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International Federation for Human Rights



FIDH / BLC SEMINAR

Advancing Human Rights
and ending impunity in Burma:
which external leverages?

Forword by Shirin Ebadi, 2003 Nobel Peace Prize Laureate

Bangkok, May 2009

Article 1: All human beings are born free and equal

in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. Article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty. Article 3: Everyone has

the right to life, liberty and security



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A Seminar Fraught with Risks

Organising an international conference in Bangkok, for the purpose of discussing, among other things, the criminal responsibility of members of the Burmese junta relating to crimes being committed to this day, was expectedly fraught with significant difficulties and tensions. The participation in this seminar of leading exiled Burmese organisations, international and regional human rights NGOs, as well as international law researchers and specialists of worldwide repute, to discuss the possibility of prosecuting the leaders of one of the most brutal regimes known, was an overwhelming challenge.

Even prior to the opening of this conference, the Burmese government – which dispatched its intelligence agents on site – took various steps to prevent this meeting from taking place, and we appreciate the fact that the Thai authorities did not succumb to this pressure. Thus, the seminar did take place, in early May 2009, in a climate of barely disguised suspicion and threats which became increasingly disconcerting. Special protection had to be arranged for the leader of our Burmese partner organisation and his family – General Secretary of the Burma Lawyers Council, co-organiser of the seminar – due to a warrant launched in Rangoon for his arrest on the eve of the seminar.

In spite of these disturbing incidents, around 100 participants had the opportunity of presenting and sharing their experiences and views on highly complex issues. What legal qualifications can be attributed to these crimes? Do they fall within the jurisdiction of the International Criminal Court, or is it necessary to set up an *ad hoc* Tribunal? What is the most appropriate role of institutions such as Association of South East Asian Nations (ASEAN), in improving human rights in Burma? Should we accept the constitutional reform processes set up by the junta, or regard these as a ruse intended to attenuate international criticism? These are the persisting questions currently facing victims' associations, many international law specialists, as well as all observers of the Burma drama, staged behind closed doors for the last 45 years or so.

What is happening in Burma is truly a tragedy. Brutal acts of the junta – whether these involve the persecution of ethnic minorities, serious violations of international labour law, or the continued repression of the “Saffron Revolution” – are committed daily, with no appropriate reaction from the international community. The geostrategic importance of the country, so rich in raw materials and so poor in democracy, is the prevailing consideration. Thus, this seminar had a secondary objective: to present a diagnosis of the situation as well as demands common to all our organisations, for the purpose of obliging international bodies to stop acting as if they know nothing of the extent of these violations. However, for this to happen there was an underlying need to agree on all major issues, and this conference provided us with the ideal opportunity to find common ground. Contributions were quite lively, resulting in impassioned and rich discussions.

The main benefit derived from this seminar was that it allowed us to advance somewhat on these issues, and, more importantly, on the global strategy that must be adopted with respect to the international community. In that sense, the disquietude of the Burmese regime as a result

of this event, was in our view, the most obvious proof that we were on the right track. The following documents currently are testimony of this exceptional meeting, and will definitely constitute major advocacy tools for our organisations.

We are already seeing the first results of this immense collective work. The U.S. administration has taken on one of the main claims presented during this seminar, namely the creation of an International Commission of Inquiry, under the aegis of the United Nations. If such International Commission of Inquiry were to be validated, it would have the task of specifically defining past and current human rights violations as well as identifying perpetrators.

“When the disease is not known, there can be no remedy”, says a Burmese proverb. For our part, we now have more information as to the ills plaguing the population in this country. We know that there can be no effective treatment by simply wiping the slate clean and starting anew. In Rangoon, the voice of Aung San Suu Kyi, who is still under house arrest, joins with that of hundreds of thousands of refugees piling up at the borders of the country, as a daily reminder that Burma cannot claim international legitimacy by merely plastering onto one of the worst dictatorial systems in the world, a mask of democracy that fools no-one. Gold leaf can only decorate temples, it can never build them...

Shirin Ebadi, 2003 Nobel Peace Prize Laureate

Souhayr Belhassen, President of the International Federation for Human Rights (FIDH)

FIDH Opening Remarks

by **Cynthia Gabriel**, FIDH vice president

Excellencies,
Distinguished guests,
Ladies and gentlemen,
Friends of FIDH and BLC,

It's with great pleasure that we welcome you today, at this opening ceremony of the seminar on "*Advancing Human Rights and ending impunity in Burma: which external leverages?*". This seminar organized by the International Federation for Human Rights and the Burma Lawyer's Council constitutes a great challenge for both organizations as well as for all of us present here today. Indeed, FIDH and BLC have spent a considerable amount of energy and time and resources to bring all together major Burmese and international actors to discuss the crucial issue of putting an end to impunity and to the serious human rights violations persisting in Burma.

“”

The following two days will be full of discussions, intense exchanges, maybe different ideas and opinions or approaches. This was one of the very first objectives of this important gathering: to build networks and consolidate strategies, to consolidate our common lobbying, to exchange on future tactics and strategies to promote more effectively the issue of Burma at the international level. This first objective has been already achieved. The presence of so many organizations in this room is the very proof of that.

Our common goal is to promote democracy in Burma, to put an end to human rights violations, to fight against impunity. With this central aim in mind, we will discuss how we will do it: the possibility to use the international justice system and the referral to the International Criminal Court will occupy a major place in our discussions. However, the current dynamics at the international level oblige us to examine other ways to push for democratic change in Burma. Important actors such as China and India, ASEAN and the role of EU and US as well as the UN's engagement will also be on the top of the agenda.

For the International Federation for Human Rights, one strategy does not exclude the other. We should make use of all possible means to achieve our goal and reply to the challenges that we are facing today. The military regime follows its agenda without any signs of openness and inclusiveness, without any real willingness to bring democracy in Burma. It is FIDH's sincere hope that following this seminar, a new push will be given to the cause of Burma, built upon a strong alliance and maybe a common understanding of the challenges and the possible answers of the human rights community, all over the world. We are not expecting a common strategy to be elaborated in two days, but we are here above all to interact and to strengthen and coordinate the dynamic of actors and activists, at all levels, local, national, regional and international. Constant communication, consistent actions and coordinated approaches are crucial to effectively advance the cause of the Burmese people.

This is the first and most important thing that we should keep in mind during these two days: this is not just a seminar or another theoretical or academic international gathering: this is an action-oriented meeting that must serve our common objective: make peace, human rights and democracy a reality in Burma, a nation very often forgotten by the international community and media. The interest, the passion that all of us show today will encourage the Burmese people to continue their struggle for a better future. We will certainly use our liberty to promote theirs !

Thank you so much for being here and many sincere thanks to our partner, the Burma Lawyers' Council for making this seminar possible with its precious cooperation...

BLC Opening Remarks

by Thein Oo, BLC president

Good morning distinguished guests, ladies and gentlemen!

“”

I am very honored to deliver a speech at this timely and important seminar. This seminar, I believe, will be a cornerstone to build concrete steps for bringing back justice, human rights and peace in Burma.

As we are all aware of the real situation of Burma, it is very obvious that there is not only a lack of rule of law, democracy and human rights but also the governing military regime is enjoying impunity for all crimes they have committed. It is also clear that the military regime has been using that impunity to try to stay in power as long as they wish.

They have already committed heinous crimes, such as Crimes against Humanity, War crimes, ethnic cleansing and possibly Genocide, and they have been systematically committing human rights violations for decades. Unfortunately, in fact, the opposite of justice has been served; the criminal perpetrators are free from any judicial trials and courts.

In fact, the brutal and premeditated attack of the military regime to assassinate Nobel laureate and leader of the election winning party National League for Democracy, Daw Aung San Suu Kyi and their convoy in May 2003, is well known. They already and systematically committed extra-judicial killings, rape and torture of innocent civilians, particularly ethnic nationalities, since they seized power in 1988. Thousands and thousands of documents have been collected as evidence. Moreover, recently in September 2007, the military regime committed serious crimes when they crushed the Buddhist monks' peaceful demonstrations.

Furthermore, in May 2008, the military regime committed additional crimes against humanity by denying international and local access of food and medical supplies to the victims of Cyclone Nargis which claimed the lives of about one hundred and fifteen thousand civilians and additionally over fifty thousand became homeless.

Although the military regime has been enjoying impunity for over two decades they are sure to extend their rule until concrete and effective pressure reaches them. In fact, the UN General Assembly has passed many resolutions against the military regime to stop their systematic human rights violations since 1994, but the regime didn't even listen, not only to the UNGA resolutions but also European Union (EU) and other regional and international resolutions to stop their criminal actions.

The grave problem of Burma is lack of rule of law, democracy and human rights and the military regime never respects rule of law in both theory and practice. They even do not obey their own laws, in other words, they are above the law and the cloud of immunity is covering all levels of state powers, legal obligations and political obligations.

Now, the time has come to find possible ways and mechanisms for the democratic local and international communities to achieve justice. It is time to find possible actions that can be taken by the UN Security Council or the International Criminal Court, strong resolutions in the UN General Assembly and strong actions from the EU and other parts of the international community.

The question has arisen among the international community and inside Burma about how to stop the crimes and whether to bring the perpetrators to justice immediately, soon or later. It is a common desire to take action against perpetrators and secure the lives of Burmese People one way or another, either diplomatically or legally. In fact, neither action is being effectively undertaken by the regional and international communities.

Therefore, we should work together to discuss and agree upon political and legal mechanisms and strategies that can be used in the UNGA, UNSC, ICC and other international and regional organizations to end the impunity of the very oppressive regime in Burma.

Finally, I do hope that this (Advancing Human Rights and ending impunity in Burma) seminar is timely and important and will conclude with viable effective strategies and mechanisms.

Let the people free Burma, put the perpetrators behind bars.

Thank you.

*“There can be no global justice unless the worst of crimes – crimes against humanity – are subject to the law.
In this age more than ever we recognize that the crime of genocide against one people truly is an assault on us all – a crime against humanity.
The establishment of an International Criminal Court will ensure that humanity’s response will be swift and will be just.”*

Kofi Annan, July 16, 1998

Advances in International Law on Grave Crimes and the Security Council’s Role¹

Janet Benshoof, President of the Global Justice Center

Mingalaba.

I am honored to give this keynote presentation on how advances in international law can – and must – be used to end the impunity fueling the reign of terror over the people of Burma.



I want to thank the Burma Lawyers Council and FIDH for their vision, hard work, and dedication to making this critical meeting happen. Most of all, I want to express my deep admiration for my friends from Burma. Your unrelenting work for justice and democracy, and courage in face of immense personal suffering, is inspiring and humbling.

What I hope from this meeting is no less than a turning point in history; the beginning of the end to impunity in Burma. And, only one body in the world has the power to make this happen – the United Nations Security Council.

Over the last ten years, states legal obligations to act in face of gross violations of international humanitarian law have rapidly expanded. The global consensus on ending impunity for criminal dictators has, in turn, changed the dynamics around Security Council decision making. No longer can we regard the Security Council as a “purely political” body, unfettered by international law imperatives.

1. This more comprehensive written version of the April 27, 2009 speech has been edited to include the Security Council’s finding on Burma’s impunity for sexual crimes in conflict under SCR 1820. June 19, 2008. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/391/44/PDF/N0839144.pdf?OpenElement>.

I. What does this mean for Burma?

There is ample evidence that the gross violations of international humanitarian law perpetrated by Senior General Than Shwe and others arise to the level of a threat to peace. In this situation, under a contemporary interpretation of what are called '*jus cogens*' principles, the Council, as the sole gatekeeper to accountability, is required to use its Chapter VII powers to refer the situation of Burma to the International Criminal Court.

Leaving the people of Burma trapped in a "law free zone" is neither a legal nor moral option. The continuing failure of the Security Council to end impunity for the grave crimes in Burma sends a clear message that a political chasm can forever separate law from justice. We cannot afford to undermine the fragile structure of global accountability central to our world order. Over the last twenty years there have been revolutionary advances in global justice enforcement—on paper and, in practice. The current center-stage role of the Council in enforcing international humanitarian law is vastly different from the Council's more limited role in say, 1962, or 1988. Even subsequent to 2004, when the Security Council took the historic step of referring Sudan to the International Criminal Court, there have been legal advances which further help the case of Burma.

The key question, I believe, is not "if" there should be an ICC referral, but, "how". Yes, the junta is stronger than ever. But, law is also stronger than ever. Obstacles can open up unexpected opportunities – especially – if we look for them and, act on what we find.

This means we must now take a new look at how the facts in Burma provide powerful support for the Security Council action.

II. This Much We Know For Sure

We all know, emboldened by decades-long impunity, Senior General Than Shwe and others continue to wage what is the oldest internal armed conflict and one of the longest runs of unaddressed criminal violations of the Geneva Conventions in the world.

We all know "business as usual" for Senior General Than Shwe and his henchmen is rule by terror and enslavement of the people of Burma using forced labor, torture, arbitrary arrests and imprisonment, murder, rape and abducting children for the army.²

We all know these grave crimes violate international humanitarian and human rights law and constitute war crimes, crimes against humanity and, potentially, crimes of ethnic cleansing and genocide as demonstrated by the targeted attacks against civilian ethnic populations.

We all know that no perpetrators of these heinous crimes, which include serious breaches of Burma's obligations as party to the Geneva and Genocide Conventions, have ever been prosecuted in Burma or by an international or regional body.

2. For an overview of the U.N. documentation on Burma, see The International Human Rights Clinic at Harvard Law School, Crimes in Burma (May 2009) [hereinafter Harvard Report]. See also International Federation for Human Rights (FIDH), ALTSEAN and Burma Lawyers' Council Report, *Burma/Myanmar International Crimes Committed in Burma: the Urgent Need for a Commission of Inquiry*, Aug. 2009; and International Center for Transitional Justice, *Impunity Prolonged: Burma and its 2008 Constitution*, Sept. 2009.

We all know that due to their longstanding impunity the junta has been able to destroy all indicia of legitimate sovereignty by consolidating all organs of government, including the judiciary, into one criminal enterprise.

What do we do with all this we know?

I believe these facts, given revolutionary advances in international law, provide a tool of unprecedented power to require the Security Council to act to end impunity in Burma. Let us turn to the Security Council.

III. The Power of the Security Council

The Security Council is the only world body with the power to end the impunity of Senior General Than Shwe and his criminal cohorts. Although human rights groups have called on states to use the doctrine of universal jurisdiction to prosecute criminal perpetrators from Burma, should they appear on their territory, procedural immunity precludes state prosecution of sitting heads of state. Only the ICC or an ad hoc Tribunal established under the Security Council's Chapter VII powers can arrest and try criminals who are sitting heads of state, like Senior General Than Shwe.

Further, even if Burma had acceded to the ICC, given the junta's imperviousness to some twenty years of exhortations and sanctions by states and the UN, it would be difficult – if not impossible – to exercise effective jurisdiction over Senior General Than Shwe and his cohorts without the enforcement powers inherent in a Security Council referral. A Chapter VII referral to the ICC imposes a binding legal duty on all states to cooperate with the ICC prosecutor regardless of whether they are party to the ICC.

IV. Legal Milestones and the Security Council

In 1945 fifty one self-contained states formed the United Nations premised on the concept of impregnable sovereign states.

This has radically changed.

Today, our world is based on an interdependent global economy using advanced technology and communications and, as demonstrated by this meeting, on a burgeoning transnational civil society. The nature of conflict itself has changed from primarily interstate conflicts with military targets to mainly internal conflicts targeting civilians, mostly women and children. The consensus today that global peace and security are dependent on enforcing international humanitarian law means that a Security Council action addressing a state's grave crimes is no longer considered a breach of state sovereignty.

The evolving role of the Security Council is highlighted on the wall chart behind you. Here are some of the milestones:

– In 1984, the Security Council mandated that states neither treat as null and void [Apartheid South Africa's] so-called new constitution and neither assist with any elections nor support

any resulting government arising out of the constitution.³ The Council said to recognize such a constitution would serve to encourage crimes of apartheid and would violate the principles of the UN Charter.⁴

- In 1991 the Security Council for the first time found the purely internal genocidal crimes of Saddam Hussein against the Kurdish population a threat to “international peace and security in the region.”⁵ This foreshadowed the jurisprudence of the ad hoc Tribunals and the Rome Statute of the International Criminal Court, which treat most crimes perpetrated in the context of internal armed conflicts as war crimes. For Burma, a country in armed conflict, this means Senior General Than Shwe and others, including Chief Justice U Aung Toe are culpable as war criminals.
- In 1992 the Security Council, equating “crimes against humanity” with a “threat to the peace” in the context of ongoing armed conflict, evoked its Chapter VII power to set up a commission of experts which in turn led to resolutions establishing the ad hoc Tribunals for the former Yugoslavia (ICTY) and then Rwanda (ICTR) in 1993 and 1994 respectively.
- In 1999 the Security Council passed its first thematic resolution to protect civilians in armed conflict. In 2009, the Presidential Statement marking the resolution’s tenth anniversary stated that “enhancing the protection of civilians in armed conflict **is at the core of the work of the United Nations Security Council for the maintenance of peace and security.**”⁶ Since 1999 the Council has increasingly passed resolutions mandating an end to impunity for conflict related crimes including for sexual violence against women, forced labor and the conscription of child soldiers.⁷ This principle was further expanded by the Security Council’s historic 2006 endorsement of the “Responsibility to Protect” doctrine.⁸
- In 2002 the advent of the International Criminal Court ensured there could be recourse to an international court when states fail to prosecute grave crimes.⁹ The Council’s role as the ultimate enforcer of the Geneva and Genocide Conventions is strengthened by the ICC. Security Council dynamics are also changed by the contract between the United Nations and the ICC, which sets out the Security Council’s ability to refer or defer ICC actions. The effect of this agreement is to make Council actions or, in the case of Burma, inactions, pivotal to the success of the ICC.¹⁰
- In 2004 the Security Council exercised its Chapter VII powers to refer Sudan, a nonparty, to the ICC. This referral was the first time the Security Council had acted in its role as ultimate enforcer of the Genocide Convention.¹¹

3. S.C. Res.554, ¶ 5, U.N.Doc. S/RES/556 (Aug. 17, 1984).

4. *Id.*

5. S.C. Res. 688, U.N. Doc. S/RES/0688 (Apr. 5, 1991).

6. Statement by the President of the Security Council, U.N. Doc. S/PRST/2009/1 (Jan. 14, 2009).

7. *See* S.C. Res 1820, U.N. Doc. S/RES/1820 (June 19, 2008)[hereinafter SCR 1820]; S.C. Res. 1612, U.N. Doc. S/RES/1612 (July 26, 2005); S.C. Res. 1325, U.N. Doc. S/RES/1325 (Oct. 31, 2000).

