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Perspective

The International Criminal Court's Indictment of the Sudanese President for Genocide in Darfur and its Relevance to Burma

By B.K. Sen
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Burma is a country that has been under military rule for decades. Human rights violations, crimes against humanity and systematic aggression against ethnic minorities have been widespread. Those who have been fighting for change, political reform and good governance have been thrown in prison. Inhuman conditions prevail in prisons and selective torture is carried out. To hold the perpetrators accountable is not an easy matter. The Darfur example shows the challenges that the activists of Burma will confront in their pursuit to realize transitional justice.

To date, 106 States have signed the Rome Statute that led to the creation of the International Criminal Court (ICC). The US is not a member of the ICC. Former U.S. President Bill Clinton had a big role to play in the creation of the ICC. In fact, he signed the 1988 Rome Statute but the treaty was never submitted to the US Senate for ratification. The Bush administration officially withdrew the signature. The double standard of the Bush administration was yet again demonstrated when it was reluctant to lend legitimacy to the ICC's jurisdiction despite its antipathy towards the government in Khartoum.

In the Sudan conflict, the ICC Prosecutor has sought the arrest of the Sudanese President. The UN Secretary-General was quick to distance himself. He said the move would have very serious consequences for peace keeping operations and the political process. The Arab League and African Union have said that the ICC move could adversely impact the peace process in Darfur. The Chinese government has expressed "grave concerns and misgivings" over the ICC Prosecutor's decision. China had taken credit for persuading the Sudanese government to agree to the joint deployment of AU/ UN forces in Darfur. International Crisis Group has also criticized the ICC's move. Sudan is going to polls in 2009 and the President has promised a free and fair election. "Save Darfur" activists and human rights activists in the West have labeled the conflict in Sudan as "genocide". But the contrary view is that the conflict is political and the peace process should not be destabilized by outside elements. There is a fear that the West will selectively target elected heads of the State, such as the President of Sudan, and a precedent may be set.

President al-Basher has described the Prosecutor's accusations as "lies" and said that the ICC has no jurisdiction over Sudan. The main allegations against him were



based on his command responsibility. The Sudanese government has refused to hand over two senior officials earlier indicted by the ICC on war crimes charges. Sudan's position is that it is not a member of the ICC and the court has no jurisdiction over Sudan. The ICC's move has led to protests on the streets and all political parties except the separatist groups have condemned the ICC.

The ICC has the authority to act against the Sudanese President on the basis of a UN Security Council mandate. The Security Council passed Resolution 1593 in March 2005 referring the situation in Darfur to the ICC Prosecutor. The Chief Prosecutor requested a warrant on 10 counts which include allegations of murder, torture and rape. Eighteen ICC judges will weigh the evidence and then decide. Under Article 16 of the Rome Statute, the Security Council has the power to suspend any indictment as part of a "deferral of investigation and prosecution." Russia and China, both veto wielding States, have indicated that they would thwart any attempts to isolate Sudan and its President. Many Sudanese and even the UN want al-Bashir at the helm to revive the faltering peace negotiations in Darfur.

Burma has made attempts to take the case of human rights violations to the Security Council and ICC. All have been aborted. The interest of the international community unfortunately is lukewarm. The US has been at the forefront in condemning Burma's junta but now thinks that the neighboring countries have to play an active role to move the peace process. In that category China is the only country which can influence the junta in Burma. The newly appointed UN Human Rights Commissioner or the Special Envoy can do little. The US has a huge trading interest in China and China is critically dependent on US investment. The US' leverage has to be used to remind China of the risk in not cooperating with the US and the international community. The election in 2010 scheduled by the junta is elusive and has to be nullified and genuine peace talks have to be revived in line with the new initiative that Daw Aung San Su Kyi has released. There must be a time frame and the talks must be made at the highest level by those who wield decision making powers. The pressure on the Security Council and the ICC has to be built up but the focus on peace talks has to be intensified. Law has a long hand and the junta knows it well.



Part E: Political Developments

(E . 1)

Dictators Cannot Bury Democracy

By B.K. Sen
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Burma appears to be calm and in a vicious cycle. The military crack-down on Buddhist monks, the devastation caused by Cyclone Nargis, the refusal of the junta to accept humanitarian assistance in the face of millions of deaths, the systematic violation of human rights for decades, the brute force used in refusing to restore democracy in terms of the mandate of 1990 Election - all these tragedies seem to have never happened. The desperate attempt to earn respectability and legitimacy continues. Unfurling a Constitution defying all norms and making a show of acceptance in an equally fraudulent referendum were only signs of the junta's bankruptcy. The junta is running out of options. Fixing 2010 as the time to hold elections is the last card. The day of democratic reckoning is inevitable.

History will repeat itself, as it did in respect of the 1974 Constitution. It was inherently anti-people. It collapsed in spite of Dr. Maung Maung's desperate attempt to save it by an amendment. The SPDC's Constitution is also inherently anti-democratic and no façade of democracy can save it on the day of reckoning. In Pakistan, a country long plagued by military dictators, constitutional rule came and fell. Military dictators seized power and tried to prevent the restoration of constitutional rule notwithstanding the fact that some of the dictators did set up a façade of constitutional rule. Pakistan is a classic case study where the military dictators abysmally failed to bury democracy. The dictators in Burma may ignore this but to the activists the case is a source of great inspiration.

On January 30, Daw Aung San Suu Kyi publicized her new initiative within the framework of an on-going "dialogue process". The occasion was the outcome of the visit by the UN Secretary General's Special Envoy last October after the crackdown of the Saffron upheaval. The Envoy's effort to bring about reluctant and subsequent talks with Daw Suu Kyi speaks volumes of her undying relevance to the democracy movement in Burma. Than Shwe agreed to start a "dialogue process" and a liaison officer to engage with her was subsequently appointed. Democratic activists long disillusioned about Than Shwe's trickery dismissed it as an empty gesture aimed to diminish the external pressure on the junta. But the significance ought not to be missed, namely Daw Suu Kyi met her NLD associates and told them that she had asked the liaison officer to convey her



message to Than Shwe that the dialogue has to be facilitated at the "highest" political level. Her proposal in essence was that she has to meet the decision-maker/policy-maker to bring about any substantive progress in the ongoing "dialogue process", "time bound" with no "prior conditions from both sides". The purpose of this new initiative was to test for the SPDC's real game plan and at the same time to quicken the pace of a negotiated settlement of the basic democracy issue. The political context of the initiative is as important as its substance. The message is clear that nothing can move within the parameters of the road map that the junta has laid down. The question has to be answered, what happens to the long labored exercise that the junta has produced in placing a Constitution before the country? Will the junta give it up and go for talks which eventually will dislodge it from the seat of power? Not likely. The only option that the activists have is to patiently build in the minds of the people that rule of law will triumph. Frustration and fatigue have to be prevented, adventurism must be avoided and people's faith in ultimate victory promoted. Daw Aung San Suu Kyi has taken a new initiative. She has asked for talks only at the highest level and refused to meet the liaison officer and UN Envoy. It is for the people to build up resistance to erode the junta rule.

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