



Part D: Criminal Accountability Issues

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[The following is an excerpt from “Burma’s ‘Saffron Revolution’ is not over: Time for the international community to act”, issued by the International Federation of Human Rights and the International Trade Union Confederation in December 2007. It has been reprinted here with permission. The entire publication can be found at http://www.ituc-csi.org/IMG/pdf/Birmaniam_FIDH_ITUC_101107.]

Possible crimes against humanity: prosecuting the Burmese military before the International Criminal Court (ICC)?

“Whatever the outcome of dialogue, those guilty of crimes against humanity must be brought to justice”.

NCUB Presidium

“Many people think an ICC referral would stop or hurt a political dialogue. But criminal accountability needs to be highlighted. The crackdown was part of crimes against humanity. (...) People should not put too much hope on political dialogue. Past and existing crimes cannot be left like that. Victims cannot be ignored. (...) It’s about victims.”

Aung Htoo, General Secretary of Burma Lawyer’s Council

Criminal accountability for those responsible of the crimes committed in Burma is an issue far less discussed than the need for national reconciliation or the call for economic sanctions. However, this issue begins to feature higher on the list of the priorities put forward by representatives of Burma’s democracy movement.

Under Article 7(1) of the ICC statute, the definition of Crimes Against Humanity “means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) 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 impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”

In order to establish that these acts fall within this definition, it must be shown that they were part of widespread or systematic attacks against civilian population.

The joint FIDH-ITUC mission took place fairly soon after the violent crackdown in Burma. Several signs suggest that it can become a serious issue. An open letter to the United Nations Secretary-General and Member States on this issue has been signed by most organizations representing the people of Burma, located on the Thai-Burma border. The NCUB and the Burma Lawyers Council (BLC) encourage human rights organizations to gather evidence about the existence of crimes against humanity in the whole country.

Is justice a necessity or an obstacle to peace in Burma? The debate between justice and peace is old and universal. While a few individuals interviewed believed a thorough analysis of the pros and cons had to be carried out, very few drawbacks were mentioned by representatives of Burma, lawyers, or campaigners (such as the possible danger of jeopardizing political dialogue with the SPDC leadership). However several advantages were outlined. Some concerned justice itself: the need for victims not to be ignored, putting an end to impunity, and the signal which legal actions would send to the SPDC. Other advantages are external: some organizations believe that the international community would be forced to act very differently than it does today should an official investigation into the criminal activity of the SPDC demonstrate the existence of genocide, war crimes or crimes against humanity.

Based on a case of crimes against humanity, various options for international justice initiatives can be developed. Both NCUB and BLC strongly encourage initiatives both at the international level (International Criminal Court) and by specific countries where 40 universal jurisdictions is recognized¹. A case on “responsibility to protect” is another way of engaging the international community and especially neighboring countries.

“As Burma has not signed the important human rights conventions, it is necessary to appeal to the principles of international law on the basis of crimes against humanity. It



would require a resolution by the Security Council to set up such a Court.”

Mr. Aung Htoo, General Secretary of the Burma Lawyers’ Council

The perpetrators of crimes committed in Burma, such as those responsible for the killings in 1988, have not yet been brought to Court. Yet international criminal law has improved a lot since 1988, and especially since 2002, with the Statute of the International Criminal Court (ICC) coming into effect.

The ICC may investigate acts of genocide, war crimes and crimes against humanity which have occurred after 1 July 2002. As the Burmese junta refused to ratify the Statute of the ICC, the people of Burma have no recourse of their own to have the crimes committed in their country investigated. However, a Security Council resolution could ensure that generalized and systematic human rights violations in Burma are brought before ICC. The Security Council can declare itself ready to invoke the jurisdiction of the International Criminal Court regarding the situation in Burma, as it is authorized to do under Article 13(b) of the Rome Statute.

A previous example of having a non ICC signatory state investigated by way of a Security Council resolution was Sudan, in the case of Darfur. In Resolution 1593 (2005), the UNSC referred the situation in Darfur to the Prosecutor of the ICC. In that case, NGO’s contributed to the collection and documentation of the alleged criminal acts and then advocated for action.

There is little doubt that if all UN human rights bodies and non-governmental human rights organizations put together the evidence they have collected during the years, this would go a long way towards helping to prove the existence of crimes against humanity in Burma under the ICC statute^{2, 3}. The crimes committed during the crackdown of the “Saffron revolution” could be added to this evidence.

The first step towards an ICC referral is a serious investigation of the junta’s criminal activity. All organizations interviewed on the issue agreed on the relevance of this first step. There are several potential ways to formally initiate such an investigation: Janet Benshoof (President of the Global Justice Center) suggests a Security Council Resolution for a Commission of Experts that would conduct this investigation⁴.



The international community has been watching the situation in Burma closer than ever since September 2007. It has offered the SPDC the opportunity of a Good Offices mission to nurture a tripartite dialogue with the National League for Democracy and ethnic groups. The SPDC must seize this last opportunity to be actively involved in the peaceful transition out of dictatorship by engaging in a genuine dialogue and starting an authentic political process of transition. However, if the SPDC do not do so, the possibility remains open for a prosecution of the Burmese military before the International Criminal Court. The SPDC should consider this issue very seriously, as initiatives preparing for criminal accountability are now considered as acutely needed by Burmese organizations, especially if the regime does not demonstrate rapid progress.

(Endnotes)

¹ The NCUB has recently published documents about the International Criminal Court's Definition of "Crimes against humanity" in five different languages (Burmese, Karen, Kayan, Mon, English,) on the front page of its website. The BLC has issued a statement with the Global Justice Center on the necessity for criminal accountability http://www.nationmultimedia.com/2007/09/29/opinion/opinion_30050677.php. BLC also published a paper on this issue in *Legal Journal on Burma*, the journal it runs; *The changing landscape of international law: The global responsibility to prosecute perpetrators of grave crimes inflicted on the people of Burma*, by Professor Janet Benshoof (President of Global Justice Center), August 16, 2007, available on <http://www.globaljusticecenter.net/janetlawpapalajornalexcept.pdf>

² ICC definition of crimes against humanity: http://www.ncub.org/FrontPageNews/Rome%20Statute%20of%20ICC_Article%207%20English.pdf

³ See, e.g; a list of reports compiled in Janet Benshoof's paper cited in the preceding footnote: Human Rights Watch, *World Report 2007: Burma, Event of 2006*, available at <http://hrw.org/englishwr2k7/docs/2007/01/11/burma14865.htm>; *Shattering Silences* (2004) by the Karen Women's Organization, *Shattering Silences: Ongoing Rape of Karen Women by the SPDC* (2006) by the Karen Women's Organization, <http://www.karenwomen.org/>, *Catwalk to the Barracks* (2005) by the Women and Child Rights Project and Human Rights Foundation of Monland (Burma) <http://www.rehmonnya.org/>, *License to Rape* (2002) by the Shan Women's Action Network, *Still Licensed to Rape* (2005) by the Shan Women's Action Network, <http://www.shanwomen.org/>, *System of Impunity* (2004) by the Women's League of Burma, <http://www.womenofburma.org/>, *No Safe Place: Burma's Army and the Rape of Ethnic Women* (2003) by Refugees International <http://www.refugeesinternational.org/content/country/detail/2892/>

⁴ *Ibid.*

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