8. *See* S.C. Res 1674, U.N. Doc. S/RES/1674 (Apr. 28, 2006).

9. *See* Rome Statute of the International Criminal Court, art. 17, July 17, 1998, U.N. Doc. A/CONF.183/9, 37 I.L.M. 999 (1998)[hereinafter Rome Statute].

10. *See* Negotiated Relationship Agreement between the International Criminal Court and the United Nations, U.N. Doc. ICC-ASP/3/Res.1 (2004). *See also* Rome Statute, *supra* note 7, at art. 13.

11. The U.S., in calling on the UN to initiate an investigation into the violations in Darfur, which led to an ICC referral, invoked Article 8, which states “Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts

– In 2009 the Security Council acknowledged the ongoing impunity for ICC-covered crimes of sexual violence in Burma based on a report of the Secretary General under the mandate in SCR 1820 passed in 2008.¹² Secretary of State Hillary Clinton subsequently referenced the ongoing use of “rape as a tactic of war” by countries like Burma, as a reason for the Security Council to strengthen measures to end such sexual violence by passing Security Council Resolution 1888.¹³

What does this all mean for Burma?

The international law developments increasing states’ legal duties to address what are termed “*jus cogens*” crimes, increase the Security Council’s legal role as the ultimate enforcer when states fail to act.¹⁴

It is common for international law experts to accept that certain *jus cogens* principles constrain Security Council’s actions because their very peremptory nature is binding on the Council. What is not discussed is that these same norms also impose a duty on the Council to act in certain situations.

This is what is key to a new Security Council strategy on Burma.

V. Next Steps: Turning Obstacles into Opportunities

We must rethink old strategies in order to successfully use these new legal tools for Burma. Take China. Put at the forefront of your thinking that China wants ties with Burma, not with Senior General Than Shwe. China is making international humanitarian law (as opposed to human rights law) a centerpiece of its bid for global legitimacy. The ICC is taught as a legal course at nearly every major law school in China. Further, in all the examples I have given, when the focus is solely on impunity for gross violations of international humanitarian law, China has never exercised its veto power on the Council.

I often hear disparaging remarks about the ICC and on the “futility” of efforts for justice for Burma. It is all too easy to point out shortcomings of the ICC to date and, be discouraged about the seemingly intransigent problems in Burma. However, such short-sighted positions are self-defeating and, more importantly, an abdication of our duties as global citizens to make justice work, however imperfectly.

The ICC is not a cure-all for Burma but, it exists. Without our help the people of Burma cannot access this portal of justice, which is a matter of their fundamental rights.

enumerated in article III.” Convention on the Prevention and Punishment of the Crime of Genocide, art. 8, Dec. 9, 1948, 78 U.N.T.S. 277; Colin L. Powell, *The Crisis in Darfur, Written Remarks before the Senate Foreign Relations Committee* (Sept. 9, 2004).

12. SCR 1820, *supra* note 7.

13. Secretary of State Hillary Rodham Clinton, Opening Remarks on the Adoption of a UNSC Resolution to Combat Sexual Violence in Armed Conflict (Sept. 30, 2009). In addition to recognizing violations of 1820, the Security Council from 2001 through 2009 received four consecutive reports from Secretary General on children and armed conflict citing Burma’s national army for violating international law prohibiting the use of Child Soldiers and two specific reports detailing such violations. See Report of the Secretary-General on Children in Armed Conflict in Myanmar, U.N. Doc. S/2007/666 (Nov. 16, 2007). The Security Council’s Working Group on Children and Armed Conflict subsequently urged the government of Myanmar “to put an immediate end to the continuing recruitment of child soldiers.” Working Group on Children and Armed Conflict, Conclusions on Children and Armed Conflict in Myanmar, S/AC.51/2008/8 (July 25, 2008).

14. A *jus cogens* norm is defined as a “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Conventions on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331.

Central to a Security Council strategy is to focus on individual members' clear legal duties to act in face of Burma's grave crimes, including breaches of the Geneva Conventions. Member States do not shed their legal obligations when sitting on the Council. The actions – or inaction – by the individual fifteen member representatives must be in accordance with their States' obligations including under the Geneva, Genocide, and Torture Conventions, the Rome Statute and customary law.

In light of the serious breaches of peremptory norms by the junta, international law requires that all members on the Council propose – individually and collectively – a resolution to refer Burma to the ICC. This action is required to be taken, regardless of the likelihood of success.

We must, over and over again, at every opportunity, remind Member States of their individual legal obligations under international law and, spell them out. This is not being done. State representatives express surprise when shown how international law mandates that their state take action to end impunity in Burma.

Although neither genocide nor crimes against humanity require an ongoing armed conflict situation, Burma is in armed conflict. Thus, we must make clear that the killings and rapes of ethnic women are war crimes.

The junta is now seeking to “legalize” its criminal military oligarchy by means of a sham constitution and elections which violate the Geneva Conventions and, thus, constitute breaches of peremptory norms. These grave breaches require the Security Council to take the same immediate actions it took in 1984 denouncing the peremptory norms embodied in South Africa's 1983 apartheid constitution.

The general amnesties in the constitution strike at the heart of Burma's obligations under the Genocide and Geneva Conventions and customary international law.¹⁵ The fact that no national court in Burma has any jurisdiction to prosecute perpetrators of *jus cogens* crimes, including for genocide, war crimes, and crimes against humanity, strengthens the case for an ICC referral, since national level prosecutions are constitutionally prohibited.

The constitution also breaches the Geneva Conventions by giving unfettered powers to the Commander-in-Chief of the armed forces outside of any constitutional constraints. Such powers, including over courts martial and military tribunals, breach Article III of the Geneva Conventions, which require parties afford “all the judicial guarantees which are recognized as indispensable by civilized peoples.”¹⁶

15. Constitution of the Republic of the Union of Myanmar (2008), Ch. XIV, § 445.

16. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. In fact, the General Assembly has repeatedly called upon the government of Burma “to respect fully the obligations of the Geneva Conventions. . . in particular the obligations in article 3 common to the Conventions. . .” G.A. Res. 48/150, ¶13, U.N. Doc. A/RES/48/150 (Dec. 20, 1993).

Conclusion

The legal duty to ensure Senior General Than Shwe and other top criminal perpetrators are prosecuted for perpetrating crimes of concern to the global community is neither an option nor a “lever” for change. This legal duty, just like the criminal culpability of these perpetrators, exists today and forever. It can never be negated, suspended, or replaced by a statute of limitation, peace agreements, talks, sanctions, elections, negotiations or amnesties.

The top military leaders and criminal judges in Burma will face criminal trials; if not this year or next year, then in ten or twenty years. War criminals from Cambodia and Nazi Germany are still being prosecuted even today some thirty and sixty years after the crimes occurred.

However, generations of men, women, and children of all ethnic and religious backgrounds have lived and died in Burma without knowing peace, without having received any forms of redress or justice and, without experiencing the most basic guarantees of human dignity embodied in the Universal Declaration of Human Rights.

They are entitled to justice in their lifetime.
I believe we can make this happen.

Thank you

Past Referrals Experiences: The Referral of the Situation in Darfur and Current Developments (Article 16 of the ICC Statute)

Mariana Pena, FIDH Permanent Representative to the ICC

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My presentation comes in the context of the discussion about the possibility of an ICC referral of the situation in Burma. I would like to start my presentation by explaining why when we were considering the programme for this seminar at FIDH, we thought it would be relevant to include this matter for discussion today. Discussing the possibility of a Security Council referral on the situation of Burma can of course not be done in the abstract. Apart from weighing all the political considerations surrounding international action on Burma, it is, in our view, also necessary to look back at other experiences (actually just one experience) on referrals by the Security Council to the International Criminal Court to first, understand the complexity of a referral process, and second, look at the political climate on the ICC at present.

I would like to emphasize that despite my understanding that other panellists will address jurisdiction of the Court and triggering mechanisms – but to put my presentation into context, I will just say that in order for the ICC to start an investigation, a situation must first be brought to its attention – “referred” to it. The Security Council is one of the entities which is empowered to make such referrals. And referrals by the Security Council are particularly important when the relevant State is not a State Party to the ICC Statute).

As you are possibly aware, the Security Council has so far referred only one situation to the ICC, and that is the situation of the conflict in the Sudanese region of Darfur. This conflict has been pitting rebel movements to government and government-supported militias for over six years now. Gravity is one of the central elements taken into consideration by the ICC when making a decision to open an investigation. The situation in Darfur has been considered one of the gravest in the world – more than 300,000 people have died and 2.5 people have been displaced. In this regard, I would like to stress however, that gravity of a situation is not only determined by the number of victims, i.e. the scale of the crimes, but also by the nature of the crimes, the manner of commission of the crimes and the impact of those crimes.

The situation in Darfur was referred to the ICC in March 2005. I can tell you, at the outset, that the political climate at the Security Council in relation to the ICC is very different today from the one at the time. And probably – and this is purely my own speculation - if a resolution for a referral of the very same situation were to be put forward nowadays, it would not be approved.

Before the Darfur situation was referred to the ICC, the UNSC had passed several resolutions throughout 2004 deploring the crimes that were being perpetrated there, and calling

on disarmament of militias and engagement in peace negotiations. However, none of these contributed significantly to the improvement of the situation on the ground. The next step was the establishment, in September 2004, of an international Commission of Inquiry, which was mandated to look into violations that had been committed. The Commission's report, released in January 2005, revealed that crimes against humanity and war crimes (i.e. crimes falling under the jurisdiction of the ICC) had been committed in Darfur. The Commission's report also strongly recommended that the UNSC refer the situation in Darfur to the ICC. And it is following this recommendation, that a resolution was tabled by France and approved by the Council. Following, the referral, the ICC opened an investigation in June 2005.

It should be recalled that, at the time, the ICC had been in existence for less than three years. It was carrying out two investigations and it had not yet started proceedings against any person, and therefore, no trials were under way. It was a very infant moment for the ICC, whose potential to impact situations was yet unknown. The ICC was a new instrument in international law – and in international politics. The ICC-referral came up as an option since previous resolutions by the Council calling for improvement had not worked, and other possible measures to improve the situation, such as deployment of a UN peacekeeping force, seemed difficult to achieve. At the same time, there was pressure on the Council because of the public dimension of the conflict, to act and be perceived as having undertaken concrete action.

The referral was approved despite the United States' rejection of the ICC at the time (which characterised the Bush administration): 11 States voted in favour, none against and 4 abstained (Algeria, Brazil, China, US). Particularly because it successfully overcame the US rejection of the Court, the referral was considered a major success. It contributed enormously to the credibility of the ICC as an institution, and to its reaffirmation in the international scene.

Four years after the referral, the dynamics in the international community and thus, at the Security Council, have changed (dramatically) in relation to the ICC. The ICC is today a well-recognised institution, leading four investigations. It has issued 13 public arrest warrants in all four situations. Four suspects have been surrendered to the Court. The first trial has recently started, while the Court prepares to go to trial on two other cases later this year. The main mandate of the ICC is to investigate and prosecute serious crimes (not any human rights violations, but those amounting to serious crimes, i.e. crimes against humanity, war crimes and genocide). But the ICC also has an enormous potential to contribute to crime prevention of further commission of crimes, and thus to the consolidation of peace.

International politics around the ICC have changed quite a lot, especially over the last year. And that change happens to be related to the situation in Darfur, which is the very first situation referred by the UNSC. In July 2008, the ICC Prosecutor requested that an arrest warrant be issued against the Sudanese President Omar Al-Bashir. This was followed by the issuance of an arrest warrant by decision of the judges taken on 4 March 2009. The Prosecutor's announcement that he intended to prosecute a Head of State has brought about a turmoil in relation to States' positions (and this is mainly African and Arab States) with regard to international justice. In essence, most fear that the ICC could prosecute other leaders, who have also allegedly committed serious violations, in their countries. Although the ICC Statute clearly states that there is no immunity from prosecution for Heads of States and Governments (a well-settled principle when it comes to commission of very serious crimes; a principle accepted by States when they ratified the Statute), the practical application of such principle has disturbed others in power.

So, behind the argument of an “Anti-African bias” or a “Anti-Muslim bias”, what lies is, in reality, is the fear that the ICC could actually uncover the serious violations for which various Heads of Governments are responsible. This trend has translated, in practice, in a move to try to make the Security Council make use of Article 16 of the ICC Statute. Under Article 16 of the ICC Statute, the Security Council has the power to request the Court to suspend investigations or prosecutions, when those can pose a threat to international peace and security (so, by adopting a resolution under Chapter VII of the UN Charter).

There are calls from African and Arab States, and from the African Union and the League of Arab States themselves for the Security Council to adopt such a course of action. At FIDH, we believe that Article 16 was not conceived for this type of situations, and that it is being manipulated in the name of peace and the so-called “peace vs. justice dilemma”. It is also questionable whether Article 16 can be used when the relevant situation was referred to the ICC by the Security Council itself.

Despite the numerous calls for this to happen, no Security Council member has yet put forward a resolution making use of Article 16. The reason for that is that the Security Council is deeply divided on the matter, and opponents of the ICC’s actions in Darfur, fear they would not be successful if they tabled a resolution at this point in time. So, they are in, a way or another, waiting to gain more supporters of a suspension in order to make such formal move. It is not clear whether they will be successful. So far, they have not, as mainly European and Latin-American States have taken a strong stance to defend the principles of fight against impunity and accountability for serious crimes. So has the United States.

You will not be surprised that among those opponents are : Libya (a major power in the African region now sitting in the SC). South Africa, which is another major African and Third World power, and was on the Council until last December, also supports a suspension. And of course, China and Russia (which, as you know, are permanent members and, as such, have major power to influence Council’s decisions) do so as well. China and Russia have always been mild in their criticism of the Sudanese regime, because of their economical ties with Sudan and their interest in oil from that country. But as it happens in relation to other countries, their position is also influenced by the fact that they are also involved in serious human rights violations, and therefore, try to avoid criticism of others. Both (and especially China) have put forward arguments about peace and democracy having to be prioritised over justice, at least at the present moment.

FIDH believes that this is, of course, an excuse because justice and the ICC can contribute to peace, rather than be an obstacle to it. All in all, the reason for me describing this situation for you today is to emphasise that there is a very delicate moment for the UNSC in relation to any advocacy concerning the ICC. The very credibility and future of the Court is at stake at the heart of Article 16 discussions and negotiations.

In the current climate, a referral of another situation seems difficult, in principle. In any case, when advocating for the referral of another situation, we believe that it is of paramount importance to take this background into consideration. At the same time, we believe that it is important to continue to raise voices and shame those like China, Russia and others, who are reluctant on international justice or who refuse to take concrete action to improve the current human rights situation in Burma.

Before I conclude, I would like to make some final remarks about the ICC which are relevant in the context of our discussion today: It is relevant to note that the criticism that the ICC has excessively focused on Africa over its first years of existence, is putting pressure on the Court to initiate investigation in other continents. The Office of the Prosecutor undertakes intense “analysis activities” (the ICC representative will touch upon that) with respect to other cases, including Colombia, Afghanistan, Georgia. Recently, the Prosecutor has announced that he is also analysing the situation in Palestine. Palestine posed and continues to poses challenges in relation to jurisdiction of the Court, as it is not a State Party, and it is even not meet all the requirements to be considered a State. The Palestinian authority has made use of a possibility offered by the ICC Statute to States non-parties, which is to lodge a declaration accepting the jurisdiction of the Court.

To conclude, I would like to stress that discussion about the ICC potentially opening investigations in other countries can have an enormous impact. Such has been the case in Colombia, for example. We think that the same could happen in Palestine. Dictators and oppressive governments around the world have come to fear the ICC, because that affects them not as a system or as part of a system, but as individuals who could be held criminally responsible. So, this why I believe that the discussions that we will have today and tomorrow, need to take into consideration how to maximise any possible advocacy around the ICC and Burma, with the aim of having an impact to improve the very serious situation in regard to human rights violations in the country.

Thank you very much for your attention.

Current Dynamics Within the Security Council, Past Security Council Reaction to Non-Compliant Government and Prospects in 2009 with the New SC members

Antoine Madelin, FIDH Director for Intergovernmental organisations



My name is Antoine Madelin, I am working at the FIDH as director for intergovernmental organisations, a post where I oversee our interventions and interaction with the United Nations institutions and the European Union governments.

