

# Impunity Prolonged: Burma and its 2008 Constitution

September 2009



A young girl works in a field in Shan State, south of Hsipaw. The fields had been confiscated after the Shan State Army ended their truce and the Burmese authorities took the land belonging to the SSA and villagers. They then forced the entire village to harvest the rice before taking it to sell in the market in Lashio. 2005. Photo by Nic Dunlop/Panos Pictures.

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### **About ICTJ**

The International Center for Transitional Justice assists countries pursuing accountability for past mass atrocity or human rights abuse. ICTJ works in societies emerging from repressive rule or armed conflict, as well as in established democracies where historical injustices or systemic abuse remain unresolved.

*The use of geographical names in this report should not be interpreted as implying an ICTJ position on the political status of the mentioned locations.*

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## Executive Summary

Burma (also known as Myanmar) has been under military rule since 1962 when General Ne Win took power from the democratically elected government. Following nationwide protests in 1988, another coup marked the commencement of the current regime (initially called the State Law and Order Restoration Council, or SLORC, and now called the State Peace and Development Council, or SPDC). The new regime promised to usher in democracy and elections were held in 1990. However the military rulers refused to allow the winning National League for Democracy (NLD) to form a new government. Instead, they convened a National Convention to draft a new constitution, handpicking most of the initial 702 delegates and inviting only 106 of the elected Members of Parliament to participate. After many delays, the convention completed the draft on September 3, 2007.

The convention ended just after a sudden rise in fuel costs caused the prices of commodities to increase considerably, prompting Buddhist monks to lead mass demonstrations calling for economic reform and national reconciliation. The military responded with ferocious force, raiding monasteries and firing on crowds of peaceful protestors. Many of the protesters were detained and reportedly tortured, and some were sentenced to long prison terms.

In response to international criticism over the crackdown, the SPDC announced that a national referendum on a new constitution would take place on May 10, 2008, and elections would follow two years later. One week before the referendum, Cyclone Nargis hit Burma, and more than 130,000 people either died or were missing. Still, the military rulers insisted on proceeding with the referendum; they later claimed that, despite the death and mass destruction, more than 92 percent of eligible voters had approved the new constitution.

An analysis of the constitution's provisions suggests that instead of being a true catalyst for lasting change, it further entrenches the military within the government and the associated culture of impunity. In addition to providing amnesty to the ruling regime for any crimes committed, the constitution creates a governing structure that gives the military the ability to dominate the government and protect its interests in perpetuity. It reserves 25 percent of the seats in both houses of parliament for members of the security forces who undoubtedly will obey the instructions of their commanding officers. A substantial number of the remaining 75 percent of MPs will probably be ex-military and civil service officials who support the SPDC. To reinforce the structural guarantee that the regime retains its control, the constitution further requires that a number of the most important ministries be led by military personnel. As a result, military interests will dominate the government and parliament.

The constitution declares that any amendment must be supported by more than 75 percent of parliament. So any changes would require that all nonmilitary MPs (including those who had formerly been in the

military) and at least one member of the armed forces vote for a proposed amendment to limit military dominance. The result is a carefully planned strategy in which a functioning democracy is impossible under the 2008 constitution, and altering its fundamentally undemocratic provisions is virtually impossible. Although human rights organizations are unable to operate freely inside Burma, people have been able to gather reports of violations, often at great risk, and smuggle them out of the country. These reports indicate that members of the military continue to be responsible for widespread, systematic human rights violations committed against anyone perceived to oppose the regime. Those responsible for such violations do so with almost total impunity.

Although the range of reported violations is broad, including mass killings of civilians, this report focuses on three categories as a means of analyzing the manner in which impunity persists in Burma: sexual violence, forced labor, and the recruitment and use of child soldiers (often referred to as child soldiering). Each of these categories is the subject of international conventions that Burma has ratified, therefore raising obligations that the Burmese government must fulfill under international law. Such conventions include the 1979 Convention on the Elimination of All Forms of Discrimination against Women, ratified by Burma in 1997; the 1930 Forced Labour Convention, ratified by Burma in 1955; and the 1989 Convention on the Rights of the Child, with Burma's accession in 1991.

#### *Sexual Violations*

The record of sexual violations, drawn from investigations carried out by UN special rapporteurs and Burmese women's groups, demonstrates that rape is not a violation committed by rogue elements in the military, but rather appears to be a strategy of the SPDC. The perpetrators have a level of impunity that indicates institutional support for these practices.

In general, the response of the military to international accusations of sexual violations has been consistent obfuscation. Burmese officials have said that national laws and remedies exist for these crimes and allegations that sexual violence by military forces is systematic are false. More recently, however, the SPDC has begun to accept that some members of the security forces are guilty of rape, and perpetrators have been forced to pay some compensation to their victims. Although the manner and degree of this punishment is far from appropriate for such horrific crimes, it signifies a relatively minor degree of willingness to acknowledge them. Still, this level of progress pales in significance compared with the magnitude of the problem of sexual violations in Burma.

#### *Forced Labor*

The SPDC has been implicated in widespread practices of forced labor. Some people are required to carry heavy loads for the military; if they move too slowly or collapse during the process, they are treated poorly and savagely beaten. Others are forced to work on construction and public works programs, on farms cultivating subsistence crops, and on development projects paid for by foreign companies, such as gas pipelines or hydroelectric plants.

It appears that international action over the past decade—and the threat thereof—has made the SPDC take some action on forced labor as well as the related violation of child soldiering. However, it is less clear whether this pressure has prompted limited, yet meaningful change or merely created superficial steps designed to avert international scrutiny and sanctions.

The International Labour Organization (ILO) established a Commission of Inquiry in 1998 and decided two years later to impose sanctions. In response, the SPDC allowed the ILO to open an office in Rangoon. The liaison officer there reported that impunity rendered the existing national complaints system relatively meaningless. Although a new complaints mechanism has been established through the ILO, it



handles a small number of cases given the widespread nature of the practice. Significantly, several people who filed complaints have been prosecuted for doing so.

### *Child Soldiers*

Battalion commanders in the Burmese army must recruit a specific number of new recruits each year, or risk losing their commands. One method of insuring that the quota is filled is through recruiting children—a widespread practice well documented by the UN, international NGOs, and local human rights organizations over the last decade.

As in the case of forced labor, the Burmese government has reacted in a very limited fashion to international attention to the problem. During the months before the passage of UN Security Council Resolution 1612—requiring the UN Secretary General to provide the Security Council with a list of parties that recruit and use child soldiers—the SPDC began to develop a plan to deal with the issue. It established a committee to demobilize child soldiers and reintegrate them into society, as well as to raise the country's awareness of the illegal practice and punish those responsible for it. Only a small number of child soldiers have been discharged so far. Impunity for recruitment and use of child soldiers remains strong.

### *Impunity*

Whenever a country's military is charged with taking strong action in the interests of national unity, sovereignty, and security, members of the armed forces often severely abuse civilians. Armed with guns and the knowledge that they are not likely to be held accountable for their abuses, members of the military often resort to inhumane behavior. Rape is tolerated and is seen not as a crime but rather as a necessary strategy to punish individuals, families, and communities that may oppose the government. This illusion validates and encourages more violations. Civilians are snatched from their homes and forced to provide free labor to support the military's endeavors against opposition forces. Given the high rates of attrition in the armed forces, the expanding size of the army, the numbers of volunteers decreasing, and deserters increasing, recruiters have turned to children to meet their quotas. While all of these activities are illegal under Burmese and international law, they persist because of the country's culture of impunity.

As a result, Burma presents one of the most difficult challenges in the world in relation to making progress toward combating impunity, uncovering the truth, seeking to assist victims, and reforming institutions responsible for mass violations of human rights. The government severely restricts civil society's ability to safely promote respect for human rights, and the constitution reinforces military dominance, including constitutional guarantees of impunity.

In such a context, Burmese civil society and international actors can focus strategies on moderate short-term goals to build the foundations for long-term change and mechanisms of accountability. One step these groups can take now is to strengthen the ability of activists in Burma and its border regions to objectively gather and use information and reports about human rights violations. In many post-conflict settings, the loss or decay of evidence, or improper methodology for collecting it has severely hampered progress on transitional justice issues. However, since recent history indicates that eventually some form of reckoning will come to those who have committed crimes in Burma, a coordinated, well-informed approach to documenting the violations can produce data that helps international actors formulate policy in response to the situation and preserves evidence for any potential prosecutions, truth-seeking mechanisms, or other measures to deal with the legacy of impunity.

