575.

⁵ *Prosecutor v. Samuel Hinga Norman*, Case No. SCSL-2003-14-Ar72 (Appeals Chamber) "Decision On Preliminary Motion Based On Lack Of Jurisdiction (Child Recruitment)," May 31, 2004, at paras. 50 and 53.

right of victims of these human rights violations to an effective remedy.⁶ The authorities maintain a culture of impunity not only by restricting access to complaints mechanisms, but also by harassing and taking legal action against those who bring complaints against the military. Burmese authorities have imprisoned rape victims who have made formal complaints or who have reported their stories to the press. The regime reinforces the perpetrators' sense of impunity by using the press and other propaganda techniques to smear victims based on their political or ethnic affiliations. Attacks in the press are also used on people or organizations involved in the forced labor complaints mechanisms of the International Labor Organization (ILO), which has developed a detailed record of this tactic.

8. Pursuant to the Supplementary Understanding between the Government of the Union of Myanmar and the International Labor Office (2007), Burmese citizens have the right to lodge complaints with the local ILO liaison officer about the use of forced labor. This complaints mechanism is designed to give victims of forced labor an opportunity to seek redress and/or remedies from government authorities. However, it is insufficient to deal with the vast number of abuses taking place. Since it came into force in 2007, 331 complaints of forced labor have been filed, and 286 met ILO requirements.⁷ At least 39 complaints involved child soldiering.

9. The 2008 constitution reinforces the prevailing culture of impunity. The final article in the constitution's chapter on transitory provisions purports to exempt from any legal liability the conduct of the SPDC and its predecessor. Article 445 in Chapter 14 (hereinafter "the immunity clause") states, "All policy guidelines, laws, rules, regulations, notifications and declarations of the State Law and Order Restoration Council and the State Peace and Development Council or actions, rights and responsibilities of the State Law and Order Restoration Council and the State Peace and Development Council shall devolve on the Republic of the Union of Myanmar. No proceeding shall be instituted against the said Councils or any member thereof or any member of the Government, in respect to any act done in the execution of their respective duties."⁸ On its face, this clause amounts to an amnesty for acts that may constitute serious human rights crimes. The language of the immunity clause is ambiguous, both in terms of whether it will have retroactive or proactive application, and the scope of acts that can legitimately be covered.

10. As a party to the Genocide Convention and the Geneva Conventions, Myanmar is required to punish perpetrators of genocide and grave breaches of the Geneva Conventions in national courts or tribunals, regardless of the perpetrators' political affiliation or military status. Furthermore, recent developments in customary international law indicate that national laws cannot provide amnesties for crimes against humanity or

⁶ See UDHR (art. 8); CERD (art. 6); CRC (art. 39); ILO Forced Labor Convention (art.14); the 2005 UN Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; General Assembly Resolution 60/147, Dec. 16, 2005, annex, paras.19-23; and UN Basic Principles on the Rights to a Remedy and Reparation.

⁷ Report of the Special sitting to examine developments concerning the question of the observance by the Government of Myanmar of the Forced Labor Convention, 1930 (No. 29), ILO, 99th Session, Geneva, June 2010, Committee on the Application of Standards.

⁸ Constitution of the Republic of the Union of Myanmar, May 29, 2008 (the 2008 Constitution), found at http://burmadigest.info/wp-content/uploads/2008/11/myanmar_constitution-2008-en.pdf (last accessed on June 27, 2010).

other serious violations of international humanitarian law.⁹ At a minimum, there is an obligation to investigate gross human rights violations, hold those most responsible legally accountable, and provide victims with an effective remedy.

11. Under the 2008 constitution, which will come into force following the expected elections in 2010, the structure of the judiciary consists of ordinary courts, the courts-martial (military courts), and a constitutional tribunal. While the president appoints judges, with the approval of the legislature, the constitution asserts the independence of the judiciary by requiring that all judges be free from political affiliation. Yet this constitutional guarantee is undermined in relation to acts of the military because the constitution also provides that all cases against the military must be adjudicated in courts-martial, including major human rights violations such as rape, forced labor, and recruiting child soldiers.¹⁰ Given the history of impunity outlined above and the lack of trust in the military, it is not clear that the military courts can be trusted to provide justice for human rights violations. In addition, recent developments in international law indicate that military courts should not handle such crimes.¹¹

12. The constitution's role in perpetuating a culture of impunity is confirmed by the articles that give the military veto power over any prospective amendments.¹² Ratifying any constitutional amendment requires a vote of more than 75 percent in parliament, effectively giving the military a veto over any proposed amendment since it controls 25 percent of the seats. The quota, combined with the likelihood that military representatives will be bound to comply with orders from their superiors and that pro-military factions in other parties will also win seats in parliament, renders the Burmese government virtually unchallengeable. The military's entrenched power calls into question the regime's rhetoric of supporting a true democratic transition.

Achievements

13. The ruling regime in Myanmar has recognized that members of the military have committed some serious crimes and that the perpetrators deserve punishment; for example, the military has provided some monetary compensation to victims of sexual violence and their families. Although these payments are not consistent, sufficient, or the most appropriate means of redress, they are steps in the right direction and suggest that the military may recognize that sexual violence is wrong and should be redressed.

14. Similarly, creating a complaints mechanism for forced labor also recognizes that this practice, as well as child soldiering, is wrong.

15. The constitutional tribunal has sole authority to interpret the constitution. While it is impossible to know how the tribunal might address immunity issues, the fact that it will be made up of nine members—three chosen by the president and three chosen by both houses in the legislature—who cannot belong to a political party suggests at least a move

⁹ See ICRC rules 158 and 159 in *Customary International Humanitarian Law: Vol. I: Rules* (Cambridge University Press, 2005); "The Report of the Independent Expert to update the Set of Principles to Combat Impunity," Feb. 18, 2005, UN Doc E/CN.4/2005/102; "The Rule-of-law Tools for Post-conflict States: Amnesties," 2009, UN Doc HR/PUB/09/1.

¹⁰ See articles 20(b) and 319 of the 2008 Constitution.

¹¹ Administration Of Justice, Rule Of Law And Democracy: Issue of the administration of justice through military tribunals, June 14, 2004, UN Doc E/CN.4/Sub.2/2004/7, Principle 4 at paras. 17-a9.

¹² See articles 433-436 of the 2008 Constitution.

in the right direction.

16. Such progress is inconsistent, however, and remains grossly inadequate considering the gravity and scope of the human rights violations.

Recommendations

17. The international community should:

- establish an independent Commission of Inquiry into serious human rights violations in Myanmar, including sexual violence, forced labor, and the recruitment and use of child soldiers, and the effectiveness of domestic remedies for those violations;
- call upon the government of Myanmar to cease the practices described in this submission;
- insist upon accountability for serious violations of human rights;
- strengthen the application of current mechanisms through Security Council Resolution 1612 and the Forced Labor Convention to address the government policy of widespread, systematic human rights violations, including forced labor and child soldiering.

18. The government of Myanmar should:

- immediately cease and prohibit the military's practices of recruiting and using child soldiers, forced labor, and sexual violence;
- amend the 2008 Constitution by removing the provisions that maintain impunity for human rights violations, particularly the immunity clause and the various articles that could exclude people from exercising their rights to fundamental freedoms; and by giving the courts under the Supervision of the High Court of the Region or the High Court of the State the jurisdiction to hear and decide on criminal cases against members of the military if a civilian is the alleged victim.