Like a few others at FIDH, I have been working on Burma for many years, but for my part I'm afraid, without developing a specialisation on the human rights situation in this country... Our specialisation, the one that our three offices in Geneva, Brussels and New York aim to provide, is a specialisation on the advocacy and lobbying strategies for each and every situation.

Thus I will try to speak on Burma, from the perspective of the dynamics of these intergovernmental organisations, and of one in particular, the United Nations Security Council, rather than from a field perspective.

In doing so, I will first look with you at when and how the question of Burma was raised at the UN Security Council (or when it was not raised).

I will then try to map out the current options at the Security Council, and provide some form of analysis of the current attitudes towards each of these options in general.

I will thus move on from Mariana's presentation on the one -and only- example of an ICC referral, the case of Darfur, to analyse the broader picture at the Security Council.

But first, maybe a few words on what I will attempt to demonstrate: My aim is indeed not to declare whether or not we should be working on an ICC referral. I think that the working groups will enable people to reflect on the modalities of such campaign, and each organisation can think of whether it is worth the fight and the energy. I look forward in this respect, to hearing what one and another will have to say.

My aim is more to describe the overall picture in which such campaign has to be fought. *Know thy enemy* is the key motto for a successful advocacy.

The one thing I can say and will say about this battle is that it is a tricky one. But as Marvin Gay and Tammi Terrell would have sung it back in 1967... does any one know the song? Well there' *Ain't no Mountain high enough*.

Burma at the United Nations

In starting this description, I would like to say only one thing: know and look at the work of a great organisation based in New York, called the Security Council Report. Their website, www.securitycouncilreport.org, is a wealth of information on each and every country that has been raised at the Security Council, which provides a great understanding on what are the dynamics there.

So back to Burma. If the military coup which toppled the civilian government dates back to March 1962, the United Nations' closer look at what was happening in the country only dates back to the early nineties, following the kidnapping of the first multi party democratic elections by the military, who refused to recognise the 80% victory of the National League for Democracy and refused to relinquish power.

Aung San Suu Kyi was awarded the Nobel peace prize in 1991, and that same year, the UN General Assembly adopted resolution 46/132, deploring the fact that the Government of Myanmar had not fulfilled commitments to taking steps toward the establishment of a democracy and expressed concern at the seriousness of the human rights situation in the country.

A few months later, at the March 1992 session of the UN Commission on Human Rights resolution 1992/58 was passed, which established a Special Rapporteur on the situation of human rights in Myanmar. Yozo Yokota of Japan was the first to be named to the post.

Between 1993 and 1996, the junta attempted a national convention to draft a constitution, which failed, and subsequently in 1997, the UN Secretary General appointed a Special Envoy, at that time Alvaro de Soto of Peru, at the request of the General Assembly.

But this did not succeed in promoting democracy in the field, and NLD followers remained persecuted.

The first mention of the situation in Burma at the Security Council was made by the United States in June 2005, in a closed session, under the item "other matters".

UN Security Council intervenes on situations that pose a threat to international peace and security. For long, the coup d'Etat of pro-democracy repression were not (and I have to say are still not) considered by the majority of the UN Security Council as a threat to international peace and security. So in order to do so in June 2005, the US invoked the refugee flows, which were massive, specifically following the repression of the Karen, and the drug trade, as constituting a threat to international peace and security.

FIDH, alongside several non governmental organisations, also called on the Council to address the matter. But what some analysts say is that efforts to get the Council involved were boosted, following the US's initiative, by the publication, in September 2005, of a report jointly commis-

sioned by Vaclav Havel, the former president of the Czech Republic, and Bishop Desmond Tutu, South Africa's Nobel Peace Prize winner, entitled "Threat to Peace: A call for the UN Security Council to Act in Burma", which argued for a multilateral diplomatic initiative at Council level to push for change in Myanmar.

In December 2005, the Security Council held its first ever *briefing* on the situation in Myanmar. The way such briefing was conveyed is quite interesting: procedural matters on agenda items are free from veto, which 5 States can put on any decision (US, UK, China, Russia and France). There were 10 states supporting briefing. Opposed were Algeria, Brazil, China, Japan and Russia, on the grounds that "this is an internal matter", and that the human rights situation can be dealt with elsewhere within the UN architecture. The decision was made by consensus that the Council would receive a briefing on Myanmar by a Senior Secretariat official, *under the "other matters" item, and during informal consultations*. The alternative was a *formal* meeting, which would have resulted in a vote to approve an agenda item. With ten votes in favour, the decision would have been positive, but at the same time, it would have shown the split in the Council. Acting by consensus at this stage was thought to have greater impact.

The UN Secretariat was thus asked to provide a briefing on this, and it was the then UN Under-Secretary General for Political Affairs, a man we all know now, former Nigerian ambassador to the UN in New York, Mr Ibrahim Gambari.

He was subsequently called to visit the country in May 2006 and held high-level talks with the Myanmar government and opposition leaders. He met with Senior General Than Shwe, leader of the State Peace and Development Council (SPDC) and other senior members of the SPDC. He also was allowed to meet for an hour with Aung San Suu Kyi. This was the first time in more than two years that Suu Kyi had been given access to a foreign visitor.

When he returned, he briefed the Council, and the US, backed up by the Europeans, attempted to introduce a resolution, which was *informally* rejected. So it was not even presented at the debates of the Council.

But another step was however achieved in September 2006, with the introduction of "the situation in Myanmar" as a specific *agenda item* of the UNSC, thanks to a similar procedural trick as in December 2005, because voting on specific requests for agenda items –which are procedural matters- cannot be countered by veto.

Under rule 2 of the Provisional Rules of Procedure, the President of the Security Council calls for a meeting of the Council at the request of any member of the Council. Here the letter (S/2006/742) was from the Representative of the United States of America to the United Nations, John Bolton.

As there was opposition to this agenda item, a vote was taken in an open meeting of the Council in order to adopt the provisional agenda. As a procedural issue, the approval needed nine votes in favour and permanent members could not use their veto. The agenda was approved by ten votes with China, Russia, Qatar and Congo voting against and Tanzania abstaining. As a result of this vote, Myanmar was formally added to the agenda of the Council.

After a couple more briefings, the US introduced a *draft resolution* to the UN Security Council in January 2007, which was vetoed by two permanent members, Russia and China. Such double veto had not been seen since the end of the Cold war. The Council then lived a new peak of polarisation between countries which froze the discussions for a few more months.

It was not until the demonstrations of summer and fall of 2007, with the repression appearing on the news of every TV screen, that Security Council members were able to rethink their efforts on the situation.

In parallel to the 1st Avenue's building, multilateral diplomacy developed throughout the world, with notably the Indonesian President Susilo Yudhoyono and US President George W. Bush agreeing on the need to get countries in the region involved in resolving the crisis.

The Security Council then decided to hold a specific *emergency session*, on the situation, and deployed Gambari to the field. The Council subsequently adopted a *Presidential statement*, the first Presidential statement¹ on the situation, on October 11th.

At the height of the repression, but also the height of the international mobilisation, demonstrations around the world echoing the peaceful monk's mobilisation, the reaction was to hold a dedicated meeting, and come out with a Presidential statement, not even a resolution.

In parallel, in Geneva, the UN Human Rights Council held a special session at the initiative of European States, which led to the adoption by consensus of a resolution.

The dynamics around the Presidential statement are interesting to note, with Indonesia taking an active part in finding "consensual language" for the Security Council to adopt a "constructive approach". Here, what Indonesia was also trying to avoid was a call for sanctions against the Burmese regime. But on the other side, with every TV screen documenting the repression, the Security Council had to be seen as doing something.

Following that, Gambari's good offices appeared as the most consensual option among members of the Security Council. In fact, it is the best fig leaf for some, even within Europeans. Gambari indeed flew to a number of ASEAN capitals, to Beijing and Delhi, and everywhere got the word that yes we are on the right track: negotiations with the regime to bring back democracy.

The next substantial evolution was following the Nargis cyclone and the blocking of foreign emergency aid, when France asked the Security Council to agree to a briefing from Under Secretary-General for Humanitarian Affairs and UN Emergency Relief Coordinator John Holmes. What was new here was the invocation of the concept of "*responsibility to protect*" as the basis for Council action on Myanmar and suggesting that a resolution authorising the delivery of aid was needed.

1. The statement reaffirmed strong support for the Secretary-General's good offices mission and strongly deplored the use of violence against peaceful demonstrations. It emphasised the early release of political prisoners and outlined what the Council expected of the government, including genuine dialogue with Aung San Suu Kyi, all concerned parties and ethnic groups. It called on the government to address political, economic, humanitarian and human rights issues and to seriously consider Gambari's recommendations and proposals. Myanmar said that it "regretted" the presidential statement as the situation in Myanmar did not harm regional or international peace and stability.

But many UN members were seriously concerned at what they believed was an attempt to expand the scope of the norm relating to responsibility to protect approved in the 2005 UN World Summit. In that decision, the General Assembly resolution agreed by world leaders had defined a carefully limited scope for the norm covering only protection of people from genocide, war crimes, ethnic cleansing and crimes against humanity. Here, opponents were arguing that the Junta's decisions following the cyclone did not fall under such categories.

Once again, Gambari was the only consensual solution, and he went back to the country, calling for indulgence. Subsequently, emergency relief coordinator Holmes noted "some" progress, and that satisfied some at the Council.

But outside of the Council, frustration started to mount, and it nowadays continues to do so. The least that we can say is that there is no "notable progress" to use UN diplomatic language. In addition, the probably premature offer for assistance by the United Nations Special Envoy to monitor the 2010 elections, an already rigged process, also raised criticism from NGOs. Aung San Suu Kyi thus refused to meet with Gambari – as did General Than Shwe, but probably not for the same reasons.

We have not witnessed any evolution since, but corridors' analysts notice two trends, none are really positive.

The first one is from some European countries, which start to consider carrots instead of sticks, weighing in some of the economic sanctions that they impose on Burma, which were strengthened following the 2007 Saffron revolution. Such policy was developed with other countries such as Uzbekistan, Turkmenistan, and is even considered for Belarus, at the EU foreign policy level.

The second trend is from the side of the Burmese Junta, which gradually claims that economic sanctions diminish their social welfare, and attempts to respond to the Security Council on these lines, thus chanting a song that is music to the ears of Non-aligned States.

It is within this context that the US Administration has changed. The Administration who had been in place to support action in New York has now changed. There is a new ambassador, Susan Rice, and it is unclear for the moment what their policy will be. Surely the US will not alienate itself so many partners as it did with the war in Iraq. Right now is a little bit of a honeymoon for them, but Myanmar has not been their first and foremost priority, with the Iraq disengagement, Afghanistan, dialogue with Iran, the Middle East, and so on and so forth.

Options for the Security Council

Aside from the referral, what are the options, and what are the ingredients to get there:

Resolution

– A first step would be a resolution, but we are not there, and the Council failed to get one at the peak of the Saffron revolution.

- Resolutions on major human rights crisis are less and less likely, notably with the UN Human Rights Council seen as being able to call for special sessions. There is a persistent refusal by China, and to a lesser extent Russia, two vetoing powers, to enable this.

There is one good precedent, that is Iraq, in April 1992, Resolution 688. Yet, the environment has changed. Today, the Council is still not dealing with Sri Lanka or Zimbabwe.

ICC referral

- For the referral, you need a resolution. So the first battle needs to be fought. But in addition to what my colleague Mariana has said on the context, I would like to add a couple of comments: when the Sudan referral was made, we were at the peak of the repression, with massive killings of civilians, one element that we don't have in Burma. At that time, the referral was negotiated mainly because countries were reluctant to deploy a military operation to bring back peace in a major conflict zone. The referral was then seen by all as an "easy" and "cost free" option.

Sanctions?

- More will be said on sanctions tomorrow.
- Today, sanctions are indeed adopted by the UN Security Council, but they are mainly adopted against terrorists and on nuclear proliferation. For Iran and DPRK, for example, it is purely a non-proliferation issue, there is no interest on the human rights situation in Iran or the DPRK. For terrorism, it is not easier, as it takes a lot of time for the Council to come up with one or two names of persons to be on the list of restricted travels...
- An interesting development with regards to sanction however happened a few weeks ago with the adoption of a list of individuals subject to restrictions in the Democratic Republic of the Congo, following the recruitment of child soldiers (yet, the decision to sanction was adopted in July 2006, and it took till March 2009 to come up with three names to put on that list).

Other options, softer options maybe, should also be considered.

Ban Ki Moon

- criticised as being too weak. Main advocate of the soft diplomacy approach. What is the result? To the extent that he might be considered as a non-Secretary General in the media.
- Yet, the "discreet" man was able to bluff everyone after the bombing of the UN headquarters in the Gaza strip following Israeli Operation Cast Lead. Is there a way to call for the new Ban on Myanmar?
- Kofi Annan used to come to the Council and bring his own views (on Eritrea, Sudan, etc). Ban hosts a monthly lunch with UNSC ambassadors, he brings things that are not otherwise addressed. Could be an opportunity here.

Security Council calling on others to act?

- Precedent in 1956, following the Soviet invasion of Hungary. In view of the impossibility to reach an agreement, called for the General Assembly to hold a special session (Resolution 120). But here we would need to consider what would be the added value, as the GA and the Human Rights Council already have Myanmar on their agenda.

For more information on UN and Burma / Myanmar, see annex :

Key UN Documents relating to Myanmar and referred to in Security Council Report publications *Abstracts from Securitycouncilreport.org*

Presidential Statements

- **S/PRST/2008/13** (2 May 2008) was the presidential statement noting the commitment of the Myanmar government that the referendum would be free and fair and underlining the need for the government of Myanmar to “establish the conditions and create an atmosphere conducive to an inclusive and credible process”.
- **S/PRST/2007/37** (11 October 2007) was the presidential statement strongly deploring the use of violence against demonstrations and emphasising the importance of early release of prisoners.

Selected Letters

- **S/2008/289** (2 May 2008) was the letter from Myanmar objecting to the Council’s 2 May presidential statement.
- **S/2007/591** (5 October 2007) was the letter from the Japanese permanent representative to the UN conveying Japan’s position on developments in Myanmar.
- **S/2007/590** (5 October 2007) was the letter from the US permanent representative to the UN requesting an urgent meeting of the Council to discuss Myanmar.
- **S/2006/742** (15 September 2006) was the letter from US ambassador John Bolton requesting a meeting of the Council to discuss Myanmar. An annex to this letter contained Bolton’s 1 September letter asking for Myanmar to be placed on the Council’s agenda.

Selected General Assembly Reports

- **A/61/369** (21 September 2006) and **A/61/369/Corr. 1** (18 October 2006) was a report of the Special Rapporteur on the situation of human rights in Myanmar.
- **A/60/221** (12 August 2005) was a report of the Special Rapporteur on the situation of human rights in Myanmar.

General Assembly Resolutions

- **A/RES/59/263** (23 December 2004) requested the Secretary-General to report to the General Assembly and the Commission on Human Rights and to provide the necessary assistance to his Special Envoy for Myanmar.
- **A/RES/56/231** (24 December 2001) strongly urged the Government of Myanmar to take urgent and concrete steps to ensure the establishment of democracy.
- **A/RES/53/162** (9 December 1998) further strongly urged the Government of Myanmar to ensure full respect for human rights and fundamental freedoms.
- **A/RES/52/137** (12 December 1997) noted that Aung San Suu Kyi was allowed to travel to peacefully conduct normal political activities.
- **A/RES/51/117** (12 December 1996) requested the Government of Myanmar to permit unrestricted communication with physical access to Aung San Suu Kyi by members of the National League for Democracy.
- **A/RES/50/194** (22 December 1995) urged the Government of Myanmar to engage, at the earliest possible date, in a substantive political dialogue with Aung San Suu Kyi and other political leaders.
- **A/RES/49/197** (23 December 1994) requested the Secretary-General to continue his discussions with the Government of Myanmar.

- **A/RES/48/150** (20 December 1993) strongly urged the Government of Myanmar to release unconditionally and immediately the Nobel Peace Prize Laureate Aung San Suu Kyi.
- **A/RES/47/144** (18 December 1992) called upon the Government of Myanmar to release unconditionally and immediately Aung San Suu Kyi.
- **A/RES/46/132** (17 December 1991) urged the Government of Myanmar to allow all citizens to participate freely in the political process.

Selected Commission on Human Rights Reports

- **E/CN.4/2006/34** (7 February 2006) was a report of the Special Rapporteur to the Commission of Human Rights.
- **E/CN.4/RES/2005/10** (14 April 2005) extended the mandate of the Special Rapporteur by one year.
- **E/CN.4/2005/130** (7 March 2005) was a report of the Secretary-General and his Special Envoy for Myanmar.
- **E/CN.4/2005/36** (2 December 2004) was a report of the Special Rapporteur to the Commission on Human Rights.
- **E/CN.4/2004/33** (5 January 2004) detailed a trip by the Special Rapporteur to Myanmar.
- **E/CN.4/1999/129** (22 March 1999) included the Permanent Mission of Myanmar's response to reports of human rights violations.
- **E/CN.4/RES/1992/58** (3 March 1992) decided to establish the mandate of a Special Rapporteur on human rights in Myanmar.

Selected Commission on Human Rights Resolutions

- **E/CN.4/RES/2005/10** (14 April 2005) extended the mandate of the Special Rapporteur by one year.
- **E/CN.4/RES/1992/58** (3 March 1992) decided to establish the mandate of a Special Rapporteur on human rights in Myanmar.