Recently Burmese activists have been considering the potential value in calling for a UN Commission of Inquiry into international crimes in Burma and/or calling for a referral of the situation to the International Criminal Court (ICC). Although the court's jurisdiction generally applies to crimes committed in territories or by nationals of countries that ratified the Rome Statute, the UN Security Council has the

power to refer a situation in a country that has not done so if it presents a threat to international peace and security. This happened with Sudan in 2005, where the subsequent investigation led the ICC to indict President Omar al-Bashir and issue an arrest warrant for him. However, referral requires Security Council agreement, and the unique factors that led to the Sudan referral are distinct from the current political dynamics in relation to Burma. Regardless of the likelihood of any possible referral to the ICC, establishing a Commission of Inquiry is a measure that the international community has supported in a range of situations in which more information is needed to decide if further action is necessary. Given the difficulties of getting thorough information from Burma, a commission could help assess the nature and extent of serious human rights violations.

Many groups are either considering or supporting various other strategies. These include advocating a global embargo on supplying arms to the SPDC, bringing cases for mass crimes committed in Burma under the universal jurisdiction legislation in other countries, and bringing civil claims in the United States under the Alien Tort Claims Act, which allows victims to sue perpetrators of international torts or crimes even if the crime does not involve a U.S. citizen and is committed outside U.S. borders.

Other recent experiences in Argentina, Peru, and Cambodia provide examples of national leaders who were tried in courts decades after they committed mass atrocities. Although the level of impunity in Burma may now appear intractable, it is no more so than the situations that existed during the reigns of the Argentine junta, Peru's President Alberto Fujimori, or the Khmer Rouge in Cambodia. It is now clear that no leader who allows such violations to take place on their watch, no individual responsible for them, can be certain that they will never be held accountable.

Burma is no exception. The Burmese continue to be forced to live with mass violations, impunity that encourages more crime, a constitution that entrenches the military's power, and a blanket of terror over political opposition. While this context does not dictate that nothing can be done toward fulfilling the right to justice, truth, and reparations, any strategic approach needs to focus on catalyzing change, preparing for future accountability measures, preserving and organizing evidence, and effectively using available international mechanisms.

## 1. Recent Historical Context: The Roadmap to Democracy

The SLORC emerged in 1988 after 26 years of military rule under General Ne Win, who had staged a coup against the democratic government in 1962. In 1988, weary from dictatorship and disgruntled about the increasingly disastrous state of the economy, students in Rangoon began leading protests calling for democracy. The demonstrations spread to cities and towns throughout the country, culminating in a major nationwide protest on August 8, 1988 (now commonly referred to as “8-8-88”). Soldiers fired on the protestors, but then retreated and left ordinary citizens to take charge of maintaining daily order. Six weeks later the army, led by Army Chief Saw Maung, staged a coup. Saw Maung then announced the formation of the SLORC as a transitional regime and promised multiparty elections.<sup>1</sup>

Burma held parliamentary elections in 1990. The NLD won more than 80 percent, or 392 of the total 485 seats. The SLORC quickly nullified the elections by issuing Declaration 1/90, announcing that they had actually been held to choose delegates who would draft a new constitution at a National Convention.<sup>2</sup> Many of those protesting these events were arrested, including newly elected MPs, and others fled the country.

The convention met in January 1993. Elected representatives filled only 106 out of 702 delegate seats.<sup>3</sup> According to the junta, one of the convention’s key objectives was “the participation of the [armed forces] in the national political leadership role of the State in the future.”<sup>4</sup> The junta ordered the delegates to create “basic principles” for a new constitution, and throughout the process, it rejected proposals from representatives of various ethnic groups.<sup>5</sup> Due to the flawed mandate and restrictions on open debate and discussion, the NLD delegates walked out in November 1995. Several months later, the convention adjourned and did not reconvene until 2004. During the interim, the government passed a law prohibiting any criticism of the convention; lawbreakers faced up to 20 years in prison.<sup>6</sup>

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1 For a thorough review of the events of 1988, see Bertil Lintner, *Outrage: Burma’s Struggle for Democracy* (Bangkok: White Lotus, 1990).

2 SLORC Declaration 1/90, July 27, 1990.

3 Human Rights Watch, *Vote to Nowhere: The May 2008 Constitutional Referendum in Burma*, May 2008. The number of delegates increased over time.

4 SLORC Order 13/02, “The Formation of the Commission for Holding the National Convention,” Oct. 2, 1992. “Burmese armed forces” is *Tatmadaw*, the English transcription of the Burmese word for “armed forces.”

5 The regime rejected an August 1993 proposal from 13 ceasefire groups for a decentralized federal union and ignored a 19-point proposal from the Kachin Independence Organization in August 2007. The lack of genuine discussion prompted the New Mon State Party to downgrade its delegates’ involvement in the National Convention from participants to observers in December 2005.

6 SLORC Law No. 5/96, The Law Protecting the Peaceful and Systematic Transfer of State Responsibility and the Successful Performance of the Functions of the National Convention against Disturbances and Oppositions, June 7, 2006. See [http://www.blc-burma.org/html/Myanmar%20Law/lr\\_e\\_ml96\\_05.html](http://www.blc-burma.org/html/Myanmar%20Law/lr_e_ml96_05.html).

Burma's political scene gradually opened in 2002. The government permitted the ILO to establish an office in Rangoon and released NLD leader Daw Aung San Suu Kyi from house arrest. She began drawing large, enthusiastic crowds while visiting various parts of the country. However, this increased level of freedom was short-lived. In May 2003, Aung San Suu Kyi's convoy was attacked outside of Depayin in central Burma, and many of the people in her convoy were killed or injured. She returned to house arrest where she remained until May 2009 when she was detained for allegedly violating the terms of her house arrest.

One year later, in a move that many analysts saw as an attempt to deflect international criticism for Aung San Suu Kyi's treatment, Prime Minister Khin Nyunt announced the "roadmap to democracy" which consisted of the following seven steps:

- 1) Reconvene the National Convention.
- 2) Take the steps necessary to implement a genuine, disciplined democratic system.
- 3) Draft a new constitution in accordance with the basic principles established by the National Convention.
- 4) Adopt the constitution through a national referendum.
- 5) Hold free and fair elections for *Pyithu Hluttaws* (legislative bodies) according to the new constitution.
- 6) Convene Hluttaws in accordance with the new constitution.
- 7) Build a modern, developed, and democratic nation composed of state leaders elected by the Hluttaw, in addition to government and central organs formed by the Hluttaw.<sup>7</sup>

The National Convention reconvened in May 2004 and seemed likely to drag on, as it had since it first convened in 1993. However, once again dramatic events unfolded to push the process forward. Following a fuel price hike on August 15, 2007, the cost of commodities soared. Protesters gathered on the streets, with demonstrators demanding improvements in the economic situation. As the size of the demonstrations grew, the authorities once again resorted to force. They arrested protest leaders, including prominent former students who had been involved in the 8-8-88 movement. In the midst of this tumultuous period, the government—then called the SPDC—concluded the convention on September 3, 2007.

As the month progressed, with most former student leaders detained or in hiding, Buddhist monks began leading the demonstrations, drawing tens of thousands of people into the streets. Demands broadened from economic reforms to national reconciliation and dialogue. The authorities began a final crackdown on September 25. Dozens of people were killed, and thousands were detained.<sup>8</sup>

International attention to the horrific events in Burma and the SPDC's lack of democratic reforms prompted the regime to move quickly through the next steps of the roadmap. The SPDC announced that a national referendum on a new constitution would take place on May 10, 2008, and elections would be held in 2010.<sup>9</sup>

The week before the referendum, Cyclone Nargis slammed Burma. It was the country's worst natural disaster on record. More than 130,000 people were either killed or listed as missing, and millions lost their homes.<sup>10</sup> In the wake of this humanitarian disaster, many people, including the UN Secretary-General, and civil society groups urged the regime to postpone the referendum so the country could concentrate on disaster relief.

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7 Speech by Khin Nyunt, *New Light of Myanmar*, Aug. 31, 2003.

8 Human Rights Watch, *Crackdown: Repression of the 2007 Popular Protests in Burma*, December 2007.

9 Human Rights Watch, *Vote to Nowhere: The May 2008 Constitutional Referendum in Burma*, May 2008.

10 Office of the Coordination of Humanitarian Affairs (OCHA), Myanmar Cyclone Nargis OCHA Situation Update No. 37, July 3, 2008.

Ignoring these requests and the plight of the Burmese people, the SPDC held the referendum. Officials claimed that 92.4 percent of voters approved of the new constitution and that, despite the humanitarian emergency, 26 million out of 27 million eligible voters cast ballots. Because these figures were so far outside the realm of possibility, international commentators unanimously dismissed the entire process as a sham.

## 2. Burma's Culture of Impunity for the Military

During the course of the SPDC's two decades as a transitional regime, human rights organizations and the United Nations have documented a wide array of human rights violations committed by the ruling junta and its predecessor, the SLORC. This section examines three categories of these allegations, specifically the military's responsibility for acts of sexual violence, forced labor, and the recruitment and use of child soldiers, as well as the general lack of accountability for these violations. This report focuses on these particular categories because the Burmese government has clear international obligations to investigate and address them, having signed the 1979 Convention on the Elimination of All Forms of Discrimination against Women (ratified 1997), the 1930 Forced Labour Convention (ratified 1955), and the 1989 Convention on the Rights of the Child (accession 1991). The following section analyzes patterns in this record of impunity, drawing together common themes. It also highlights some areas where progress is being made, suggesting strategies that could potentially lead to reforms in Burma.



Burmese troops watch as women leave a Buddhist temple near Myitkyina in Kachin State, 1998. Photo by Nic Dunlop/Panos Pictures.

## Impunity for Sexual Violence

The use of sexual violence as a strategy of war, as well as a reward for soldiers, continues to be a serious problem in Burma. In 1993, Yozo Yokota, the UN special rapporteur on the situation of human rights in Myanmar, reported that, “In the context of military operations, forced relocation, portering and forced labour, the practices allegedly involve... rape, burning, and mutilation before execution.”<sup>11</sup> In response, the Burmese military stated that the allegations related to arbitrary executions “are totally false and unfounded.... The Tatmadaw [the Burmese military] has never, at any time committed such atrocities nor will it ever do so in the future.... Atrocities such as...rape of rural women, forced conscription and mass execution of villagers are being committed only by the insurgents time and again.”<sup>12</sup> Fifteen years later, the SPDC refuses to acknowledge the widespread problem of sexual violence, despite a growing record that details how officers and troops systematically use rape and other forms of sexual abuse as a strategy of war.

The Burmese government has not made any meaningful official investigations into specific incidents or wider patterns of sexual violence. Occasionally the military has made unofficial payments to victims as compensation for assaults by officers. Such payments suggest at least a recognition that the violations occurred and were wrong. However, on the rare occasion that a victim gets compensated, no other significant measures are made to hold the perpetrators accountable.

In Special Rapporteur Yozo Yokota’s 1994 report, he responded to the SPDC’s continued denials with a specific recommendation: “Given the magnitude of the abuses, official condemnation should be made by the Government of all acts by authorities involving human rights violations. Such acts, including all acts of intimidation, threat or reprisal, should not benefit from the present system of complete denial by, and impunity under, the Government.”<sup>13</sup> The recommendation, or one like it, has been made by the special rapporteurs nearly every year since.<sup>14</sup>

### The Nature of Sexual Violence in Burma

The record of violations, developed from investigations by the UN special rapporteurs as well as Burmese women’s groups, demonstrates that rape is not a violation committed by “rogue elements” in the military; instead it appears to be a strategy of the regime.<sup>15</sup> The list of incidents in the box below—highlighting one per year since 1993—provides a brief anecdotal record of rapes military officers or soldiers have committed in various locations in Burma.

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- 11 UN General Assembly, Situation of human rights in Myanmar, Nov. 16, 1993, sec.II. “Memorandum of Allegations to the Government of Myanmar,” sub-sec. B. “Torture, cruel, inhuman or degrading treatment,” par. 10, (A/48/578).
  - 12 UN General Assembly, Situation of human rights in Myanmar, Nov. 16, 1993, sec.IV. “Response by the Government of Myanmar to the Memorandum of the Special Rapporteur,” par. 9, (A/48/578).
  - 13 UN Commission on Human Rights, Report on the situation of human rights in Myanmar, by the Special Rapporteur, par. 74(g), Feb. 16, 1994 (E/CN.4/1994/57).
  - 14 See for example UN General Assembly, Interim Report of the Special Rapporteur on the situation of human rights in Myanmar, Oct. 8, 1996 (A/51/466); UN Commission on Human Rights, Report of the Special Rapporteur on the situation of human rights in Myanmar, Jan. 15, 1998 (E/CN.4/1998/70); UN General Assembly, Report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights in Myanmar, Sept. 10, 1998, (A/53/364); UN Commission on Human Rights, Report of the Special Rapporteur on the situation of human rights in Myanmar, Jan. 22, 1999 (E/CN.4/1999/35); UN General Assembly, Report by the Special Rapporteur on the situation of human rights in Myanmar, Oct. 4, 1999, (A/54/440); UN General Assembly, Situation of human rights in Myanmar—Interim Report of the Special Rapporteur, Aug. 22, 2000, (A/55/359); UN Commission on Human Rights, The situation of human rights in Myanmar: Report submitted by the Special Rapporteur, Dec. 27, 2002 (E/CN.4/2003/41); UN General Assembly, Situation of human rights in Myanmar, Aug. 30, 2004 (A/59/311); UN Commission on Human Rights, Report of Paulo Sérgio Pinheiro, Special Rapporteur on the situation of human rights in Myanmar, Dec. 2, 2004 (E/CN.4/2005/36); UN General Assembly, Interim report of Paulo Sérgio Pinheiro, Special Rapporteur of the Commission on Human Rights on the situation of human rights in Myanmar, Aug. 12, 2005 (A/60/221); UN General Assembly, Report of the Special Rapporteur on the situation of human rights in Myanmar, Paulo Sérgio Pinheiro, Sept. 21, 2006 (A/61/369); UN Human Rights Council, Report of the Special Rapporteur on the situation of human rights in Myanmar, Paulo Sérgio Pinheiro, Feb. 12, 2007 (A/HRC/4/14); UN Human Rights Council, Report of the Special Rapporteur on the situation of human rights in Myanmar, Paulo Sérgio Pinheiro, March 7, 2008 (A/HRC/7/18).
  - 15 Women’s League of Burma, *System of Impunity: Nationwide Patterns of Sexual Violence by the Military Regime’s Army and Authorities in Burma*, September 2004, 1.

### A sample of reported incidents of rape, 1993-2008

On August 2, 1993, soldiers from Infantry Battalion 64 arrested 12 women in southern Shan State, ages 15 to 30 years, and took them to a nearby farm and gang-raped them. (UN General Assembly, Interim Report on the situation of human rights in Myanmar, Special Rapporteur, October 28, 1994, A/49/594, sec. III, par. 15.)

In February 1994, a 33-year-old Karen widow and mother of three children was interrogated by a SLORC officer about her village's contact with the Karen National Liberation Army (KNLA) and accused of working for the rebels. The officer raped her three times the night she was interrogated. (Karen Women's Organization, *Shattering Silences: Karen women speak out about the Burmese Military Regime's use of Rape as a Strategy of War in Karen State*, Case 12, April 2004.)

On January 1, 1995, Light Infantry Battalion 410 abducted a group of women in Mon State and took them to Paukpinkwin Village in order to rape them. (UN General Assembly, Interim Report on the situation of human rights in Myanmar, Special Rapporteur, October 16, 1995, A/50/568, sec. III, par. 22(e).)

In 1996, a 15-year-old girl from Kywe Thone Nyi Ma was raped so many times by soldiers at a railway worksite that she bled to death. (UN General Assembly, Interim Report on the situation of human rights in Myanmar, Special Rapporteur, October 8, 1996, A/51/466, par. 51.)

On July 1, 1997, soldiers raped many women in the Kaeng Lom area as they ransacked the village, eventually killing 96 villagers. (UN General Assembly, Interim Report on the situation of human rights in Myanmar, Special Rapporteur, October 16, 1997, A/52/484, par. 108.)

On May 11, 1998, Maj. Myint Than, protected by 85 to 90 of his troops, raped a girl repeatedly for a day near Lai-Kha before burning her in her hut. (UN General Assembly, Interim Report on the situation of human rights in Myanmar, Special Rapporteur, September 10, 1998, A/53/364, par. 51.)

In July 1999, soldiers from Infantry Battalion 101, led by Lt. Col. Soe Win, gang-raped a 19-year-old, causing her death. (UN General Assembly, Interim Report on the situation of human rights in Myanmar, Special Rapporteur, October 4, 1999, A/54/440, par. 34.)

In May 2000, Capt. Tun Aung of Light Infantry Battalion 515 raped a 19-year-old for three and a half hours. When she and her family went to the military camp to identify him, he was not in the lineup. The young woman, her family, and the headman of her village were fined and threatened with 10-year prison sentences if they could not pay. (Shan Human Rights Foundation and *Shan Women's Action Network*, *License to Rape: The Burmese military regime's use of sexual violence in the ongoing war in Shan State*, Case 112.)