Other

- **S/PV.5854** (18 March 2008) was the record of the public briefing involving Ibrahim Gambari, the Secretary-General's Special Envoy to Myanmar, and the permanent representative of Myanmar.
- **SC/9228** (17 January 2008) was the press statement reiterating full support for the efforts of the Secretary-General's Special Advisor, Ibrahim Gambari.
- **SC/9171** (13 November 2007) was a press statement, which deplored "that many prisoners are still in jail and new arrests have occurred"; stressed the need for the Myanmar government "to create conditions for dialogue and reconciliation by relaxing as a first step, the conditions of detention of Daw Aung San Suu Kyi and release of political prisoners and detainees"; and confirmed that the Council would "keep developments in Myanmar under close review."
- **S/PV.5757** (11 October 2007) was agreement on the presidential statement.
- **S/PV.5753** (5 October 2007) was the record of the discussion following the crackdown on Myanmar.
- **A/HRC/S-5/L.1/Rev. 1** (2 October 2007) was a Human Rights Council resolution that deplored repression of peaceful demonstrations.
- **S/2007/14** (12 January 2007) was a draft resolution which was vetoed by China and Russia.
- **S/PV.5526** (15 September 2006) was the record of the Security Council discussion before putting the provisional agenda that included the situation on Myanmar to the vote.
- **S/Agenda/5526** (15 September 2006) was the provisional agenda for the Security Council meeting that added Myanmar to the Council agenda.

Crimes Under the Jurisdiction of the International Criminal Court and its Complementarity Principle

Evelyn Balais-Serrano, Coordinator for Asia-Pacific Coalition for the International Criminal Court



Dear Friends in the Burma and ICC Campaign,

First of all, let me acknowledge the combined initiatives of the Burma Lawyers Council and the International Federation for Human Rights of organizing this follow-up seminar to the first one that we did two years ago on Burma and the ICC.

As some of you know, the Coalition for the ICC does not, as a policy, endorse any situation to the Court. However, our individual members like FIDH and BLC and some member-organizations present here can. My role here is to share information and knowledge about the Rome Statute and the Court and how they relate to the Burma situation, particularly on the crimes under the jurisdiction of the Court and its complementarity principle.

The principle of complementarity

The Preamble of the Rome Statute states that *“it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”*.

The principle of complementarity represents the express will of States Parties to create an institution that is global in scope while recognising the primary responsibility of States themselves to exercise criminal jurisdiction. Moreover, there are limits on the number of prosecutions the ICC can bring. The effectiveness of the International Criminal Court should not be measured only by the number of cases that reach the Court. On the contrary, the absence of trials by the ICC, as a consequence of the effective functioning of national systems, would be a much better measure of its success.

The ICC is not intended to replace national courts, but to operate when national structures and courts are unwilling or unable to conduct investigations and prosecutions. The ICC does not have primacy over national systems and is complementary to national systems. Consequently, in deciding whether to investigate or prosecute, the Prosecutor must first assess whether there is or could be an exercise of jurisdiction by national systems with respect to particular crimes within the jurisdiction of the Court. The Prosecutor can proceed only where States fail to act, or are not “genuinely” investigating or prosecuting, as described in article 17 of the Rome Statute.

A State is *unwilling* if the national decision has been made and proceedings are or were being undertaken for the purpose of shielding the person concerned from criminal responsibility; there has been an unjustified delay which is inconsistent with an intent to bring the person concerned to justice; or the proceedings were not or are not being conducted independently or impartially.

To assess whether a State is *unable* to act, the Prosecutor will need to determine whether “due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings”. This provision was inserted to take account of situations where there was a lack of central government, or a state of chaos due to the conflict or crisis, or public disorder leading to collapse of national systems which prevents the State from discharging its duties to investigate and prosecute crimes within the jurisdiction of the Court.

There is no impediment to the admissibility of a case before the Court where no State has initiated any investigation. There may be cases where inaction by States is the appropriate course of action. For example, the Court and a territorial State incapacitated by mass crimes may agree that a consensual division of labour is the most logical and effective approach. Groups bitterly divided by conflict may oppose prosecutions at each others’ hands and yet agree to a prosecution by a Court perceived as neutral and impartial. There may also be cases where a third State has extra-territorial jurisdiction, but all interested parties agree that the Court has developed superior evidence and expertise relating to that situation, making the Court the more effective forum. In such cases there will be no question of “unwillingness” or “inability” under article 17.

Article 17 refers to issues of admissibility. The Court shall determine that a case is inadmissible where:

- the case is investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution
- the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute
- the person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3
- the case is not of sufficient gravity to justify further action by the Court
- in order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:
 - a) the proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court referred to in article 5
 - b) there has been an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice
 - c) the proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.

In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable

to obtain the accused or the necessary evidence and testimony, or otherwise unable to carry out its proceedings.

It should however be recalled that the system of complementarity is principally based on the recognition that the exercise of national criminal jurisdiction is not only a right but also a duty of States. Indeed, the principle underlying the concept of complementarity is that States remain responsible and accountable for investigating and prosecuting crimes committed under their jurisdiction and that national systems are expected to maintain and enforce adherence to international standards.

Crimes Under the ICC Jurisdiction

1. Jurisdiction *Ratione Materiae*

Article 5 of the Rome Statute states that the Court shall be limited to the most serious crimes of concern to the international community as a whole. It shall have jurisdiction over the following crimes:

- The Crime of Genocide
- Crimes Against Humanity
- War crimes
- The crime of aggression

The Court will have jurisdiction over the crime of aggression once it has been defined in accordance with articles 121 and 123 setting out the conditions under which the Court shall exercise its jurisdiction with respect to this crime.

The Crime of Genocide

“Genocide” is defined by the Statute as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such:

- Killing members of the group;
- Causing serious bodily or mental harm to members of the group;
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- Imposing measures intended to prevent births within the group;
- Forcibly transferring children of the group to another group.

Crimes Against Humanity

“Crimes against humanity” are defined in the Statute as 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.

“Attack directed against any civilian population” means a course of conduct involving the multiple commission of acts against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts here refer to:

- Murder
- Extermination

Includes the intentional infliction of conditions of life such as deprivation of access to food and medicine, **calculated** to bring about the destruction of part of a population.

- Enslavement
The exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
- Deportation or forcible transfer of population
Forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.
- Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law
- Torture
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 shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions
- Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity
Force pregnancy means the unlawful confinement of a woman forcibly made pregnant with the intent of affecting the ethnic composition of any population, or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.
- Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
Persecution means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.
- Enforced disappearance of persons
The arrest detention or abduction of persons by, or with authorization, support or acquiescence of, a State or political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.
- The crime of apartheid
Inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.
- Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

War Crimes

“War crimes” means

- Grave breaches of the Geneva Conventions of 1949, namely:
 - wilful killing
 - torture or inhumane treatment, including biological experiments
 - wilfully causing great suffering, or serious injury to body or health
 - extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
 - compelling a prisoner of war or other protected person to serve in the forces of a hostile Power

- wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial
- unlawful deportation or transfer or unlawful confinement
- taking of hostages
- other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
 - intentionally directing attacks against civilian population as such or against individual civilians not taking direct part in hostilities
 - intentionally directing attacks against the civilian objects, that is, objects which are not military objectives
 - intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilian objects under the international law of armed conflict
 - intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated
 - attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives
 - killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion
 - making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury
 - the transfer, directly or indirectly, by the Occupying power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory
 - intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives
 - subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons
 - killing or wounding treacherously individuals belonging to the hostile nation or army
 - declaring that no quarter will be given
 - destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war
 - declaring abolished, suspended or inadmissible in a court of law the rights and actions of nationals of the hostile country
 - compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of war
 - pillaging a town or place, even when taken by assault
 - employing poison or poisoned weapons
 - employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices

- employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions
- employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment or in accordance with the relevant provisions set forth in articles 121 and 123
- committing outrages upon personal dignity, in particular humiliating and degrading treatment
- committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions
- utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations
- intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law
- intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions
- conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities
- in the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause
- violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture
- committing of outrages upon personal dignity, in particular humiliating and degrading treatment;
- taking of hostages
- the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable
- Paragraph 2(c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature
- Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:
 - intentionally directing attacks against civilian population as such or against individual civilians not taking direct part in hostilities
 - intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law
 - intentionally directing attacks against personnel, installations, material, units or vehicles

- involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under international law of armed conflict
- intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives
 - pillaging a town or place, even when taking by assault
 - committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions
 - conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities
 - ordering 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
 - killing or wounding treacherously a combatant adversary
 - declaring that no quarter will be given
 - subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons
 - destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict
- Paragraph 2 (e) applies to armed conflicts of not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups
- Nothing in paragraph 2(c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means

2. Jurisdiction *Ratione Temporis*

Article 11 of the Rome Statute states that the Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute on July 2nd 2002.

If a State becomes a party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless the State has made a declaration under article 12, paragraph 3.

Article 12, paragraph 3 states that if the acceptance of the State which is not a Party to this Statute is required, under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crimes in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

3. Jurisdiction *Ratione Personae*

The ICC has jurisdiction over individuals and not legal entities, such as multinationals or corporations (Article 25 of the Rome Statute), and has only jurisdiction over individuals of 18 years of age or older (Article 26). Moreover, in application of the principle of non-retroactivity, no person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute (Article 24).

It is also important to underline that, commanders, from the military as well as other superiors, can be tried where they knew or should have known that their subordinates were committing crimes within the jurisdiction of the ICC, when they failed to take necessary measures to prevent or repress their commission and, for other superiors, when the crimes concerned activities that were within their effective responsibility and control (Article 28). The Rome Statute applies equally to all persons without any distinction based on official capacity. Immunities that may apply under national or international law are not applicable before the ICC (Article 27).

Justice for victims of atrocities committed by the military junta has long been delayed and overdue. With the ICC, there is hope for the future. There is hope to put an end to the sufferings of people. A hope to end impunity not only in Burma but elsewhere in the world where there is similar suffering and injustice.

Thank you.

Role and Activities of the ICC Office of the Prosecutor¹

Mariana Pena, FIDH Permanent Representative to the ICC

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The International Criminal Court (ICC) is composed of three organs: 1) the Judiciary (composed of the Presidency and the Chambers); 2) the Registry; and 3) the Office of the Prosecutor (OTP). This presentation will focus on the role and activities of the latter. It will, first, look at the structure and functions of the Office. Second, it will focus on the role of the Office in the opening of new investigations.

I. Functions of the Office of the Prosecutor

The OTP is responsible for conducting investigations and prosecutions of crimes falling within the jurisdiction of the ICC. It receives communications and referrals on crimes which fall under ICC jurisdiction; examines those in order to determine whether an investigation must be opened and, in case of a positive decision, it pursues the investigations. As a result of the investigation, it can decide to prosecute one or more individuals. If so, the OTP brings the case(s) for prosecution and litigates before the ICC Chambers. The OTP acts independently as a separate organ of the Court.²

A. Functions and structure of the OTP

The Office is headed by the Prosecutor Mr. Luis Moreno-Ocampo, who comes from Argentina. Ms. Fatou Bensouda, from Gambia, is the Deputy Prosecutor. The two of them together with the Heads of the Jurisdiction, Complementarity and Cooperation Division and the Investigation Division are responsible for the policies and overall operations of the Office.

Three main divisions carry out the operational work of the Office:

- Jurisdiction, Complementarity and Cooperation Division (JCCD);
- Investigation Division;
- Prosecution Division.

The three divisions work together through “joint teams” assigned to particular situations or cases.³

1. A presentation of the same topic was made at the seminar by Ms. Satoko Ikeda of the Jurisdiction, Complementarity and Cooperation Division at the ICC Office of the Prosecutor. This presentation has been prepared by the author and it only reflects her views and those of FIDH.

2. Rome Statute, Article 42(1)

3. A “situation” under the ICC Statute refers to all crimes committed on a given territory throughout a period of time, e.g.: the situation in the Democratic Republic of Congo as of July 2002. By contrast, a “case” refers only to a limited number of those crimes with whom a person is charged, e.g. the case against Thomas Lubanga Dyilo.

1. Jurisdiction, Complementarity and Cooperation Division

This division is composed of two sections: Analysis Section and International Cooperation Section.⁴

The JCCD is responsible for providing analysis of, and legal advice on, any issues pertaining to jurisdiction, complementarity and cooperation that are considered necessary for the effective and efficient conduct of investigations and prosecutions. While the specific objectives of the Division are likely to change from year to year, some general tasks include:

- Analysis of communications and referrals (Article 15 and 53);
- Seeking additional information pertaining to situations of interest to the Court;
- Dedicated situation analysis (admissibility, interests of justice) for each situation during the investigation and at other stages;
- Negotiation and conclusion of cooperation agreements needed to support the investigations and activities of the OTP;
- Channeling of requests for assistance;
- Building contacts and networks for the provision of information and cooperation;
- Verification of conformity with procedures and standards and tracking compliance;
- Building and strengthening relationships of support and cooperation in specific situations and in the general enabling environment.⁵

2. Investigation Division

The Investigations Division is responsible for conducting investigations, collecting evidence, interviewing witnesses, identifying perpetrators and selecting cases for prosecution.⁶ It is composed of a Planning and Operations Section and of Investigation Teams.⁷

During the investigation stage, as well as at all stages of the proceedings, the OTP is required to take measures to ensure the protection of victims and witnesses. In order to limit the risks posed to potential witnesses, the OTP has stated its intention to limit the number of witnesses contacted.⁸ The OTP has indicated that, where possible, investigators will attempt to work with witnesses “outside areas of conflict, whether in other countries or more secure parts of the same country” and that interviews will be conducted “only following a clear assessment of protection issues and through means and in locations where exposure is minimized.”⁹

Article 54(3)(f) requires the Prosecutor to “take necessary measures, or request that measures be taken to ensure [...] the protection of any person.” To this end, a *Gender and Children Unit* has been established under the Investigations Division and provides advice and support in relation to victims and witnesses issues,¹⁰ including: pre-interview psychological assessment of potential witnesses; assistance to interviews of highly traumatized witnesses; the development and implementation of policies on the analysis and investigation methodologies regarding gender and sexual violence and violence against children.¹¹

4. Proposed Programme Budget for 2010 of the International Criminal Court, ICC-ASP/8/10, 30 July 2009, p. 31

5. Proposed Programme Budget for 2006 of the International Criminal Court, ICC-ASP/4/5, 24 August 2005, §§ 100, 104, 114 & 123.

6. FIDH, *Victims' Rights before the International Criminal Court: A Guide for Victims, their Legal Representatives and NGOs*, April 2007, p. 23

7. Proposed Programme Budget for 2010 of the International Criminal Court, ICC-ASP/8/10, 30 July 2009, p. 31

8. OTP, *Report on Prosecutorial Strategy*, 14 September 2006, p. 5

9. Report to the Assembly of States Parties on the Activities of the Court, ICC-ASP/4/16, 16 September 2005, § 52.

10. Proposed Programme Budget for 2010 of the International Criminal Court, ICC-ASP/8/10, 30 July 2009, p. 165

11. Proposed Programme Budget for 2006 of the International Criminal Court, ICC-ASP/4/5, 24 August 2005, § 137

3. Prosecution Division

The Prosecution Division, composed of a Prosecution Section and an Appeals Section, carries primary responsibility for the litigation of cases before the different Chambers of the Court, which includes the preparation of written submissions and the supervision of investigative and case-preparatory work. In everything it does, the Division is tasked with carrying out “fair, effective and expeditious public proceedings” as required by the Rome Statute.¹²

The tasks of the division include:

- Litigation of cases before the Pre-Trial, Trial and Appeals Divisions of the Court.
- Drafting litigation documents and preparing legal submissions.
- Preparing and presenting oral arguments.
- Provision of legal guidance to other divisions of the OTP/joint teams in the development of investigative strategies and case preparation.¹³

B. Guiding legal principles

There are three main principles that guide the work of the OTP:

- **Independence:** The Office acts independently from other organs of the Court.
- **Objectivity:** Its decisions are based upon objective criteria and are not influenced by subjective considerations.
- **Complementarity:** According to Article 17 of the Rome Statute, the ICC is complementary to national judicial systems. This means that States have the primary responsibility for preventing and punishing atrocities committed on their own territories. As a consequence, the intervention of the ICC is exceptional, i.e. it only steps in when States fail to conduct investigations and prosecutions, or where they purport to do so but in reality are unwilling or unable to genuinely carry out proceedings. The Office has also adopted a *positive approach* to complementarity: it encourages genuine national proceedings where possible; relies on national and international networks; and participates in a system of international cooperation.

C. Certain policy elements

1. Investigation into all parties to the conflict. According to the principles of objectivity, the OTP does not limit its investigations to one or certain parties to the conflict. Even when a referral or communication refers only to crimes committed by only some of the parties involved, the OTP will look into crimes committed by all relevant parties.¹⁴

2. Investigation and prosecution of those most responsible. The ICC has been designed to prosecute only the gravest cases related to the most serious crimes of concern to the international community as a whole.¹⁵ Accordingly, the OTP focuses its investigations and prosecutions on those bearing the greatest responsibility for the most serious crimes.¹⁶

12. Proposed Programme Budget for 2007 of the International Criminal Court, ICC-ASP/5/9, 22 August 2006, § 145

13. Proposed Programme Budget for 2010 of the International Criminal Court, ICC-ASP/8/10, 30 July 2009, p. 165

14. For example, when Uganda referred the situation in the north of the country to the ICC, it indicated that it was referring the crimes committed by the rebel group the Lord's Resistance Army. The OTP declared that the referral was accepted but that it encompassed all crimes committed in the context of the conflict between the LRA and the Ugandan Army.