In mid-2001, soldiers from Infantry Battalion 244 raped a 14-year-old girl near Wan Kad village in Shan State, resulting in her death. They left her naked body by the river. (Women's League of Burma, *System of Impunity: Nationwide Patterns of Sexual Violence by the Military Regime's Army and Authorities in Burma*, September 2004, Case 40.)

In October 2002, a lance corporal and a private from Light Infantry Battalion 309 in Chin State raped and murdered a ninth-grade student. She had to pass through the military camp every day on her way to and from school, and the soldiers attacked her one evening. (Women's League of Chinland, *Unsafe State: State-sanctioned sexual violence against Chin women in Burma*, March 2007, Case 22.)



In February 2003, a 15-year-old Lahu girl was gang-raped and murdered by SPDC troops patrolling in the Mong Pyark area of Shan State. (Women's League of Burma, *System of Impunity: Nationwide Patterns of Sexual Violence by the Military Regime's Army and Authorities in Burma*, September 2004, Case 1.)

In January 2004, a 20-year-old Mon woman went to negotiate the release of her father, who had been detained after he was accused of having contact with Mon rebels. Capt. Hla Khaing of Light Infantry Battalion 586 took her into a house, kicked out the homeowner, and raped the woman repeatedly for two days. (Women's League of Burma, *System of Impunity: Nationwide Patterns of Sexual Violence by the Military Regime's Army and Authorities in Burma*, September 2004, Case 5.)

In April 2005, Corp. Zaw Min of Light Infantry Battalion in Shan State took the 6-year-old daughter of a fellow officer to "buy sweets." She did not come back. When her body was found, she had been brutally raped and killed. (Women of Burma, *In the Shadow of the Junta: CEDAW Shadow Report, 2008*, 63-64, citing report from Shan Herald Agency for News and confirmed by a source inside Burma.)

In June 2006, two women, 28 and 24 years old, were traveling through Sagaing Division on their way home from Mizoram, India. Passing near an army camp, they were stopped by soldiers from Light Infantry Battalion 268 who checked their identity cards and demanded they sleep a night in the village. That night, five of the soldiers raped the women. (Women's League of Chinland, *Unsafe State: State-sanctioned sexual violence against Chin women in Burma*, March 2007, Cases 2 and 3.)

In February 2007, seven soldiers from Infantry Battalion 138 in Kachin State raped four girls, ages 14 to 16. Recognizing that the rapes had taken place, the army later paid the girls about \$230 in compensation, but their families requested more money. When the incident was reported in the exile media, the girls were arrested and imprisoned. (*The Irrawaddy*, February 15, 2007, and Human Rights Watch's *World Report 2008*, 249.)

In July 2008, soldiers from Light Infantry Battalion 437 raped and killed a 15-year-old girl in Kachin State. Her body was found three days later, 200 feet from the army camp. Her body had been stabbed seven times, and her face was badly mutilated. (Women of Burma, *In the Shadow of the Junta: CEDAW Shadow Report, 2008*, 65-66, citing Kachin News Group, "Teenage Kachin schoolgirl gang raped and killed by sadistic Burmese soldiers," August 9, 2008.)

In the 2006 report *Unsafe State*, the Women's League of Chinland maps the incidents of rape it has documented, showing that rapes are committed by troops from at least 11 battalions throughout Chin State and in close proximity to military camps.<sup>16</sup> The UN Committee on Human Rights (now the Human Rights Council) and the General Assembly have acknowledged that the problem of rape in Burma entails more than a few isolated incidents. Following the publication of *License to Rape* in 2002, the UN Committee on Human Rights passed a resolution deploring the state's systematic violations of human rights, including rape.<sup>17</sup> The General Assembly also passed resolutions expressing grave concern and calling for an end to systematic human rights violations, including rape.<sup>18</sup>

16 Women's League of Chinland, *Unsafe State: State-sanctioned sexual violence against Chin women in Burma*, March 2007, 2.

17 United Nations Commission on Human Rights Resolution 2002/67, April 25, 2002, par. 5(a) E/2002/23—E/CN.4/2002/200.

18 United Nations General Assembly Resolution 59/263, Situation of human rights in Myanmar, March 17, 2005, par. 2 and 3, A/RES/59/263.

**Table: Documentation of Rape and Sexual Violence<sup>19</sup>**

NAME OF REPORT	License to Rape	Shattering Silences	System of Impunity	Catwalk to the Barracks	Unsafe State	Total Cases Cited <sup>20</sup>
RELEASE DATE	May 2002	April 2004	September 2004	July 2005	March 2007	
FOCUS AREA	Shan State	Karen State	All ethnic states and central Burma <sup>21</sup>	Mon State	Chin State	
PERIOD COVERED	1996–2001	1988–2004	2002–2004	1995–2004	1989–2006	
NUMBER OF CASES	173	125	26	37	38	399
NUMBER OF WOMEN AND GIRLS	625	127	34	50	39	875
NUMBER OF GIRLS (YOUNGER THAN 18)	77	20	15	11	5	128 <sup>22</sup>
REMARK	High-ranking military officers (commander—corporal) committed 83 percent of cases, 61 percent were gang rapes, and 25 percent resulted in death. Perpetrator punished by commanding officer in only one case.	Half of the incidents were committed by high-ranking officers; 40 percent were gang rapes. In 28 percent of cases women were killed after being raped.	Seventeen cases were gang rapes by senior military officers, authorities, or with their complicity.	Scores of “comfort women” forced to work by day and be sex slaves at night; 30 young women, including schoolgirls, made to stay at military base and take part in a military “fashion and beauty show.” More than half the cases committed by military officers, often in front of or together with their troops.	Women and girls as young as 12 are being raped in their homes and on farms, while traveling outside their villages and when conscripted as forced labor	

<sup>19</sup> Adapted from Women of Burma, *In the Shadow of the Junta: CEDAW Shadow Report*, 2008.

<sup>20</sup> Total number is sum total of all reports with no cases repeated among the reports

<sup>21</sup> Burma’s seven states are Kachin, Karen (Kayin), Karenni (Kayah), Chin, Mon, Arakan (Rakhine), and Shan. It also has seven divisions: Sagaing, Tenasserim (Tanintharyi), Pegu (Bago), Magway, Mandalay, Rangoon (Yangon), and Irrawaddy (Ayeyawady). In 1989, the SLORC changed the English language names of the country and several states, divisions, towns, etc., from what it perceived to be colonial era names. The revised names are in parentheses.

<sup>22</sup> *In the Shadow of the Junta* mistakenly gives a total of 161.

From 2002 to 2007, women's organizations from Burma documented nearly 400 incidents of rape and other forms of sexual violence that Burmese military personnel committed between 1988 and 2006. They identified 875 victims, 128 of whom were younger than 18. Several factors suggest that the number of incidents detailed in these reports is a fraction of those that actually occurred. While some communities sympathize with and support rape victims, the social stigma connected with sexual violence leads many women to remain silent about what they have experienced or even to leave their communities. In its 2005 report, *Catwalk to the Barracks*, the Women and Child Rights Project (Southern Burma) reports that three women interviewed for the report "decided to flee from their villages after the incidents because they felt 'blamed and despised' by local villagers."<sup>23</sup> Another woman reported feeling too ashamed to call for help while she was being sexually assaulted. We can assume that, along with the social stigma, the isolation of many rural villages in Burma, the presence of military checkpoints, and the physical dangers of armed conflict also lead to an underreporting of incidents of sexual violence.

A pattern connecting increased armed conflict with rape emerges from a close reading of the records. The 2008 shadow report the Women's League of Burma (WLB) prepared for the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) committee found that the "majority of incidents...take place in the ethnic states which have been most impacted by the regime's policies of military expansion. Sexual violence is being used by the regime as an integral part of its strategy to subjugate the ethnic peoples."<sup>24</sup> When rape is used in this way, it is a criminal act under international law.<sup>25</sup>

### The Junta's Response to the Allegations

The SPDC responded to rape allegations by identifying the Defense Services Act, Defense Services Rules, the Myanmar Penal Code, and the Civil and Criminal Procedures as domestic laws against rape; breaking these laws can be punishable by death.<sup>26</sup>

However, the existence of laws that prohibit sexual offenses and provide strong punishments does not mean they are enforced. Through the 1990s, the military junta generally denied that its troops were perpetrating sexual violence and consistently claimed no reliable evidence existed. In response to a 1994 charge of gang rape in Shan State's Laikha Township, the junta told the UN, "No reports from civil or military have been received and no information about the alleged incidence has been received from the local populace. Here again, no proof has been provided."<sup>27</sup> The junta's response, however, did make vague references to some members of the army who break laws and said, "Actions have been taken against them."<sup>28</sup>

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23 Women and Child Rights Project (Southern Burma), *Catwalk to the Barracks*. July 2005.

24 Women of Burma, *In the Shadow of the Junta: CEDAW Shadow Report*, 2008. Shadow reports are a method for civil society groups to supplement or present alternative information to the periodic government reports that state parties submit under treaties.

25 The record of international tribunals holding people accountable for committing rape has improved in the last decade. A 1997 decision at the International Criminal Tribunal for the former Yugoslavia found Duško Tadi guilty of crimes against humanity for acts that included crimes of sexual violence. The court's decision marked a shift away from the traditional approach of viewing sexual violence as a crime against honor to viewing it as a weapon of war. This view gained prominence when the 1998 Rome Statute of the ICC defined rape committed as part of a widespread or systematic attack against civilians as a crime against humanity. The ICC used this definition when it indicted Germain Katanga and Mathieu Ngudjolo Chui of the Democratic Republic of Congo, Joseph Kony of Uganda, and Jean-Pierre Bemba Gombo of the Central African Republic. The Special Court for Sierra Leone and the International Criminal Tribunal for Rwanda also found people guilty of crimes against humanity for acts of rape.

26 Article 375 of the Myanmar Penal Code prohibits rape, and Article 376 allows the courts to sentence convicted rapists to life in prison. In U Win Mra's statement responding to the 1997 U.N. General Assembly Resolution on the Situation of Human Rights in Myanmar, the permanent representative and alternate chairman of Myanmar's UN delegation said, "Any member of the Armed Forces convicted of murder or rape can be sentenced to the maximum punishment of death penalty." See [www.burmalibrary.org/reg.burma/archives/199803/msg00043.html](http://www.burmalibrary.org/reg.burma/archives/199803/msg00043.html).

27 UN General Assembly, Addendum to the Report on the situation of human rights in Myanmar, Special Rapporteur, Oct. 28, 1994, A/49/594/Add.1, Observations and rebuttals on the summary of allegations, par. 23.

28 Ibid.

The special rapporteurs have increasingly expressed concern about the junta's mechanisms of impunity in their annual reports to the Committee on Human Rights and the General Assembly.

Given the magnitude of abuses, the Government should subject all officials committing human rights abuses and violations to strict disciplinary control and punishment and put an end to the culture of impunity that prevails in the public and military sectors.<sup>29</sup>

The Special Rapporteur is deeply concerned about the serious human rights violations that continue to be committed by the armed forces in the ethnic minority areas. The violations include extrajudicial and arbitrary executions (not sparing women and children), rape, torture, inhuman treatment, forced labour and denial of freedom of movement. These violations have been so numerous and consistent over the past years as to suggest that they are not simply isolated or the acts of individual misbehaviour by middle- and lower-rank officers but are rather the result of policy at the highest level, entailing political and legal responsibility.<sup>30</sup>

Following the 2002 publication of *License to Rape* by the Shan Human Rights Foundation and the Shan Women's Action Network (SWAN), the SPDC came under much greater international pressure to address the issue of sexual violence, particularly in Shan State.<sup>31</sup> The official response consisted of denials, accusations that those making the allegations were politically motivated and therefore unreliable, and cosmetic investigations. All of these responses have permitted the regime to prolong impunity.

During a press conference held on July 12, 2002, Labor Minister U Tin Winn called the allegations "false and groundless." U Thaung Tun, director-general of the Ministry of Foreign Affairs' Political Affairs Department said the charges were "fabrications of the insurgents" and claimed that the "gentle and calm" nature of Burmese Buddhists made such atrocities unacceptable, pointing out that "it is generally believed that guilty-conscience [sic] of a rapist is more severe than legal punishment."<sup>32</sup>

During a meeting on women's affairs later that month, Khin Nyunt called the allegations "a conspiracy of the expatriate groups opposing Myanmar, insurgent groups and news agencies."<sup>33</sup> However, in an apparent bow to growing international pressure, he proposed the development of an official investigation, adding, "If there are offenders who have really committed the said crime, severe action will be taken against them. Thus special duties will have to be assigned to set up the enquiry."<sup>34</sup>

The junta later reported to the special rapporteur that three investigations were carried out.

These investigations found:

- "Almost all of the allegations were highly exaggerated and their main purpose was to hurt the prestige of Myanmar and the Myanmar Armed Forces."
- There was no proof supporting the "allegation of the SURA [Shan United Revolutionary Army] narco-terrorists."
- "It is clear that the accusations are unfounded," and there were "no rape cases committed by military personnel between 1996 and 1999 and in 2002," but there were "three cases in 2000 and

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29 UN General Assembly, Report on the situation of human rights in Myanmar, Special Rapporteur, Oct. 16, 1997, A/52/484, par. 152(r).

30 UN General Assembly, Report on the situation of human rights in Myanmar, Special Rapporteur, Sept. 10, 1998, A/53/364, par. 59.

31 As outlined in the chart above, the groundbreaking report identified 173 incidents of rape or other forms of sexual violence the Burmese military carried out against 625 women and girls; 83 percent of the perpetrators were high-ranking officials.

32 "(4) Report saying Myanmar Government suppressing Shan nationals and Tatmadawmen raping Shan women totally untrue," *New Light of Myanmar*, July 13, 2002.

33 "1. Secretary-1 attends special meeting on women's affairs," *The New Light of Myanmar*, Aug. 1, 2002.

34 Ibid.

2001” in which the perpetrators were sentenced to five to ten years in prison.<sup>35</sup>

Military personnel, including Dr. Daw Khin Win Shwe, Khin Nyunt’s wife, carried out the investigations. SWAN tracked them and found that the investigators traveled in a 12-truck military convoy with armed soldiers. Village heads were warned ahead of time to be sure that villagers who met the investigators did not mention any incidents of rape. The investigating teams had prepared statements that villagers were told to sign confirming that there had been no incidents of rape by military personnel. The statements were in Burmese, and the meetings were held in Burmese,<sup>36</sup> a language that many, if not most, villagers could not understand. The SPDC did not release details related to the three incidents it claimed to have discovered.<sup>37</sup>

The special rapporteur concurred generally with SWAN’s analysis, stating that “having been undertaken by military and other SPDC personnel, the investigations lacked the independence required to be convincing and credible.”<sup>38</sup> He suggested that the SPDC explore a set of alternatives, including an independent assessment under his mandate, an international Commission of Inquiry with a new UN mandate, or a balanced national inquiry involving the SPDC and possibly the NLD with technical assistance from the UN.<sup>39</sup> The SPDC did not take any of those suggestions.

The reports that followed the Shan report covered incidents in Karen, Mon, and Chin states, and a comprehensive account by the Women League of Burma’s (WLB) documented incidents in all seven states as well as some of the divisions in central Burma. As mapped out in the Chin account, all the reports identified a significant link between increased armed conflict and sexual violence. In reports since 2002, the special rapporteurs continued to identify sexual violence as a systematic violation of human rights. This characterization echoes the findings of the women’s organizations’ reports that identified sexual violence as a political and military strategy, including its use as punishment for allegedly supporting opposition armies. Throughout these reports, generally the Burmese government did nothing about the incidents. In some cases, victims and their families were threatened and told not to speak of the incidents to others; some were imprisoned. Many survivors of rape who provided testimony to the women’s groups said fear and the stigma of sexual violence were major barriers in combating impunity.

Victims of sexual violence in Burma cannot submit complaints to the CEDAW Committee because the SPDC has not signed the optional protocol that allows people to take advantage of that procedure. However, because Burma is a party to CEDAW, the junta is obliged to report regularly to the committee on measures it has taken to end all forms of discrimination against women. In the most recent session, the committee affirmed the findings of the Burmese women’s organizations.

The Committee expresses its deep concern at the high prevalence of sexual and other forms of violence, including rape, perpetrated by members of the armed forces against rural ethnic women, including, inter alia, the Shan, Mon, Karen, Palaung, and Chin. The Committee is also concerned at the apparent impunity of the perpetrators of such violence, although a few cases have been prosecuted, and at reports of threats, intimidation and punishment of the victims. The Committee regrets the lack of information on mechanisms and remedies available to victims of sexual violence as well as measures to bring perpetrators to justice.<sup>40</sup>

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35 United Nations Commission on Human Rights, Report on the situation of human rights in Myanmar, Special Rapporteur, Dec. 27, 2002, E/CN.4/2003/41, par. 40.