15. Rome Statute, Preamble and Article 17

16. OTP, Paper on some policy issues before the Office of the Prosecutor, September 2003, p. 5-6

3. Focused investigations and prosecutions. The Office only selects a limited number of incidents for investigation and prosecution. Those incidents should reflect the entire range of criminality and victimisation in a given situation/in relation to crimes committed by a person or group of persons.¹⁷

As a consequence, *only a very limited number* of cases will reach the ICC. According to the principle of complementarity (see above), States must carry out national proceedings to try middle and low level perpetrators.

II. Role of the OTP in the opening of new investigations

The OTP is responsible for the opening of investigations into new situations. In doing so, it must be guided by provisions of the Rome Statute.

It must be recalled that the OTP can only open investigations for situations where the Court has jurisdiction.

The ICC's jurisdiction

– **Material jurisdiction**¹⁸

The ICC has jurisdiction over four types of crimes, generally considered the “most serious crimes”: genocide, crimes against humanity, crimes of wars and – once a definition is adopted – the crime of aggression

– **Territorial and personal jurisdiction**¹⁹

The ICC has jurisdiction over crimes:

- committed by a national or on the territory of a State party to the Statute, or of a non-party State that has made an ad hoc declaration accepting the Court's jurisdiction.²⁰
- when it is the Security Council which refers a situation to the ICC, its jurisdiction is not limited to the national and territories of State Parties but will be determined by the terms of the referral

– **Temporal jurisdiction**²¹

The ICC has jurisdiction over crimes committed after 1 July 2002 (date of the entry into force of the Statute).

17. OTP, Report on Prosecutorial Strategy, 14 September 2006, p. 5

18. Rome Statute, Article 5

19. Rome Statute, Articles 12-13

20. Such declarations have been made by Côte d'Ivoire and by the Palestinian National Authority. In relation to the latest, the ICC must first determine whether the Palestinian authority has the capacity to lodge such a declaration in accordance with the Rome Statute.

21. Rome Statute, Article 11

There are three trigger mechanisms for the opening of investigations:

Trigger mechanisms²²

For the Court to exercise jurisdiction:

- a situation must be referred to the Prosecutor by a State party;²³
- a situation must be referred to the Prosecution by the United Nations Security Council (within the framework of Chapter VII of the Charter);²⁴
- the Prosecutor opens an investigation on his own initiative, with the authorisation of the Pre-Trial Chamber.²⁵

The JCCD is responsible for receiving and analysing referrals from States Parties and from the Security Council. It also receives and analyses communications from individuals, non-governmental organisations, or other sources.²⁶

Once it has received a referral or one or more communications on a situation, the JCCD gathers information from different sources, with the aim to seeking to determine whether an investigation must be opened. This phase of the proceedings is known as *preliminary analysis*. The OTP is guided by Article 53 of the Rome Statute, which establishes the conditions to open an investigation:

- **Jurisdiction:** First of all, the JCCD must assert that the Court has jurisdiction over the situation (see above).
- **Admissibility:** The admissibility requirement refers to *complementarity* and *gravity*. As indicated above, according to the principle of complementarity, cases are admissible before the Court only when there are no investigations and prosecutions at the national level for the cases on which the Court is likely to focus its investigation upon; or when States have initiated investigations and prosecutions but are not genuinely willing or able to carry out those proceedings. Additionally, although any crime falling within the jurisdiction of the Court is a serious matter, the Rome Statute foresees and requires an additional consideration of *gravity* whereby the Office must determine that a case is of sufficient gravity to justify further action by the Court. In the view of the Office, factors relevant in assessing gravity include: the scale of the crimes; the nature of the crimes; the manner of commission of the crimes; and the impact of the crimes.²⁷
- **Interest of justice:** Even when the above conditions are met, the Office can decide not to proceed when “there are nonetheless substantial reasons to believe that an investigation would not serve the interest of justice.” In making such a determination, the OTP must take into consideration the gravity of the crime and the interests of victims.²⁸

22. Rome Statute, Article 13

23. The Prosecutor has received three referrals from States Parties: Uganda (December 2003), the Democratic Republic of Congo (April 2004) and the Central African Republic (December 2004)

24. The Prosecutor has received one referral from the UN Security Council in relation to the situation in Darfur, Sudan (March 2005)

25. The Prosecutor made an application for such an authorisation in the case of Kenya (November 2009)

26. Rome Statute, Article 15. See also Article 54(3)(e) on the possibility of submitting materials on condition of confidentiality

27. OTP, Report on Prosecutorial Strategy, 14 September 2006, p. 5

28. For more information on the OTP approach to the interest of justice, see OTP, Policy Paper on the Interest of Justice, September

Documentation efforts by non-governmental organisations and communications to the Office of the Prosecutor

It is important to note that all documents and information on the crimes gathered by non-governmental organisations is both relevant and significant for the Office of the Prosecution in the analysis, investigation and prosecution of cases. However, it must be observed that whenever the OTP opens an investigation into a given situation, it sends its investigation teams and carries out its own investigations.

There is no specific format for communications to the Office. They do not need to be documents specifically prepared for the ICC. Reports prepared for other entities but nevertheless relevant to the Court's mandate can also be enclosed. As far as possible, communications should seek to address the three matters described above: jurisdiction, admissibility and the interest of justice.

Documentation by local groups must be done according to their capacity and access to information, bearing in mind security implications and the need to ensure protection to their personnel and sources.

For further information, see FIDH reports on the ICC (www.fidh.org/-International-Criminal-Court-ICC), in particular:

- Victims' rights before the International Criminal Court: A Guide for Victims, their Legal Representatives and NGOs, April 2007
- The ICC's First Years, December 2009

2007. See also: FIDH Comments on the OTP draft policy paper on "The Interest of Justice", September 2006; and Réflexions sur la notion "intérêt de la justice" au terme de l'article 53 du Statut de Rome, November 2005

Documenting Crimes Against Humanity in Eastern Burma

Dr. Yuval Ginbar, Legal Adviser, Amnesty International

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Soe Nay, which is not her real name, was talking about her experiences back in Burma, the experiences which had turned her into a refugee. She was small and slim and looked older than her 37 years. We were sitting on the wooden floor – bamboo, to be precise - of a hut, with the rain pounding on the roof, that was made out of leaves. I remember thinking how different this refugee camp – Mae Ra Mou – was from the Palestinian refugee camps I’d frequented in my pre-Amnesty days, where everything was dusty and dry, how much more pleasant it looked, but then in Palestine they at least had electricity, televisions, phones. Here – nothing, not even running water, which was ridiculous in a place awash with rain.

Soe Nay spoke about soldiers from Light Infantry Brigade 44 constantly coming to their village, in Taungu township, whose population was a mixture of Buddhists and Christians, how they would harass, intimidate, steal – “they’d take the best pigs” she said. She spoke about the army imposing indefinite closures on the village, threatening that anyone who left would be shot dead, about how each family had to provide the army with porters every week. Only after speaking for about 20 minutes on the general situation did she mention that her own husband had been taken away by soldiers 7 months earlier, and had not been seen or heard of since. It struck me, not for the first time during that mission, how many of our witnesses left their own individual troubles, however desperate, to the end of their testimony, sometimes speaking about them only after we’d specifically ask if they themselves had suffered from any of the violations they were describing.

I’ve started with this individual angle because crimes against humanity have what may crudely be termed statistical and other wider-scope requirements – we have to show quantities, patterns, joint criminal enterprises etc. But essentially it still boils down to individuals, each suffering his or her private pain, inflicted by the powerful on the powerless – the civilian population. Therefore research in cases of, let’s say suspected crimes against humanity, must at least initially adopt the same basic method of documenting any human rights violation – with leg-work, talking to victims, survivors, witnesses and where possible government officials, so as to carefully piece together the smaller picture before attempting to portray a larger one.

This is also a matter of integrity – of course, you never start such a research without having some notion of what’s happening, of the scale and severity of the violations, be it based on your own organization’s previous research, your sources in the fields or the work of other NGOs, UN bodies etc. But it would be wrong to approach a human rights situation with pre-conceived conclusions and set out to prove them.

So for the report, published last year, whose very title – “*Crimes Against Humanity in Eastern Myanmar*” – points to our research’s eventual conclusion, we sent two missions to the Thailand-Myanmar border, in July 2006 and November 2007, and I had the privilege of taking part in the earlier one. The period covered was between the beginning of the *Tatmadaw* offensive in the area, in November 2005, and early 2008 (extended through further research).

We spoke with witnesses – all of whom were also victims – as we always do in our research missions:

- We talked to each witness separately – unless he or she felt the need to be supported, but not instructed;
- We first explained who we are and what we do. And just as importantly what we can and what we can’t do. We requested the name of each witness for our files but promised anonymity. We explained our “do no harm” principle, the need for precision, the lack of any expectation on our behalf from the witness beyond that they tell the plain truth;
- We conducted detailed, patient, neutral questioning, to make sure we get the precise, full picture of what the witness knew;
- We ensured the witness clarified when he or she was describing an event they were directly witness to – or victims of - and when his or her knowledge was just “circumstantial” or “hearsay”.

And we sat on that bamboo floor for long hours, with increasingly aching backsides, and wrote their testimonies.

Now I’m a legal adviser, not a researcher, so I didn’t have to do the rest of the extensive legwork - and other work - that my colleagues did to complete the research. But I did advise them, quite soon after we returned to London, having read the testimonies me and my colleague had taken, and having read a bit of the history and what other sources reported, that we need to examine the possibility that what is taking place in Kayin (Karen) State and Bagu Division amounts to crimes against humanity.

What, then, do you need to know, or to establish, in order to determine not only that violations of human rights and international humanitarian law (accepting there’s an armed conflict happening there – which I won’t go into) been committed, but that these violations actually amount to crimes against humanity? Actually, as an NGO, and not a court, we use more modest terms than “determine,” such as “believe that” or “express concern that...” – we’re basically making a *prima facie* case, not issuing verdicts.

In assessing the information before us, we had to bear in mind that we couldn’t go into – well, into where the violations themselves were taking place, only interview those who fled. We had very limited tools of corroboration – certainly the government was not responding to our requests for information. On the other hand, we had detailed research dating back to the late 1980’s to rely on, and compare our new findings with.

The easy part was to show that the violations themselves constitute acts which, once other requirements are met, would amount to crimes against humanity. We work on the basis of Article 7 of the Rome Statute of the International Criminal Court, which we consider as reflecting rules of customary international law. Those testimonies we assessed to be reliable clearly showed acts against the civilian population which would constitute crimes under Article 7 – 7(1) to

be precise. There was – I’m using the Article’s words - murder, enslavement; deportation or forcible transfer; imprisonment or other severe deprivation of physical liberty in violation of international law; torture; enforced disappearances; persecution against an identifiable group on ethnic grounds; and other inhumane acts.

Notice the lack of the crime of rape from our list – this goes back to our field research. One or two witnesses told us of isolated cases dating back to the late 1990’s. None, however, spoke of rape, sexual slavery, enforced prostitution or other sexual attacks during the period that we were covering. This is not to say necessarily that the *Tatmadaw* are no longer using rape as part of their attack on Karen civilians, just that we have not documented any during the period, and therefore, obviously, could not include it among our findings.

Less straightforward was of course showing the other elements of the Article 7 provision – the “multiple commission” of the crimes, their widespread or systematic nature. I’ll ignore the additional requirement of “knowledge of the attack,” which would pertain to individual defendants, and which is not the kind of detail we were seeking.

Now the legal concept of crimes against humanity took shape in the wake of World War II. Even at the height of the *Tatmadaw* offensive it would be extremely difficult to compare their actions to what took place during that war. The *Tatmadaw* violations are of the slow-burning type, in more senses than one. At least during the period we researched, we couldn’t point to any case of a single, massive atrocity – just a constant flow of small-scale violations, slowly but steadily accumulating into large-scale ones.

Was Amnesty International therefore applying creative interpretation to the notion of crimes against humanity, were we pushing the definitional envelope, to grab headlines and international attention at the expense of legal precision? We believe that we were not. We believe we were on solid – conservative, if you will – legal grounds when expressing concern that the human rights violations in eastern Burma amounted to crimes against humanity.

The terms “widespread” and “systematic”, although discussed extensively by courts, lawyers and academics, essentially maintain their everyday meaning. For instance the ICTY said that:

“For an attack to be “widespread”, it needs to be of a large-scale nature, which is primarily reflected in the number of victims, whereas the term “systematic” refers to the organised nature of the acts of violence and the non-accidental recurrence of similar criminal conduct on a regular basis.” [*Prosecutor v. Radoslav Brđanin*, ICTY Case No. IT-99-36-T, Trial judgment of 1 September 2004, para. 135].

Once the reliability – including consistency – of the majority of testimonies was established, they provided much of the required information in this respect too. For instance, *Tatmadaw* actions that witnesses told us of, which could be described as village-wide, including the destruction or confiscation of crops and food-stocks; the burning of houses and sometimes of whole villages, forcing inhabitants to relocate; forced labour; and long-term village closures were clearly attacks on civilians on a wide-scale. Their repetition throughout the area and throughout the period by regular military units very strongly suggested a pattern, a policy, a system. Other crimes, including unlawful killing, enforced disappearance and torture were often threatened with publicly, and in the case of torture at times inflicted publicly, so there was a clear intent to affect the wider civilian population.

The extent to which we rely on sources beyond our own field research for determining issues such as whether human rights violations are widespread or systematic varies from place to place and from case to case. In Darfur, for instance, we were among the first to research thoroughly the use of rape as a weapon of war by the Sudanese government and its militias, and concluding that they constituted war crimes and crimes against humanity. [May 2004]. In the case of, say, the terrorist attacks on New York on 9/11 – which we also considered a crime against humanity – we relied to a very large extent – if not wholly – on information available to the public. Recently we expressed concerns to the AU that the situation in Somalia involves war crimes and “possibly crimes against humanity,” even as our field research on the situation is ongoing. On the other hand, we’ve made a finding, based mostly on our own research, not of crimes against humanity but of torture widespread enough to fall under Article 20 of the UN Convention Against Torture in the south of this country – Thailand.

In the case of eastern Burma, we would probably be hesitant to come up with a crimes against humanity conclusion on the basis of our field work alone. So we were grateful to have at our disposal the publications of others – from organisations constantly reporting from the field, international NGOs, and then the ICRC, the ILO, the UN Special Rapporteur and so on – this is by no means an exhaustive list. The picture that emerged from collating these sources supported our preliminary impression, and so we concluded that crimes against humanity were being committed in eastern Burma during the period covered by our report.

We published the report, with this stark but well-substantiated conclusion, both in fact and in law, hoping that it would stir the international community into action. And I guess we’re all here today because Amnesty International’s efforts in this respect – and the efforts of others – have not exactly resulted in a resounding success.

But while the whole issue of addressing impunity ultimately depends on others – basically governments – we, bearing in mind that crimes against humanity do not admit of statutes of limitations, can do what largely depends on us to help future prosecutions – if not in the near future then in the longer term, when Burma changes, Asia changes, the Security Council changes, or the world as a whole changes. We can follow the examples of activists in Chile in the late 20th Century, Zimbabwe more recently and of course Cambodia, who tirelessly, thoroughly and meticulously conduct research, which I’m delighted to hear has started to be coordinated regarding Burma too. As a result of such research individual testimonies, individual events, and the names and details of individual victims *and* suspected offenders are filed, so that when a national, regional or international prosecutor (or maybe investigating judge) finally arrives, he or she will have a solid platform on which to build the cases.

Which will necessarily take us back to Soe Nay and other victims and witnesses, and to their individual stories, tragedies, loved ones lost – those single manifestations of humanity of which we are all part, and therefore against all of whom these crimes were committed.

Thank you.

International Criminal Law and Burma: A Brief Explanatory Note

Magda Karagiannakis¹, Barrister, former UN legal advisor



Security Council Referral

Burma is not a state party to the ICC Statute or a state otherwise accepting the jurisdiction of the court. Accordingly the crimes that have occurred there can be brought before the court through a UN Security Council referral under Chapter VII of the UN Charter. This chapter permits the Security Council to take action to maintain or restore international peace and security.

Investigation

Once the matter has been referred to the ICC and the investigation has begun it cannot be terminated by any authority outside the prosecutor or the court. However, there is a possibility that an investigation or a prosecution can be deferred for a renewable period of 12 months by the Security Council.

During an investigation the prosecutor has the obligation to establish the truth and extend the investigation to cover all facts and evidence relevant to criminal responsibility. This means that the prosecutor must investigate all potential crimes notwithstanding the alleged perpetrator's affiliations, that is, without regard to whether they are affiliated with the government or the opposition or any other any other groups.

Once commenced, the investigation will be conducted confidentially in order to protect information, evidence and witnesses. Therefore, while an investigation is underway the prosecutor will not reveal which individuals are being investigated, nor will he label anyone as an alleged criminal. The first time this allegation will be made public is when the prosecutor files an application for an arrest warrant.