36 SWAN, *A Mockery of Justice: The State Peace and Development Council’s Investigation into the ‘License to Rape’ Report*, Sept. 24, 2002.

37 Ibid.

38 United Nations Commission on Human Rights, Report on the situation of human rights in Myanmar, Special Rapporteur, Dec. 27, 2002, E/CN.4/2003/41, par. 42.

39 Ibid., par. 43.

40 Committee on the Elimination of Discrimination against Women, Forty-second session, Oct. 20 to Nov. 7, 2008, Concluding observations of the Committee on the Elimination of Discrimination against Women, Myanmar CEDAW/C/MMR/CO/3.

The intimidation of victims has made genuine inquiries about sexual violence difficult and dangerous. The junta's response violates the right to truth, justice, and a guarantee of non-recurrence that are integral parts of combating impunity. This pattern too often leaves victims without recourse and at times punishes them for the violence they have suffered. A similar pattern of response emerges from the analysis of forced labor and child soldiering in Burma.



A young girl works in a field in Shan State, south of Hsipaw. The fields had been confiscated after the Shan State Army ended their truce and the Burmese authorities took the land belonging to the SSA and villagers. They then forced the entire village to harvest the rice before taking it to sell in the market in Lashio. 2005. Photo by Nic Dunlop/Panos Pictures.

## Impunity for Forced Labor

Forced labor is one of the most widespread human rights violations perpetrated in Burma. It is also the area in which some of the most intensive pressure has been applied to combat impunity. The violation features in nearly every special rapporteur's report on the situation of human rights in Myanmar since 1993 and throughout dozens of reports by local and international human rights organizations.<sup>41</sup> Forced labor was legalized under British colonial rule through the Towns Act (1907) and the Village Act (1908). The government finally amended the laws in 1999 to conform to Section 374 of the penal code outlawing the practice.<sup>42</sup> Yet the authorities apply Section 374 selectively, and the military continues to use forced labor to support basic functions.

### The Nature of Forced Labor in Burma

The practice of forced labor in Burma falls generally into four main categories:

- Military operations, i.e. carrying goods and supplies for troops, with loads weighing from 16 and 33 kilograms (35 to 73 pounds). The work is dangerous, entailing extensive walking without rest, being used as human minesweepers, and being subjected to beatings and killings if one slows down or collapses.
- Construction and maintenance of infrastructure, including roads and military facilities.

41 Examples include U.S. State Department, *Country Reports on Human Rights Practices 2007*; Karen Human Rights Group, *Forced Labour and extortion in Pa'an District*, Aug. 8, 2008, KHRG #2008-F11 (among dozens of other reports the group has written on forced labor in Burma); Human Rights Documentation Unit, *Human Rights Yearbook 2008* (and its other annual reports); and Amnesty International, *Crimes against humanity in eastern Myanmar*, June 2008 (ASA 16/022/2008).

42 International law prohibits forced labor also. See the ILO section below.

- Cultivation of subsistence and cash crops.
- Construction of development projects, including gas pipelines and hydroelectric dams.<sup>43</sup>

The first two are the most closely connected to military abuse, but considering the junta's needs for food and energy, the third and fourth categories are also areas related to military impunity.

The following account, drawn from the Network for Human Rights Documentation—Burma (ND-Burma) database, is typical.<sup>44</sup>

*This account is based on testimony given on May 10, 2006, to a fieldworker from the Human Rights Foundation of Monland (HURFOM), an ND-Burma member organization. The speaker is a 26-year-old male farmer from Mon State.*

I don't remember the date of the first time I was used as a porter by the army. But it was in 2004, I think. At that time, they gathered all porters, about 20 people from my village. The troops took us to Kone Pae village, which is about 2 miles from my home, Mu Hae village. They ordered us to carry bullets, rations, and shells. How heavy was it? Oh, I am not sure how to measure it in kilograms, but I think it was about 28 to 30 viss (45 to 48 kilograms, or 99 to 106 pounds).

They forced us to walk faster and faster. I was kicked from behind by a soldier several times because I was walking too slowly. The distance was so very far because it took a whole day's walk; we started in the morning, and we didn't set up camp until the evening. My body was so seriously sore, but I dared not tell them.

Each time, the portering has taken about 20 to 35 days. The sixth time I went was in February 2005. It was for about 45 days, and I had to carry soldiers' rations. At that time, I was seriously sick, but the only medical assistance I received was Burmese traditional medicine. It did not help make me well again. I thought I would die. Finally I could not walk, so they left me. Fortunately, I met a hunter from the nearby village, and he took me to his hut and cared for me. After five days, I went back to my village.

Since then, whenever I have been called to serve as a porter I have paid the army about 5,000 to 8,000 kyat (U.S. \$5 to \$8). This was the same amount that would be paid to recruit another porter. I owed a lot of money for that. My wife was very depressed. My son was suffering from malnutrition, and he was slowly starving because there was not enough income to feed him. I felt so very sad. Life is very hard living in my village. Most of the villagers are faced with poverty; we were not allowed to work on our farms, which were situated outside the village. Most of the underage children are facing starvation because their parents can't earn money.

Including the last time, I have been forced to serve as porter seven times by the Burmese army. Each time I served was when they launched offensives against the Mon armed rebel group near my village.

On the April 21, 2006, one of the troops from the Burmese army came and called villagers from each household to gather at the square in the middle of village. Then they announced that each household must send one man to serve as a porter with the army. They divided the village into four parts; each part contained 30 households which had to rotate porter duty.

<sup>43</sup> Human Rights Documentation Unit, *Human Rights Yearbook 2007*.

<sup>44</sup> ND-Burma is a network of 12 Burmese organizations that use a shared database of human rights violations.

My house was from one of the first parts that had to go. I explained that I was the one who paid for porter fees very often and they must exempt me from the duty. But the sergeant denied my request, and he ordered me to pay another 8,000 kyat (about U.S. \$8) if I did not want to serve as a porter. I told my wife, and my wife said that there was no more money to pay them. So we decided to leave my village.

We left secretly with three other households. We traveled for a day before we met a group of traders, and we traveled with them the following day. Finally we reached this place, the Loh-Loe Refugee Camp, near the Burma-Thai border.

Forced labor goes on in almost every state and division. As the testimony above demonstrates, it correlates closely with increased armed conflict in which battalions must follow a “self-reliance policy,” conscripting forced laborers because the government does not provide adequate support.<sup>45</sup> When the military orders people to work for them, those who are unable or unwilling to go must send replacements or pay a fine.<sup>46</sup> When villagers are taken for forced labor, they are also at risk of becoming victims of other human rights violations, including extrajudicial killings, rape, torture, ill treatment, and forced relocation.

The 1998 ILO Commission of Inquiry noted in its concluding observations:

[T]he impunity with which government officials, in particular the military, treat the civilian population as an unlimited pool of unpaid forced labourers and servants at their disposal is part of a political system built on the use of force and intimidation to deny the people of Myanmar democracy and the rule of law. The experience of the past years tends to prove that the establishment of a government freely chosen by the people and the submission of all public authorities to the rule of law are, in practice, indispensable prerequisites for the suppression of forced labour in Myanmar.<sup>47</sup>

### **The Junta’s Response to the Allegations: Pressure from the International Labor Organization**

The Burmese government became a member of the ILO in 1948 and has ratified 19 ILO conventions, including the Forced Labour Convention No. 29 (1930) that it ratified in March 1955. The ILO’s unique form of membership, comprised of governments, employers, and workers, has allowed it to pressure the Burmese junta to address impunity in ways that other UN agencies have not.<sup>48</sup> The International Confederation of Free Trade Unions (ICFTU) has taken the lead within the ILO in documenting the junta’s non-compliance with the Forced Labour Convention and calling for action. The 1998 Commission of Inquiry then issued an exhaustive report finding forced labor to be widespread and systematic in Burma.<sup>49</sup>

The report’s recommendations called for the SPDC to investigate complaints of forced labor and to prosecute and punish those responsible. It noted that the “power to impose compulsory labour will not cease to be taken for granted unless those used to exercising it are actually brought to face criminal responsibility.”<sup>50</sup>

45 UN General Assembly, Report on the situation of human rights in Myanmar, Special Rapporteur, Sept. 21, 2006, A/61/369, par. 33.

46 National Coalition Government of the Union of Burma, Human Rights Documentation Unit, *Burma Yearbook 2007*, 187.

47 ILO, Forced labour in Myanmar (Burma): Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29), GB.273/5, par. 542, July 2, 1998.

48 The ILO organizes an annual conference to adopt conventions and recommendations with two government delegates, one employer delegate, and one worker delegate from each member state. The ILO’s executive body is called the Governing Body.

49 ILO, Forced labour in Myanmar (Burma): Report of the Commission of Inquiry appointed under article 26 of the Constitution of the International Labour Organization to examine the observance by Myanmar of the Forced Labour Convention, 1930 (No. 29), GB.273/5, par. 275, July 2, 1998.

50 *Ibid.*, par. 539(b).



Following the report, the ILO increased pressure. In 2000, the organization barred the SPDC from receiving any technical cooperation or attending ILO meetings, symposia, or seminars except in cases where the sole purpose was securing compliance with the commission's recommendations.<sup>51</sup> The ILO also requested that all members review their relations with the regime and "take appropriate measures" to ensure that those relations did not perpetuate the system of forced labor.<sup>52</sup> These measures related to foreign direct investment in the country and relations with state- and military-owned enterprises that contributed to forced labor.<sup>53</sup>

The SPDC yielded to the pressure. The junta allowed a "High-Level Team" in the country in 2001 to assess the forced labor situation—a significant development given that the members of the 1998 Commission of Inquiry had not been allowed to visit Burma. The team found that although the laws had been updated to prevent the practice of forced labor, victims did not trust the police and the judicial system to operate independently of the regime.<sup>54</sup> The team recommended that the ILO establish a presence in Burma to create a "facilitator mechanism" as recourse for victims.<sup>55</sup> In 2002, the ILO opened an office in Rangoon and appointed a liaison officer.

The ILO sought to establish a formal Plan of Action with the SPDC to address the ILO's concerns about forced labor and the need for a mechanism that victims of forced labor could use to lodge complaints. The liaison officer traveled to various parts of Burma and referred cases of forced labor to the authorities. In the negotiations regarding the Plan of Action, a consistent tension emerged between the authorities' stated commitments to eradicate forced labor, and reality, which suggested that they were merely giving lip service to the issue.

During this time, the liaison officer began monitoring the courts and the Convention 29 Implementation Committee, an administrative body developed as a national supervisory mechanism for monitoring compliance with the Forced Labour Convention that the SPDC created after the 1998 Commission of Inquiry report. The ILO director-general observed that, based on the liaison officer's reports, "Specific complaints of forced labour brought to the attention of the Convention 29 Implementation Committee are systematically denied, and cases brought directly before the courts are rejected."<sup>56</sup> In 2004 the committee reviewed 38 cases; it issued a response in 18 of those and rejected the charges in each of those. Individuals brought six cases directly to the courts; three were dismissed and three were ongoing at the end of 2004. In two of the rejected cases, the alleged victims were prosecuted for defamation and imprisoned for six months.<sup>57</sup> This aggressive action against people filing complaints sent a warning to others considering similar legal action.

The Burmese press, generally viewed as a mouthpiece of the government, issued statements denouncing the ILO and its acceptance of "one-sided" information from the ICFTU. This media attention was ac-

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51 Resolution concerning the measures recommended by the Governing Body under article 33 of the ILO Constitution on the subject of Myanmar, adopted by the International Labour Conference at its 88th Session (Geneva, June 2000).

52 Ibid.

53 International Labour Office, Governing Body, Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29), Further action taken pursuant to the resolution adopted in 2000 by the International Labour Conference, Geneva, GB.294/6/2, November 2005.

54 Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29) Report of the High-Level Team, par. 68, GB.282/4, Geneva, November 2001.

55 Ibid., par.80-81.

56 International Labour Office, Governing Body, Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29), Report of the Director-General, par. 13, GB.291/5/2, Geneva, November 2004.

57 International Labour Office, Governing Body, Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29), Report of the Liaison Officer a.i., par. 13, GB.291/5/1, Geneva, November 2004. A similar situation occurred in 2006 with people from Aunglan Township. International Labour Office, Governing Body, Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29), par. 12 (Geneva, March 2006) (GB.295/7).

accompanied by legal action against victims and their representatives. The media attacks drew a connection between the ILO and what the press called “terrorist” organizations providing information on forced labor.<sup>58</sup> The ILO liaison officer faced increasing restrictions; additionally he and another ILO representative endured a campaign of orchestrated death threats. Government-affiliated organizations held mass rallies and began calling for the SPDC to consider withdrawing from the ILO.<sup>59</sup> In light of these developments, the liaison officer stopped referring cases of forced labor to the authorities because he had no assurances that anyone who filed complaints would be safe from retaliation. Late in 2005, the SPDC rejected the concept of setting up a more formal complaints mechanism that would involve the ILO.

Burma’s political climate was changing significantly during this time. Putting NLD leader Daw Aung San Suu Kyi under house arrest again in 2003 cost the SPDC some of the credibility it gained in working with the ILO. At the end of 2004, Prime Minister Khin Nyunt was removed from his post. This was a blow for the ILO because he had been one of its key interlocutors within the Burmese government. Other important ILO contacts, including the Minister of Labor, also lost their jobs.<sup>60</sup>

Despite continued tension between the SPDC and the international community, in early 2005 the junta told the ILO that the first prosecutions of local officials for imposing forced labor were completed. Three people received eight-month prison sentences, and another person got 16 months in jail. Since all four were civilians, the ILO reported that it was vital to take similar actions with military personnel.<sup>61</sup>

The ILO also began negotiations again with the SPDC on establishing a formal complaints mechanism. As these discussions progressed, the sticking point remained the SPDC’s insistence that it be able to take legal action against anyone who made false allegations. The Burmese officials said this was necessary because the NLD and other opposition forces, including those in exile, were bent on undermining the regime; therefore any complaints lodged by anyone with ties to the NLD or the opposition were spurious.<sup>62</sup> Such a view meant that cases should be considered based primarily on who brought them rather than on their merits. The ILO argued that the best deterrent to the political manipulation of a complaints process “would precisely be the establishment of an objective, impartial mechanism involving persons of unimpeachable integrity that would have the required credibility in dismissing such false complaints.”<sup>63</sup>

In light of this stalemate, the International Labour Conference decided to review potential actions it could take against Burma for breaching the Forced Labour Convention.<sup>64</sup> In addition, the ILO’s Governing Body was scheduled to meet in November 2006 to evaluate the SPDC’s progress in carrying out

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58 “Big nations of west bloc use ILO as political forum to put pressure on Myanmar in order to install their puppet government in power,” *New Light of Myanmar*, March 16, 2005.

59 International Labour Office, Governing Body, Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29), par. 4, GB.294/6/2, Geneva, November 2005.

60 International Labour Conference, Provisional Record, 95th Session, Geneva, 2006, Additional agenda item, Review of further action that could be taken by the ILO in accordance with its Constitution in order to: (i) effectively secure Myanmar’s compliance with the recommendations of the Commission of Inquiry; and (ii) ensure that no action is taken against complainants or their representatives, par. 17.

61 International Labour Office, Governing Body, Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29), Report of the Liaison Officer a.i., par. 13, Geneva, March 2005.

62 The minister of Labor explained this view during a meeting in 2006 with the ILO liaison officer; “As regards the question of prosecutions, the Minister strongly insisted that the situation in Myanmar was different from that of other countries in view of the fact that political forces were taking full advantage of issues such as forced labour to politicize the situation and tarnish the reputation of the Myanmar authorities. This is why the authorities were determined to use the relevant provisions of the Penal Code 8 to deter such political manipulation. The Minister indicated that it was of the view of the authorities that a distinction had to be made between genuine complaints, which they could accept, and politically motivated allegations, which they could not.” International Labour Office, Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29), par. 22, GB.295/7, Geneva, March 2006.

63 International Labour Office, Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29), par. 21, GB.295/7, Geneva, March 2006.

64 International Labour Conference, Provisional Record, 95th Session, Additional Agenda Item, Appendix I, Geneva, 2006.

the recommendations of the Commission of Inquiry (particularly the establishment of a complaints mechanism). Based on that evaluation, the Governing Body would be authorized to decide on a course of action.

The document the ILO prepared for that meeting explained various legal remedies that the Governing Body could implement if it was not satisfied with the SPDC's progress, including an analysis of forced labor as a crime against humanity.<sup>65</sup> This document suggested a process for future action that included a path to access international justice for forced labor and explained that the ILO could request a ruling from the International Court of Justice for a breach of the Forced Labour Convention (1930). Based on that ruling, a strategy could be developed for bringing a case, through a UN Security Council referral, to the ICC.<sup>66</sup>

In May 2006, the SPDC announced a six-month moratorium on taking legal action against people filing complaints of forced labor and promised to continue discussing with the ILO liaison officer how to create a complaints process.<sup>67</sup> Then, with the November 2006 Governing Body meeting looming and consideration of punitive action against the SPDC on the agenda, the junta went a step further. On September 20, 2006, the SPDC acquitted three people of making false complaints of forced labor.