On a practical level, investigations can take a very long time to lead to arrest warrants. The length of time that an investigation can take is critically affected by the degree of access that the investigators have to the relevant evidence. For example, the situation in Darfur was referred to the ICC by UN Security Council Resolution 1593 (2005) of 31 March 2005. The first two

1. Ms. Karagiannakis is a barrister and an academic at Latrobe University Law School. She is admitted to the List of Victims and Defence Counsel at the International Criminal Court. She has investigated and prosecuted senior political and military officials in the Former Yugoslavia for genocide, crimes against humanity and war crimes. She was counsel in the first successful prosecution for genocide in Europe by an international criminal court (ICTY). She appeared as advocate and counsel for Bosnia before the International Court of Justice in their action against the Yugoslavia for genocide. She acted as a senior legal advisor and investigator to the UN Inquiry into the assassination of the former Lebanese Prime Minister. Her consultancy work has included judicial and defence counsel training in international criminal law for national and International and non-governmental organisations.

arrest warrants were issued approximately 2 years later, with the arrest warrant for President Bashir of Sudan being issued nearly 4 years later.

Jurisdiction

The Court has jurisdiction over individuals with respect to genocide, crimes against humanity and war crimes taking place since 1 July 2002.

Crimes in Burma

There are a number of clusters of acts committed since 1 July 2002 that could constitute crimes against humanity or war crimes. This list is intended to be exemplary and not exhaustive. It includes the alleged crimes arising from:

- the suppression of the Saffron revolution
- the practice of forced labour including child labour, land confiscation, extortion, restriction of access to markets and forcible transfer committed in Eastern Burma
- the forcible recruitment of children, some as young as 10 years old, into armed forces
- persecutory campaigns violating fundamental human rights breaches of ethnic or religious groups, including rape and sexual violence against women
- the deliberate deprivation of aid to civilians after cyclone Nargus

Crimes against Humanity

All CAH must be committed as part of a widespread (large scale) or systematic (organised) attack against a civilian population (people not taking an active part in hostilities). What must be proven is a course of conduct involving the multiple commission of acts against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.

For the CAH of persecution, it must be proved that the perpetrator severely deprived persons of their fundamental rights under international law and that these persons were targeted because they belonged to a group which was targeted based on political, racial, national, ethnic, cultural, religious, or gender grounds. Accordingly, the CAH of persecution differs from other CAHs because it requires that the perpetrators have a specific discriminatory intent.

War Crimes

The applicability of war crimes to depends on the existence of an armed conflict. The ICC has held that an armed conflict not of an international character (internal armed conflict) exists whenever there is a resort to protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.

In order for acts to constitute war crimes they must be committed against persons taking no active part in the hostilities including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause.

War crimes need not fulfill the special contextual requirements of CAH and genocide. As such, one single criminal act falling under the enumerated categories and committed in the context

of an armed conflict can be prosecuted. For this reason, war crimes are said to be more easily provable than the CAH and genocide.

Genocide

The elements of the genocide acts set out in Article 6 of the ICC Statute and ICC Elements of Crimes. These elements are:

- the victims must belong to the targeted group (national, ethnical, racial or religious group);
- the killings, the serious bodily harm, the serious mental harm, the conditions of life, the measures to prevent births or the forcible transfer of children must take place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction; and
- the perpetrator must act with the intent to destroy in whole or in part the targeted group.

Notably, the ICC definition of genocide goes further than the definition in the Genocide Convention. In order for each of the genocidal acts to be proven it must be established that the conduct took place in a context of similar conduct directed against that group or was conduct that could itself effect such destruction. This means that the relevant conduct presents a concrete threat to the existence of the targeted group, or a part thereof as opposed to just being a latent or hypothetical threat.

The legal definition of genocide is very strict. It is the most difficult of all international crimes to prove because of the special intent requirement of the offence.

In order to succeed in proving genocide it must be proven beyond a reasonable doubt that a specific defendant had a special intent to destroy a protected group in whole or in part. Defendants rarely make explicit statements evidencing a clear genocidal intent. Accordingly, in most cases of alleged genocide, there will be an effort to prove genocidal intent through inferences drawn from circumstantial evidence including the systematic nature of the crimes and the acts and conduct of the defendant. In such cases, it is necessary that the finding that the accused had genocidal intent be the only reasonable inference to be drawn from the totality of the evidence.

Therefore even if circumstantial evidence of genocidal intent is produced (which usually includes mass murder, rape, torture and forcible transfer and an accused's participation in such a campaign), prosecutors must still prove why this evidence does not simply constitute proof of the mental element requirements of persecution as a CAH as opposed to genocide. This is particularly relevant to ethnic cleansing and cases which involve forcible transfer because the aim of cleansing an area of a particular group by force does not necessarily equate with intending that group's destruction.

The difference between the intent to destroy for genocide and the discriminatory intent for persecution as a CAH is that for persecution, the perpetrator chooses the victims because they belong to a specific group but does not necessarily seek to destroy that group as such.

For the purposes of genocide, the destruction which is intended must be physical or biological. An attack on the cultural or sociological characteristics of a human group in order to annihilate

these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide.

Individual Criminal Responsibility

The modes of individual criminal responsibility for offences under the ICC Statute include:

- committing individually, jointly or through another person
- ordering, soliciting or inducing a crime
- aiding and abetting or assisting a crime (ie. acts consisting of practical assistance, encouragement or moral support to a principal offender of a crime)
- in any other way contributing to the commission or attempted commission of a crime by a group of persons acting with a common purpose; and
- attempting to commit a crime

Command or Superior Responsibility

The second main form of criminal responsibility under the ICC Statute is command or superior responsibility. A military commander or a person acting as a military commander will be responsible for the crimes committed his forces if three elements are present:

- the existence of a superior-subordinate relationship between the commander (the accused) and the perpetrator of the crime;
- the accused knew or owing the circumstances at the time, should have known that the crime was about to be or had been committed; and
- the accused failed to take the necessary and reasonable measures within his power to prevent or repress its commission or submit the matter for investigation and prosecution.

Civilians who are not *de facto* members of the military but who may exercise some type of power over armed forces, such as politicians, members of government or public service officials, can be found criminally liable under the concept of superior responsibility. However the mental element requirement is higher for civilian superiors. They must have actual knowledge of the subordinate's crime, or consciously disregard information about the crime. However a military commander can be convicted on the basis that he should have known about the crime as soon as he had information about the *risk* of such a crime occurring.

The Value of Archives: An Example from Guatemala

Youk Chhang, Director of Documentation Center of Cambodia

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Guatemala is a Central American country whose area and population are about the same as those of Cambodia. And like Cambodia, it recently emerged from what was perhaps the most tragic period in its history: between 1960 and 1996, the nation experienced an internal armed conflict that left 150,000 people dead. Another 45,000 Guatemalans disappeared, and nearly 2 million people were displaced in their own country or sought refuge in other nations. Thousands of homes were torn apart and more than 600 villages were destroyed.

Most of the victims were poor indigenous people living in the countryside, and were union members and agricultural workers. But others opposed to repression in Guatemala were targeted as well, such as students, judges, attorneys, witnesses, and journalists. Most of them lived in the capital of Guatemala City. These men, women, and children were subjected to countless human rights violations, including extrajudicial executions, torture, death threats and degradation.

The individual perpetrators of this conflict – the National Police – were a little more difficult to identify. Like Cambodia’s Angkar, they maintained a high degree of secrecy. The National Police had two branches. One branch was visible: the police who wore uniforms. They were feared because they gassed, arrested and sometimes tortured demonstrators and others who disagreed with the government. But most of the terror was spread by the Secret Police. They dressed like ordinary people, but formed death squads, particularly against the guerilla movements that were forming in the countryside. They secretly kidnapped, tortured, and executed people.

The Archives’ “Discovery”

Like the Khmer Rouge, Guatemala’s National Police kept extensive records on people who they perceived to be their enemies. But unlike the Khmer Rouge, who burned as many documents as they could when the National Front and Vietnamese were invading Cambodia, the National Police kept all of their documents, perhaps because they did not fear arrest or future prosecution.

Few people outside the police knew about these records until May 5, 2005. On that day, a news report warned the public that there might be a huge explosion caused by the ordnance materials that had been in storage since 1997 at the National Police Academy in Guatemala City. Guatemala’s Human Rights Ombudsman became worried. He had learned that the explosion could destroy an area with a 1 kilometer radius that contained many homes, schools, businesses and a hospital.

On June 17, 2005, residents of the city woke up to the sound of an explosion in another part of the capital. About a ton of unused projectiles left from the internal armed conflict had blown up and produced a white cloud that many people assumed was toxic, causing wide-spread fear. This gave the Ombudsman the opportunity to file an appeal to inspect the National Police Academy. And on July 5, his team entered the Academy.

Checking the buildings adjacent to the room where the explosives were stored, the Ombudsman's team found some documents that caught their attention. As they moved from room to room in the complex, they found more and more documents. The team members were astonished: they didn't believe that the files actually existed (the police claimed that their files had either never existed or had been destroyed), much less that they were housed for more than 20 years in a place that was so accessible. They also found 3,500 explosive devices – such as dynamite, grenades, mortars, and the chemical potassium chloride.

Taking Action on the Archives

The Ombudsman's team was faced with a decision: they could close their eyes to what they had found or take action. They chose the latter course and requested a judicial order to perform research on the documents and investigate the human rights violations recorded in them. Their request was granted a week later.

In the meantime, others began to take action to prevent the transfer of documents, including archives that were held in old National Police stations in the countryside. The Ombudsman moved quickly and requested that the Minister of the Interior transfer all the archives to the National Police Academy for their protection. The Minister agreed and the National Police Commissioner appointed police officers to guard the archives.

The Contents and Condition of the Archives

When I visited Guatemala in November 2006, I was taken to the Archives to see them for myself. The approximately 80 million documents (if laid end to end, they would be about 4.5 kilometers long) stored there were in desperate condition. They were tied in bundles and stacked from floor to ceiling. Many of the rooms had flooded, destroying some documents, and the constant humidity had damaged many others. Still others had been eaten by insects or plants had germinated on them. Rats scurried among the rooms, and bats and birds flew in through the broken windows at night. Because of poor wiring, there was also the risk of an electrical fire. And no security measures were in place, although personnel were working on the archives.

The Ombudsman quickly implemented measures to protect the documents in these very difficult conditions. The nine women and two men who form the team to preserve the Archives as a Guatemalan National Heritage are assisted by nearly 200 volunteers.

Perhaps 15 to 20% of the documents in the Archives are relevant to the internal armed conflict. The contents of the Archives are diverse; they include applications and paperwork for Guatemalan identification card, applications for drivers' licenses, arrest records for all types of crimes, files on political crimes (for example, the arrest records of people accused of being communists) and fingerprint documentation.

Few of the documents were organized when they were found. However, the team discovered file cabinets marked “assassinations,” “disappeared” and “homicides” and folders on victims of political murder. There were also hundreds of rolls of photography containing pictures of bodies, as well as lists of police informants, video tapes and computer disks.

Today, the files are organized by year, month, day, type, and issuing agent. All documentation is kept, whether it seems relevant to the conflict or not.

The team’s work includes locating and preparing the relevant records (the oldest document in the Archives contains arrest warrants from 1885), cleaning them (removing objects such as rusty staples and mold), carrying out research on them, scanning the documents, and entering their contents into a database.

In less than two years, the team has processed around 2,700,000 folios and cleaned, organized, and digitized nearly 3 million documents. With funding from the United Nations, and the Swedish and Dutch governments, it is following the “3-2-3” rule, putting documents in three formats (hard, scanned, and digitized copies), two locations (Guatemala and the National Archive of Switzerland), and two copies. This is the same procedure that DC-Cam follows. Our documents are in microfiche, microfilm, and scanned copies (we also plan to digitize them), and are stored in Cambodia and the United States, with copies available on CD and over the internet.

The Importance of the Archives

In the past 18 years, the Human Rights Office of Guatemala has received thousands of reports about violations allegedly committed by the State security forces. And some victims have come forward to tell their stories as well. But with the discovery and documentation of the Archives, for the first time, Guatemala is set to reveal and preserve its modern history, which was written by the perpetrators themselves. It can then begin moving toward both judicial and historical accountability.

For at least the next ten years, the team will continue the demanding and challenging task of preserving the documents, and is now taking steps to gain legal authority over the Archives. Once this is done, Guatemala can begin to face its past and reconstruct its recent history. This will help the country to begin building a more egalitarian society and to advance justice.

They have a saying in Guatemala about the people who disappeared during the country’s internal conflict: Their lives were denied, and now even their deaths are being denied. But this is about to change. With the opening of these Archives, thousands of families have new hope that they will discover the fate of their relatives in the Archives, breaking the silence at last. As in Cambodia, ordinary people can search for their lost loved ones in the Archives, lawyers can use them to advance justice, scholars can conduct research there, and future generations can find in the Archives reasons to work to improve their society.

A Brief Analysis on the Constitution of Burma (2008)

Aung Htoo, General Secretary of the Burma Lawyers' Council

The UN Secretary General's effort to approach the 2010 election 'to be inclusive, free and fair'¹ is generally acceptable but it is quite vague and it does not address the particular situation of Burma. So long as the 2010 election implements the SPDC's 2008 Constitution, long term stability will not be realized², the actual democratization process³ will never happen, and more importantly, the rule of law which is a major foundation for seeking justice as well as economic development of the people will be perpetually denied.

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The following elements prove that the 2008 Constitution guarantees the perpetual rule of the military dictatorship.

1. The Dominant Role of the Military Council – the National Defense and Security Council (NDSC) – over the Legislative, Executive, and Judicial Bodies

The ruling military regime, the State Peace and Development Council (SPDC), will formally transform into the National Defense and Security Council (NDSC) in accordance with the 2008 Constitution. The NDSC will be above the Constitution and will control the government bodies that exercise legislative, executive, and judicial power.

Legislative Aspect

The Commander-in-Chief (C-in-C) of the Defense Services and his deputy will lead the NDSC. Both the C-in-C and his deputy have the power to place army representatives into the legislative bodies. Army representatives will make up one fourth of the total number of representatives in each legislative body. The People's Assembly speakers and the National Assembly's speakers will also be included in the formation of the NDSC. Speakers will be controlled by the army officials in the NDSC in all law making processes.

1. UN Secretary-General's briefing to the Security Council on Myanmar, New York, 13 July 2009.

2. The major ethnic armed cease-fire organizations such as the New Mon State Party (NMSP), the Kachin Independence Organizations (KIO) and the United Wa State Party (UWSP) have already declared that they would not accept the program of the SPDC to transform their own armies into Border Security Force and place them under the command of the SPDC's Commander-in-Chief of the Defense Services in January, February and April 2009 respectively. Their positions contradict article 339 of the 2008 Constitution which stipulates, 'All the armed forces in the Union shall be under the command of the Defence Services.'

3. The SPDC's 2008 Constitution prohibits the emergence of independent democratic political parties as they are not allowed to establish independent political objectives in accordance with Article 404 (a) as follows:

'A political party shall set the objective of non-disintegration of the Union, non-disintegration of the national solidarity and perpetuation of sovereignty'.

Executive Aspect

The NDSC's authority is not limited to the Legislative Branch, but has been included in the Executive Branch as well. It now appears that the NDSC will be above the elected government of the Union of Burma. The Constitution does not prescribe that the executive power of the Union shall be vested in the Union Government but, instead, it states that the executive power shall be vested in the President.⁴ In accord with a created presidential election system⁵, which was never applied in any country across the world, an incumbent military official or the one that turned civilian will become the President. The President shall have power to appoint the Union Ministers who are not elected representatives.⁶ It connotes that the Constitution authorizes the President to form a Union Government only with the military personnel, who are not elected, if it is necessary to protect the military dictatorship effectively.

Even if the President is a military officer or the one that turned civilian in order to enter the Presidential office, the President will still be dominated by the C-in-C as the President shall have to be constituted in the formation of the NDSC. Even out of the eleven NDSC members, six incumbent army officials will be under the direct command of the C-in-C⁷, whereas the remaining five will be under his indirect command. It is because the military officers, that turned civilians⁸, and very few civilians, that are protege of the military dictators⁹, may constitute the remaining five. The armed forces will not be under the control of the Union Government.¹⁰ However, the Union Government will be under the control of the C-in-C seeing as the Union Government's principal ministries, namely, the ministries of Defense, Foreign Affairs, Home Affairs, and Border Affairs, shall have to obey orders given by the C-in-C who will be operating the NDSC.¹¹

Judicial Aspect

Independence of the judiciary, which is a major component of the Rule of Law, will never become a reality under this Constitution. The President, who is a part of the NDSC military council, has the power to appoint and dismiss the Supreme Court Justices at his own discretion¹²; thus, judicial tenure is not guaranteed. The existing civilian judicial system, which is totally subservient to the military¹³, will remain in place.

4. Article 217 of the Constitution of the Republic of the Union of Myanmar (2008).

5. Article 60 of the Constitution of the Republic of the Union of Myanmar (2008).

6. Article 232 (b) (i) of the Constitution of the Republic of the Union of Myanmar (2008).

7. According to the Article 60 of the Constitution, the military official will become the President or one of the two Vice-Presidents. In addition, according to the Article 232 (b) (ii), the C-in-C shall have power to appoint the Ministers of Defense, Home Affairs and Border Affairs, that will constitute the NDSC, from among the military officials.

8. General Thein Sein, General Shwe Mahn, Deputy General Tin Aung Myin Oo, and many other high ranking military officials have already turned the civilians recently and they will participate in the 2010 election through the Union Solidarity and Development Association (USDA). As of September 4, 2010, the USDA has already nominated over 1,000 election candidates.

9. Zay Kabar U Khin Shwe, who is a very rich business man and well-known crony of the military regime, publicly stated that he will participate in the election with the instruction of the SPDC.

10. Article 200 of the Constitution of the Republic of the Union of Myanmar (2008).

11. Article 201 of the Constitution of the Republic of the Union of Myanmar (2008).

12. Appointment of judges: Article 299, 308, and 327 of the 2008 Constitution; Removal of judges: Article 302, 311, and 334 of the 2008 Constitution.

13. "Fourth Core Human Rights Element: Judiciary", elaborated by Mr. Tomas Ojea Quintana, UN Special Rapporteur on Human Rights Situation in Burma, in his report "Human Rights Situation in Myanmar" Special 5, 2008; P. 21.

II. The Constitution's Denial of Justice and the Engendering of Hatred, Revenge, and Other Violent Actions

The Constitution has already established permanent military tribunals¹⁴ separated from the oversight of the civilian justice mechanism. The military C-in-C will exercise appellate power¹⁵ over the tribunals.

Above the Law

Although there have been cases of both widespread, indiscriminate attacks and systematically directed attacks against civilian populations, the responsible military personnel have never been tried in civilian courts.¹⁶ In the aftermath of the 2010 election, if the separate military tribunals operate, the efforts of civilian victims of crime, who seek justice, will be perennially renounced. The 2008 Constitution guarantees that the military will be above the law and that there will be no state institution in Burma to take action against the military C-in-C for any crime, regardless of whether committed on a national or international level.

Engendering Hatred

The enforcement of the 2008 Constitution in the 2010 election will further aggravate an already explosive situation in which hatred already exists and revenge is unavoidable; violent measures may be sought after by many people who view this as their only alternative, due to the lack of a justice mechanism.

III. The Escalation of Human Rights Violations in the Aftermath of the 2010 Election and the Possibility of a Genuine Civil Society Never Coming into Existence

Blanket Amnesty

The 2008 Constitution provides blanket amnesty to all members of the SLORC/SPDC military regimes¹⁷ for their previous commission of heinous crimes¹⁸, which violates the UN Security Council Resolutions 1325 and 1820 and several preemptory norms.¹⁹ Said blanket amnesty is incompatible with certain positive obligations, such as the duty to prosecute from the aspect of international law.²⁰ The pronouncement of a constitution that violates international law is an "internationally wrongful act."²¹ Accordingly, a particular State act being characterized as lawful under domestic law is irrelevant here.²² The military regime would qualify as the

14. Article 293 of the 2008 Constitution.

15. Article 343 of the 2008 Constitution:

"In the adjudication of Military Justice: ...

(b) the decision of the Commander-in-Chief of the Defense Services is final and conclusive."

16. For instance, two Burmese youths, Maung Soe Paing Zaw the son of U Hoke Kyi, and Maung Aung Thu Hein the son of U Myat Thu, were shot dead by the SPDC's soldiers in Pago on 4 September 2010. No military perpetrators were arrested by police nor tried in any civilian court.

17. Article 445 of the 2008 Constitution:

"... No proceeding shall be instituted against the said Councils or any members thereof or any member of the Government, in respect of any act done in the execution of their respective duties."

18. "Crimes against humanity and war crimes" as indicated by international human rights organizations such as International Federation of Human Rights (FIDH), Amnesty International, Human Rights Watch, during 2006-2010 and also by International Human Rights Clinic at Harvard Law School, May, 2009.

19. Global Justice Centre, New York, U.S.A. E-mail: janet.benshoof@gmail.com

20. Suzannah Linton, Associate Professor of International Law, Faculty of Law, Hong Kong University.

21. A legal analysis made by the Global Justice Center, New York, USA, citing "The Responsibility of States for Internationally Wrongful Acts, United Nations International Law Commission, 2001."

22. Article 3 of Responsibility of States for Internationally Wrongful Acts.

legislative/executive organ in question due to its post referendum announcement of the adoption of that Constitution.²³ Should the 2008 Constitution be enforced, impunity will continue to prevail in the country and heinous crimes such as violations of the Geneva Conventions²⁴, crimes against humanity, and war crimes²⁵, will persist.

The essence of the 2008 Constitution is to guarantee impunity indefinitely and the 2010 election will implement it. When impunity prevails, the Rule of Law does not come into existence. Without dealing with these challenging issues, a political dialogue that may lead to genuine national reconciliation will only be a myth. Should impunity prevail and criminal accountability be systematically denied even in the national legal system, Burma will be in a vicious circle and the commission of heinous crimes will continue to occur repeatedly, denying the rule of law and damaging the stability of the state. As a result, development will never become a reality.

So long as the power of Senior General Than Shwe and a group of his lackey generals, who are responsible for having committed a number of heinous crimes, remains unchallenged, the military dictatorship will be entrenched. Then, the term 'national reconciliation' may even be used by Senior General Than Shwe to prolong his power²⁶, a fake dialogue may be created again, and the 2008 Constitution will remain unchanged. Afterwards, the regime will step forward for the 2010 election and may be able to rule the country indefinitely as a military dictatorship, safeguarded by the constitution. If the regime is able to seek legitimacy on the basis of the 2008 Constitution after the 2010 election, democratization of Burma based on the Rule of Law will be a distant dream.

Non-Existence of a Genuine Civil Society

The 2008 Constitution deprives people of their basic human rights by stipulating "exception clauses"²⁷ in the chapter of fundamental rights and duties of citizens. Under the Constitution, the effectively draconian laws²⁸ which strictly prohibit basic freedoms such as freedom of speech, association, and assembly, will continue to exist and more abusive laws will be enacted. The Constitution also lacks a rights protection mechanism. As such, a genuine civil society, which checks the power abuses of the government, will never come into existence under the 2008 Constitution. Consequently, serious violations of human rights and breaches of international norms will not be prevented.

23. David Fisher, Professor of International Law, Faculty of Law, Stockholm University, Sweden.

24. The International Committee of the Red Cross issued a global alert on Burma on 29 June 2007, verifying the Regime's criminal violations of the Geneva Conventions, stating that such violations were personally observed by ICRC delegates, that all confidential bilateral negotiations had broken down, and that the crimes by the government were likely to be ongoing.

25. "Human rights violations in Burma are likely crimes against humanity and/or war crimes." The UN Special Rapporteur on human rights situation in Burma, Tomas Quintana, recommended forming a Commission of Inquiry by the UN in his report issued in March 2010.

26. Senior General Than Shwe, as the Chairperson of the SPDC, issued a statement on August 10, 2009, instructing the Ministry of Home Affairs to reduce the term of house arrest for Daw Aung San Suu Kyi. There, he used the term, *inter alia*, 'not to impose prejudice each other'. Then, NLD highlighted it in its declaration issued on August 12, 2009 referring to its former and current policy on 'national reconciliation'.

27. Article 354 of the SPDC's 2008 Constitution:

"Every citizen shall be at liberty in the exercise of the following rights, *if not contrary to the laws, enacted for Union security, prevalence of law and order, community peace and tranquility or public order and morality*,

(a) to express freely their convictions and opinions;

(b) to assemble peacefully without arms;

(c) to form associations and organizations;"

28. 1975 State Protection Law, 1962 Printers and Publishers Law, 1985 Television and Video Act, 1996 Computer Science and Development Law, 2000 Internet Law.

III. Denial of Ethnic Nationalities' Rights to Self-Determination

Rigid Centralization

Equal rights and self-determination, stipulated by the ethnic nationalities for some decades, is required for decentralization. However, the Constitution, inter alia, formulates rigid centralization by creating a permanent military institution – the National Defense and Security Council. Each state or region does not have the right to develop its own constitution within the framework of the Union Constitution of Burma, nor does it have the right to elect its Chief Minister.²⁹ In accordance with the Union Legislative List³⁰, natural resources³¹ will be exploited mainly by the NDSC military council, in the name of the Union, but not by the respective states or regions.³²

Racial Discrimination

The majority of the non-Burman ethnic resistance organizations believe that the 2008 Constitution will exacerbate racial discrimination; the right to life and liberty of ethnic nationalities will continue to be deprived; the sufferings of the ethnic nationalities such as forced labor, forceful transfer of population, torture, rape, enforced disappearances, willful killings, extensive destruction and appropriation of properties, crop and food-stock confiscation and destruction, and forced conscription of child soldiers, will get worse. These violations are all contrary to peremptory norms.

The application of the 2008 Constitution, in regard to militarization of the whole country³³, will reinforce the military regime's efforts in nuclear weapon proliferation. As a consequence, the 2008 Constitution will not only aggravate the already explosive situation prevailing inside Burma, but become a threat to the whole world.

To resolve this, the situation of Burma should be dealt with from the aspect of international law, international human rights laws and international humanitarian laws. Burma's 2008 Constitution and 2010 election must be declared null and void by the UN Security Council, as was the case for South Africa's 1983 Constitution and its election, in accordance with the UN Security Council Resolution 554/ 1984, inter alia, as follows:

1. Declares that the so-called "new constitution" is contrary to the principles of the Charter of the United Nations, that the results of the referendum of 2 November 1983 are of no validity whatsoever and that the enforcement of the "new constitution" will further aggravate the already explosive situation prevailing inside apartheid South Africa.
2. Strongly rejects and declares as null and void the so-called "new constitution" and the "elections" to be organized in the current month of August for the "coloured" people and

29. Article 261(b) of the SPDC's 2008 Constitution:

"In order to appoint the Chief Minister of the Region or State concerned, the President shall select a suitable Hluttaw representative who has the prescribed qualifications from among the Region or State Hluttaw representatives concerned;"

30. Schedule I of the 2008 Constitution.

31. Oil, natural gas, electricity, minerals, mines, gems, pearls, forests, wildlife, natural plants and natural areas; Article 6 Schedule I of the 2008 Constitution.

32. Schedule II, Sector 4 of the 2008 Constitution.

33. The Article 340 of the Constitution authorizes the Army, but not the Union Government, to turn the civilians into military personnel under the strategy of the people's militia, with the following provision, inter alia:

"... The strategy of the people's militia shall be carried out under the leadership of the Army."

people of Asian origin as well as all insidious manoeuvres by the racist minority regime of South Africa further to entrench white minority rule and apartheid;

The Security Council made such a declaration with regard to South Africa's apartheid constitution, given that apartheid violated the peremptory norms of international law.³⁴ Burma's 2008 Constitution lays a foundation for the military's continued large-scale and systematic violations of human rights and humanitarian law rules, many of which constitute peremptory norms.³⁵ The lack of constitutional constraints on the powers of the Burmese military to pursue a nuclear weapons capability greatly increases the threat to "international peace and security."³⁶ The Security Council's annulment of the South African constitution as violation of peremptory norms thus provides a compelling precedent for the Security Council to do likewise in the case of the Burma Constitution.³⁷

In so doing, the maintenance of international peace and security under the UN Charter will be facilitated; an internationally wrongful act will be rectified; enjoyment of impunity from international crimes in accordance with national laws will be deterred; efforts for legitimization of the military rule in accordance with the Constitution will be repudiated; human rights will be effectively promoted; and as a result, it will pave the way for a democratic transition in line with several UN General Assembly resolutions.

34. David Fisher, Professor of International Law, Faculty of Law, Stockholm University, Sweden. E.mail: david.fisher@juridicum.su.se

35. *Ibid.*

36. *Ibid.*

37. *Ibid.*

Existing Sanctions Against the Burmese Regime - EU Stance

Mark Farmaner, Burma Campaign United Kingdom

Divisions within the European Union have meant that it has no coherent strategy. EU economic sanctions on Burma could be used as a case study for how not to apply sanctions. Targeted economic sanctions imposed by the European Union, used properly, could still have an important role to play. However, given the continued divisions within the EU, there does not appear to be any prospect of effective sanctions being applied in the near future.

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After the crushing of the democracy uprising in 2007, the European Union discussed or promised a range of sanctions, including targeting gems and timber, financial transactions, banking, banning new investment, and targeting the assets of business cronies. It also called for a global arms embargo. The Burma Campaign UK has been calling for many of these sanctions for more than a decade.

What actually happened was very different. The EU could only agree on a ban on investment in, and imports of, gems, minerals and timber. None of the other sanctions were introduced, and no diplomatic efforts made to build a global consensus for an arms embargo, which would be essential to overcome Chinese objections.

The gems and timber sanctions were only introduced six months after the uprising. There was no effort to use the threat of their introduction as a diplomatic tool to try to wring concessions from the regime. Nor were the sanctions introduced in coordination with other countries, such as the USA, Canada and Australia, which were also introducing sanctions. Finally, the European Union did not implement any new monitoring or enforcement mechanisms to ensure the sanctions were obeyed. Friends of the Earth has identified loopholes in the sanctions which means teak sold by Burma's generals can still reach the EU.

Many EU sanctions have looked good on the surface, but been undermined by the way they have been implemented.

A visa ban still allows regime officials to visit the EU for ASEM (Asia-Europe Meetings) which gives them the international legitimacy they crave, but has not proved a useful forum for applying diplomatic pressure on the regime.

A ban on new investment only applied to state owned enterprises, which cannot be invested in under Burmese law, and excluded the oil and gas sector, which is the biggest earner for the regime.

The asset freeze only freezes assets of people on the visa ban list, not the assets of the regime itself.

At the same time as these limited sanctions being introduced by the EU, European, American and Asian countries have invested billions of dollars in Burma. The true story is not one of sanctions being tried and failed, but of limited sanctions and huge investment.

Although the role of Asian countries in Burma's economy has increased significantly in the past five years, as one of the world's largest economies, the European Union still has economic muscle it could use to apply pressure. We believe the suffering in Burma has been going on for so long, and is so serious, that any potential point of pressure, no matter how large or how small, should be utilised.

The European Union should consider the following sanctions, but they should only be introduced tied with diplomatic initiatives, and introduced in a staggered way to maximise their political influence. This list is not in order of priority.

1. Place the judges, court officials and police involved in the trials of around 1,000 political prisoners jailed after the 2007 uprising on the visa ban list.
2. Introduce sanctions that will ban European Union companies from providing insurance in Burma. While many of the companies investing in Burma are now from Asia, London is still the capital of the global insurance industry. Asian companies investing in Burma, insure and re-insure their operations in London. Such sanctions could hit the giant Shwe gas project, which will earn the dictatorship billions of dollars.
3. Introduce sanctions on financial transactions. The USA introduced these sanctions in 2003, and they stopped the regime using dollars for international trade. However, the regime switched to using Euros.
4. Ban all new investment in Burma. At the moment there is no sanction that would stop European companies investing in a joint venture with the dictatorship in the oil or gas sector.
5. Introduce sanctions targeting the assets of Burma's business cronies, as the USA has been doing since 2007.
6. Review Burma's participation in ASEM meetings. Despite repeated promises, the EU agreed to Burma's membership of ASEM in 2004. At the time it was argued that it would provide a venue to apply increased diplomatic pressure on Burma. However, in this time there has been a significant deterioration in the human rights situation in Burma. Decision making in Burma is so centralised that talking to junior officials, or even the foreign minister, at meetings like ASEM is not effective. Diplomatic initiatives should be at a much higher level than those taking place at ASEM.

It is vital that these sanctions not be introduced as they have in the past, as a one-off slap on the wrist after an atrocity. They should be tied in with diplomatic initiatives, such as UN Envoy visits introduced in stages to maximise pressure, and coordinated with like-minded countries.

The European Union should also use existing sanctions more effectively. Reduction in existing sanctions should be more proactively offered in return for real reforms. However, sanctions should be in stages, and only be reduced if there is substantial change first, such as the release of all political prisoners.

The European Union should also revive the potential development package proposed by Britain after the uprising. This package would include debt cancellation, aid, trade, and other

development assistance. It would only start to be introduced AFTER an irreversible transition to democracy had begun. While this package will not act as an incentive for the generals, as they do not care about the welfare of the people of Burma, it could act as an incentive for some of the business cronies that help to prop up the dictatorship. At the moment the cronies are doing well under the dictatorship. If they are faced with an ever increasing series of sanctions, but offered a window of better economic opportunities under democracy, it could loosen their allegiance to the regime.

There are also important diplomatic steps the EU should be taking.

1. Exert maximum pressure on ASEAN. ASEAN has argued that engagement is more effective than sanctions and confrontation. If engagement gives ASEAN more influence, now is the time for them to prove it.
2. Bring Burma back to the United Nations Security Council. The Security Council has called for the release of Aung San Suu Kyi and all political prisoners. The Council has been defied, and must now take action to enforce its call.
3. Work to build a global consensus for a global arms embargo. The EU, USA and Canada support a global arms embargo. A global consensus should be built for an arms embargo, and then taken to the Security Council.

Legal options should also be pursued.

4. The United Nations has accused the dictatorship of a crime against humanity and of breaking the Geneva Conventions as part of its attacks on ethnic civilians in eastern Burma. The European Union should support a Commission of Inquiry to establish whether Burma's generals should face trial for these abuses.
5. The European Union should support an International Labour Organisation referral of Burma to the International Court of Justice for its continuing use of forced labour.
6. Under universal jurisdiction, where possible, EU members should pursue cases in their national justice system.

ASEAN and its approach to Human Rights within Myanmar

Kalpalata Dutta, Asian Institute for Human Rights

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The ASEAN Charter affirms the commitment of its member states to strengthen democracy, enhance good governance and the rule of law and to promote and protect human rights and fundamental freedoms. One of the fundamental principles guiding ASEAN is – non interference in the internal affairs of ASEAN member states. ASEAN’s intervention on issues of human rights violations has essentially been shaped by this guiding principle.

The military regime in Myanmar came under intense pressure from the international community when it refused to recognize the results of the elections held in 1990. At the time when EU and USA were imposing sanctions on Myanmar, ASEAN adopted a policy of ‘constructive engagement’ with Myanmar with the hope that through such engagement, Myanmar would be drawn into the ASEAN and participation in regional affairs and gradually get integrated with the international community. It was hoped that as Myanmar came out of its isolation, it would gradually move towards a democratic system and the regime would be forced to address the situation of human rights within the country. This was in line with the soft, ‘quiet diplomacy’ approach of ASEAN.

Once Myanmar became a member of ASEAN in 1997, the international community started putting pressure on ASEAN to take a strong stand against Myanmar.

The Depayin incident in May 2003 when Aung San Suu Kyi and her supporters were attacked; and the issue of Myanmar’s chairmanship of ASEAN during 2006-2007 placed further pressure on ASEAN to take a firmer stand on Myanmar. During this time ASEAN countries such as Malaysia, Philippines, Singapore sent out signals that developments that derailed or delayed the reconciliation process in Myanmar were of concern to ASEAN as they affected the relationship with its dialogue partners. In 2004, some ASEAN parliamentarians formed the ASEAN Inter-parliamentary Caucus on Myanmar to advocate for human rights and democracy in Myanmar. ASEAN issued its strongest statement after the bloody crackdown on peaceful demonstrators in 2007. ASEAN expressed ‘revulsion’ over the killings and called on the military leaders to halt the violence and free all the political prisoners. However, ASEAN seems to have accepted the referendum on the new constitution held in 2008 even though the drafting of the constitution and the referendum process itself has been mired in controversies.

In December 2008, the ASEAN Charter was adopted. By October 2009, the ASEAN Inter Governmental Commission on Human Rights (AICHR) will become functional. The strength of the commitments made in the ASEAN Charter and the effectiveness of the regional human rights body will be tested through its response to human rights issues in Myanmar.

The Democratization Process in Burma and the Role of India

Mr. Kim, Coordinator, Shwe Gas Campaign Committee¹

India-Burma Relations from 1948 to 1962

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Relations between India and Burma are rooted in shared profound historical, ethnic, cultural and religious links. Not only do they share a 1,670 kilometer-long land border along much of the northwest of Burma, but they share a strip of maritime border that is 200 kilometers long. A Treaty of Friendship was signed between the two countries in 1951, and enjoyed friendly relations from the end of World War II until 1962. Prime Minister Jawaharlal Nehru of India and Prime Minister U Nu, Burma's first independent democratic prime minister, were instrumental in cementing initial political and diplomatic ties between the two countries.

Chilling Effect of the 1962 Military Coup Until 1987

The coup d'état that took place in 1962 and the concomitant rise of General Ne Win had a chilling effect on Burmese-Indian relations, especially during the expulsion of "resident aliens," including approximately 300,000 Burmese Indians. The fervent nationalization of all private enterprise furthermore robbed many Indian residents of their livelihoods. The Indian Consulate in Mandalay was subsequently closed.

Not only had Burma previously refused membership in the Commonwealth, but they also walked out of the Non-Aligned Movement meeting in 1979 and withdrew its membership. However, the Land Boundary Agreement and Maritime Boundary agreements were signed between the two countries in 1967 and 1986, respectively, and trade talks took place between top officials that culminated in a 1974 export agreement for goods and project funding. Prime Minister Rajiv Gandhi visited Burma in 1987 despite tension regarding Burma's increasing relations with China.

India's Position on Burma from 1988-1990

Although there was no official change of foreign policy towards Burma, the relationship between the two countries reached its lowest point. India was the first Southeast Asian nation to firmly oppose the junta's rule, and maintained a pro-democratic stance. India strongly opposed the military junta's brutal crackdown and suppression of pro-democracy activists. India criticized the SLORC and extended moral and financial support and asylum to activists crossing the Indo-Burmese border. At this time, India opened refugee camps and joined the USA and others in condemning the regime.

¹. Edited by Seth Engel, FIDH Asia Bureau intern

Policy Shift in 1990-1997 Towards Engagement

India reviewed its policy towards Burma in the early 1990s and began to abandon the principles of humanism and idealism that were espoused by Prime Ministers Nehru and Gandhi. India instead opted for a “realist policy” based on National & Security interests. This policy represented a radical shift towards courting the Burmese Generals, and was based on several principles. These included a “Look East” policy where Burma played a central role in reaching out to other Southeast Asian countries and reacting to intrusive Chinese policy in the region. India also hoped to check insurgency, drug trafficking and smuggling in India’s northeastern states.

India’s Foreign Secretary J.N. Dixit visited Rangoon in 1993, which was the highest level Indian official visiting the country since Prime Minister Gandhi’s visit in 1987. As part of the thawing, a Border Trade agreement was signed in 1994, although India-Burma relations began to deteriorate once again in 1995. New Delhi conferred the Jawaharlal Nehru Award upon Daw Aung San Suu Kyi for promoting international understanding, a move that caused tension between the two countries until 1998.

A New Chapter on India-Burma Relations

India commenced its now entrenched policy of working closely with the Burmese junta in 1998 once the Bharatiya Janata Party (BJP)-led National Democratic Alliance (NDA) resumed power. This required the principle of non-interference with domestic affairs, and in return Burma promised that closeness with China would not negatively impact Indo-Burmese relations.

A number of regional forums contributed to the de-thawing of relations, which includes the Association of Southeastern Asian Nations (ASEAN) and the Bay of Bengal Initiative for Technological and Economic Cooperation (BIMSTEC), which includes, inter alia, Bangladesh, India, Burma, Nepal, Thailand, and Sri Lanka. Finally, the river Mekhong that runs through China, Burma, Laos and Thailand has become an economic corridor of increasing importance for trade with India.

The Realist “Look East” Policy

Burma is of increasing geo-strategic importance to India, as it serves as India’s bridge between South Asia and Southeast Asia. It serves as the backbone for the Indian “Look East” policy, especially for the landlocked northeast states of India. Burma’s large northern border with China is contiguous with the Sino-India disputed border, and provides access to the eastern littoral of the Bay of Bengal. A hostile Burma poses the threat of hosting foreign naval presence, which would be a grave threat to Indian security.

Indian policy is currently of non-intervention, claiming that internal affairs are not their concern. This principle is based upon the arguments that the military has ruled since 1962, and is strong enough to defend its power against unorganized and weak democratic forces. Indian Foreign Minister Pranab Mukherjee has said that “India is a democracy and it wants democracy to flourish everywhere...But we are not interested in exporting our own ideology in Burma.”

Indian interests include the huge deposits of natural gas in Burma, eliminating the insurgency groups in the northeast states of India, developing the northeast states in general, and securing

maritime and land borders from hostile forces and Chinese intrusion. In return, the Burmese junta receives recognition and support of its “legitimacy” and a boosted international image. It also receives significant financial assistance and economic packages.

Impacts of India’s Realist Policy

As a result of this policy, India does not vote in support or in favor of the democracy movement in Burma in the UN, ASEAN, BIMSTEC or the South Asian Association for Regional Cooperation (SAARC). In addition, there has been an increased exchange of high level official visits, including Vice Chairman of the SPDC Maung Aye, General Than Shwe, Indian President Prathiba Patil, etc. India also furnishes arms, technological know-how, and military training.

The benefits that India currently provides to the junta are plentiful. India gives access to credit to the Burmese government and assists in implementing development projects and exploitation of natural resources. Economic packages, increased trade and tremendous investment define the new Indian realist policy. In the energy sector, several gas pipelines provide to the region including the A-1 Block (Rakhine Offshore) and the M-8 (Moattama Offshore Area) controlled by the Sun Group of India. India supplies large amounts of military support, such as T-55 tanks, deck-based air-defense guns, radar, electronic warfare, and naval communication equipment.

Several large development projects have been undertaken jointly by the Indian and Burmese governments. Most prominent among these is the Kaladan project which is a \$100 million multi-modal transport project that clears large swaths of the Bay of Bengal for shipping. Other projects include the Thamanthi Dam Project and the upgrading of the Yangon-Mandalay railway line. India has also contributed \$27 million towards building the 160-kilometer Tamu-Kalewa highway in Myanmar’s Sagain Division and assisted construction of the Moreh-Bagan-Maesot trilateral highway that will link India, Myanmar and Thailand.

Suggestions

Indian foreign policy should be of the people and for the people, and should supplant “Look East” with “Look to the People.” Any long-term bilateral relation must respect the aspirations of both countries’ peoples. Current policy should be reviewed to take into account the Burmese peoples’ sentiment, especially if democracy is ever to prevail in Myanmar. If democracy ever does prevail, democratic forces will not look favorably upon an India that supported the junta government.

ANNEX

Programme of the seminar

Mon 4 May 2009 – Session I and II		
Time	seminar	Interventions
08:30 AM	SESSION I: Burma and the ICC: A case for referral? - General moderator: Aung Htoo, General Secretary, BLC	9:00-9:30 - Registration
09:30 AM		9:30-9:40 - Opening remarks - Kraissak Choonhavan, MP, President of the ASEAN Inter-Parliamentary Myanmar Caucus - AIPMC), U Thein Oo, Chairperson of BLC, Cynthia Gabriel, FIDH Vice-president
		09:40-10:00 - Advances in International Law on Grave Crimes and the Security Council's Role – Speaker: Janet Benshoof, President, Global Justice Center
		10:00-10:20 - Past Referrals Experiences: The Referral of the Situation in Darfur - Speaker: Mariana Pena, FIDH permanent representative to the ICC
		10:20-10:40 - Current Dynamics within the Security Council, past Security Council reaction to non-compliant government ... - Speaker: Antoine Madelin, FIDH permanent representative to the IO
10:30 AM		10:40-11:00 - Q&A
11:30 AM		11:00-11:15 - Coffee Break
		11:15-12:30 - Discussion Groups
12:30 AM – 1:30 PM : Lunch		
01:30 PM	Session I	1:30-2:00 - Report of the Discussion Groups General moderator: Mr. Stewart Manley, Staff Attorney of BLC
	SESSION II: Documenting international crimes in Burma - General moderator: Andi Friedman, Vice-president, GJC	2:00-2:20 - Crimes falling under the jurisdiction of the ICC - Speaker: Evelyn Serrano, Asia Coordinator of the Coalition for the ICC
		2:20-2:40 - Who could be prosecuted? - Speaker : Magda Karayiannakis, barrister, former ICC prosecutor
02:30 PM		2:40-3:00 - Role and activities of the ICC Office of the Prosecutor - Speaker: Satoko Ikeda, Attorney, Legal Officer in the Office of the Prosecutor, ICC
		3:00-3:15 - Coffee Break
03:30 PM		3:15-4:00 - Overview of existing documentation work on international crimes in Burma - Three Speakers: Dr Yuval Ginbar, Asia Pacific legal adviser, Amnesty International, Lway Dan Jar, ND-Burma ; and Youk Chhang, Director of DC Cam
		4:00-4:10 - Questions and Answers
04:30 PM		4:10-5:10 - Discussion Groups
05:30 PM		5:10-5:30 - Report of the Discussion Groups
6:00 PM – Cocktail		

Tue 5 May 2009 – Session III and IV

		Time
seminar	Interventions	
SESSION III: Sanctions by the Security Council under Chapter VII: what are the alternatives for Burma? - General moderator: Cynthia Gabriel, FIDH vice president	09:30-10:00 - A Brief Analysis on SPDC's 2008 Constitution and 2010 Election - Speakers : Aung Thoo, General Secretary BLC, Thin Thin Aung, Presidium Board Member of WLB	09:30 AM
	10:00-10:15 - Human rights and financial and economic sanctions: past experiences - Speaker : Ludovic Hennebel, ULB	
	10:15-10:45 - Existing sanctions against the Burmese regime – Speakers: Mark Farmaner, BCUK and Jeremy Woodrum, USBC	
	10:35-10:45 - Coffee Break	10:30 AM
	11:00-11:15 - Chances of obtaining an arms embargo: the way forward? - Speaker: David Mathieson, Burma Researcher, HRW	
	11:15-11:30 - Questions & Answers	
	11:30-1:00pm - Discussion Groups	11:30 AM
1:00 PM – 2:00 PM : Lunch		
SESSION IV: Overview of the situation in Burma and regional dynamics - General Moderator - Evelyn Serrano, Asia Coordinator of CICC	2:00-2:30 - Report of the Discussion Groups	
	2:30-2:50 - Role of ASEAN on Burma - Speakers: Kalpalata Dutta, Asian Institute for Human Rights and Debbie Stothard, Coordinator of Altsean Burma	02:00 AM
	2:50-3:20 - Role of China and India in relation to Burma - Speakers: Mr. Kim Coordinator Shwe Gas Campaign Committee- India and Wang Xiumei, professor, coordinator of ICC Project Office in China	
	3:20-3:30 - Questions & Answers	03:00 PM
	3:30-3:45 - Coffee Break	
	3:45-5:15 - Discussion Groups	04:00 PM
	5:15-6:00 - Reports of the Discussion Groups and Concluding Comments by BLC/FIDH	05:00 PM
	06:00 PM	

List of Actors and Organisations Present at the Seminar

Burmese actors

- All Arakan Student Youth Committee
- Alternative ASEAN Network on Burma (ALTSEAN - Burma)
- Assistance Association for Political Prisoners - Burma (AAPP)
- Burma Information Network
- Burma Justice Committee
- Burma Lawyer's Council (BLC)
- Burma Partnership
- Burma Relief Center (BRC)
- Chin Human Rights Organisation
- Ethnic Nationalities Council (ENC)
- Forum for Democracy in Burma (FDB)
- Human Rights Education Institute of Burma (HREIB)
- Kachin Women's Association - Thailand
- Karen Human Rights Group (KHRG)
- National Coalition Government of the Union of Burma (NCGUB)
- National Council of the Union of Burma (NCUB)
- Network for Human Rights Documentation - Burma (ND-Burma)
- Palaung Women's Organization (PWO)
- Shwe Gas Campaign Committee
- Thai - Burma Border Consortium (TBBC)
- Women's League of Burma (WLB)

International and regional associations

- Amnesty International (AI)
- ASEAN Inter-Parliamentary Myanmar Caucus
- Asian Institute for Human Rights
- Australian Council of Trade Unions
- Burma Campaign United Kingdom (BCUK)
- Christian Solidarity Worldwide (CSW)
- Coalition for the International Criminal Court (CICC)
- Documentation Center of Cambodia (DC-Cam)
- EarthRights International (ERI)
- Forum Asia (FA)
- Global Justice Center (GJC)
- Human Rights Now - Japan
- Human Rights Watch (HRW)
- International Center for Transitional Justice (ICTJ)
- International Commission of Jurists (ICJ)
- Malaysia Bar Council Human Rights Committee
- Open Society Institute (OSI)
- Oslo Center for Peace and Human Rights
- United States Campaign for Burma (USBC)
- Volunteer Service Organisation Thailand - Burma (VSO)

Establishing the facts – Investigative and trial observation missions

Through activities ranging from sending trial observers to organising international investigative missions, FIDH has developed, rigorous and impartial procedures to establish facts and responsibility. Experts sent to the field give their time to FIDH on a voluntary basis.

FIDH has conducted more than 1 500 missions in over 100 countries in the past 25 years. These activities reinforce FIDH's alert and advocacy campaigns.

Supporting civil society – Training and exchange

FIDH organises numerous activities in partnership with its member organisations, in the countries in which they are based. The core aim is to strengthen the influence and capacity of human rights activists to boost changes at the local level.

Mobilising the international community – Permanent lobbying before intergovernmental bodies

FIDH supports its member organisations and local partners in their efforts before intergovernmental organisations. FIDH alerts international bodies to violations of human rights and refers individual cases to them. FIDH also takes part in the development of international legal instruments.

Informing and reporting – Mobilising public opinion

FIDH informs and mobilises public opinion. Press releases, press conferences, open letters to authorities, mission reports, urgent appeals, petitions, campaigns, website... FIDH makes full use of all means of communication to raise awareness of human rights violations.



The Burma Lawyers' Council (BLC) is an independent organization that was formed in a liberated area of Burma in 1994. After the military seized power in Burma in 1962, and after the student uprising in 1988, the pro-democracy movement consisted mainly of students who were committed to the path of armed resistance. With this in mind, lawyers came together and formed what has now become an integral part of the pro-democracy movement.

The BLC is the only organization in the democratic movement of Burma which contributes to the promotion of human rights solely from the legal perspective. It is neither aligned with nor under the authority of any political organization.



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FIDH represents **164** human rights organisations on **5** continents



of person. Article 4: No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms. Article 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Article 6: Everyone has the right to recognition everywhere as a person before the law. Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination. Article 8: Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. Article 9: No one shall be subjected to arbitrary arrest,

ABOUT FIDH

- FIDH takes action for the protection of victims of human rights violations, for the prevention of violations and to bring perpetrators to justice.

- A broad mandate

FIDH works for the respect of all the rights set out in the Universal Declaration of Human Rights: civil and political rights, as well as economic, social and cultural rights.

- A universal movement

FIDH was established in 1922, and today unites 164 member organisations in more than 100 countries around the world. FIDH coordinates and supports their activities and provides them with a voice at the international level.

- An independent organisation

Like its member organisations, FIDH is not linked to any party or religion and is independent of all governments.

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Find information concerning FIDH 164 member organisations on www.fidh.org