By this time, the ILO and the SPDC had negotiated the terms of a complaints mechanism to formalize the de facto process that had already been operating, with the liaison officer receiving complaints. The agreement, known as the Supplementary Understanding, included guarantees against retaliatory action against those who filed complaints. However, talks reached an impasse over a seemingly minor issue of adding more staff to the ILO's office. According to the ILO report on the meeting, the impasse was difficult to understand since the SPDC had seemed ready to accept, in principle, the increase.<sup>68</sup>

When the ILO Governing Body met in November 2006, it acknowledged the release of the people who had been prosecuted for making "false allegations," as well as the moratorium on prosecuting similar cases. The decision it then had to make is one often at the heart of the question of impunity in Burma: Was the progress enough to be applauded, or was it a cosmetic act obscuring the more basic system of impunity for forced labor, designed to remove the threat of punitive action?

The Governing Body decided not to accept either of the SPDC's actions as acceptable progress and placed on the agenda of the March 2007 session an item allowing it to consider the options outlined in the ILO "legal remedies" document.

The SPDC took notice. Just before the March session, Burmese officials and the ILO signed the Supplementary Understanding on February 26, 2007, effectively establishing a formal complaints mechanism for forced labor through the liaison officer. According to the agreement, the officer (or someone he or she appoints) would conduct an initial, confidential examination of the complaints and assess whether they constituted forced labor. The officer would then refer relevant cases to a working group, established by the SPDC,

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65 Article 7 of the Rome Statute of the ICC (2002) defines crimes against humanity as any in a series of acts, which includes enslavement or severe deprivation of liberty, "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack

66 International Labour Office, Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29), Legal aspects arising out of the 95th Session of the International Labour Conference, par. 9, GB.297/8/2, Geneva, November 2006, citing the UN Charter, Article 94(2).

67 International Labour Conference, Provisional Record, 95th Session, Part Three: Observations and Information Concerning Particular Countries, Special sitting to examine developments concerning the question of observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29), Geneva, 2006.

68 International Labour Office, Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29), par. 18, GB.297/8/1, Geneva, November 2006. One explanation is that the SPDC was throwing up a last-minute obstacle on purpose so that during the Governing Body's meeting in November, the liaison officer would report that they were close to getting an agreement, but needed more time.

to be investigated by “the most competent civilian or military authority concerned, as appropriate.”<sup>69</sup>

When the Governing Body met the next month, it deferred the question of potential legal remedies, but noted that “the necessary question or questions would continue to be studied and prepared by the Office...to be available at any time that might be necessary.”<sup>70</sup>

The Supplementary Understanding was effective for a year. It was renewed for an additional year in February 2008 and again in February 2009. At the end of 2008, the liaison officer reported that since the previous February, the office had received 121 complaints of forced labor, including recruitment of child soldiers, and it had forwarded 70 to the SPDC.<sup>71</sup> Of those 70 cases, the liaison officer considered 50 of the SPDC’s responses satisfactory. In most cases the response was a reprimand, but in some instances authorities paid compensation to victims, established an activity to educate communities or local authorities about the illegality of forced labor, issued new instructions, dismissed the village chairman, or stopped the violations.<sup>72</sup> These outcomes were light on punitive measures and, although they show progress in that they upheld the right to truth and compensation, the absence of justice measures in most cases points to a pattern of ongoing impunity.



A child soldier, conscripted at 15 years old, who escaped in April 2009 from a Burmese army battalion in Papun District of Karen State. Photo provided by the Free Burma Rangers, which provides media free of charge to help the people of Burma.

### Impunity for the Recruitment and Use of Child Soldiers

In his December 2007 report to the Security Council on children and armed conflict, the UN Secretary-General said there were reliable reports that the Burmese army and other armed groups in the country were recruiting child soldiers.<sup>73</sup> Other UN reports, as well as studies done by international NGOs and local human rights organizations, confirm this finding.<sup>74</sup> While estimates on the number of child soldiers in Burma vary and are nearly impossible to confirm, the Coalition to Stop the Use of Child Soldiers says thousands of children are used.<sup>75</sup>

### The Nature of Recruiting and Using Child Soldiers in Burma

Battalions deploy recruiters to train stations and other public places to find potential recruits. Children are often compelled to join out of poverty or are physically threatened into joining the army. At the recruitment centers, officers rarely attempt to verify ages, and a recruiter can easily bribe an officer if any question is raised.

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- 69 According to the International Labour Office’s November 2006 report, the working group comprised the deputy minister of Labor as chairman, together with the deputy attorney general, the director-general of the Office of the Chief Justice, the director-general of Labor, the director-general of the General Administration Department (Home Affairs) and the deputy director-general of the International Organizations and Economic Department (Foreign Affairs).
- 70 International Labour Office, Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29), Status report on decisions regarding Myanmar, par. 12, GB.303/8/1, Geneva, November 2008, citing GB.298/5.
- 71 The complaints mechanism covers cases of forced labor and child soldiering. Of the 70 reported cases, 39 involved child soldiering and 31, forced labor. The issue of child soldiers is taken up in the following section of this report. The cases that did not fall within the definition involved other issues, such as land, pensions, and wage disputes.
- 72 International Labour Office Governing Body, Developments concerning the question of the observance by the Government of Myanmar of the Forced Labour Convention, 1930 (No. 29), Report of the Liaison Officer a.i., GB.303/8/2, Geneva, November 2008. This document refers to “village chairman” but this position is more often referred to as a headman.
- 73 Report of the Secretary-General on Children and Armed Conflict A/62/609-S/2007/757 Dec. 21, 2007, 15-17. The 2006 report names four groups: the Burma Army, United Wa State Army (UWSA), Karen National Liberation Army (KNLA, the armed wing of the Karen National Union, or KNU), and the Karenni Army (KA). The following groups were added to that list in the 2007 report: KNU–KNLA Peace Council (a breakaway from the KNU-KNLA), Democratic Karen Buddhist Army, Kachin Independence Army, Karenni Nationalities People’s Liberation Front, Myanmar National Democratic Alliance Army (Kokang), and Shan State Army—South.
- 74 The most significant of these are: Images Asia, *No Childhood at All*, 1996; Human Rights Watch, *My Gun Was As Tall As Me*, 2002; UNICEF, *Adult Wars, Child Soldiers: Voices of Children Involved in Armed Conflict in the East Asia and Pacific Region*, 2002; Human Rights Education Institute of Burma, *Despite Promises: Child Soldiers in Burma’s Armed Forces*, 2006; and Human Rights Watch, *Sold to Be Soldiers: The Recruitment and Use of Child Soldiers in Burma*, October 2007.
- 75 Coalition to Stop the Use of Child Soldiers, *Child Soldiers Global Report*, 2008.

New recruits are treated severely during training, especially if they try to escape or disobey rules. Once they are deployed to battalions, they may be forced to carry out human rights violations alongside the other soldiers.

*This account is based on testimony given to a fieldworker from EarthRights International (ERI), an ND-Burma member organization, in 2005. The speaker is a 24-year-old male villager from Pegu Division, Burma.*

I arrived here a few days ago after I escaped from the Burmese army. I came with two other friends as well. We spent one night in the jungle before we met Karen National Union (opposition force) soldiers. We were treated well by the soldiers here and not like how the officers used to order us. We were always told that if we were ever captured by Karen soldiers that they would just kill us.

I have six brothers and two sisters back home. I am the third child. Our family business was selling items, and it was not so bad because we were able to survive. I joined the military for about seven years since I was about 17 years old. I was forced to join the military and become a soldier. I was picked up by one man, who I had never met, and he sent me to the police station. When I arrived at the police station, they forced me to join the military. That same night I was sent to Rangoon with four other people for military training. All of them were my friends. Two of them are younger than I am, and the other friend is the same age as me. We were accompanied by one sergeant, and he led us to the train.

The next day we arrived in Rangoon at the Da Nyn Gone recruitment center. While at the recruitment center, I was thinking of trying to escape, but it was too late because they already cut our hair in a military style, so it was hard to run away. I was also shy and scared of escaping. Again because of the military haircut they could easily find and recapture us. While we were at the recruitment center, we were asked to state the reason we joined the army. If we didn't respond that we joined by ourselves on our decision, they threatened to lock us up. So I was forced to say that I willingly joined the military by myself. This occurred in July 1998. We were held at the recruitment center for a month before being sent to the training center.

In August 1998, I was sent to Cho Pyu training camp in Tike Gyi town. I had to attend the training for four and half months. During this training we were given food that was not good such as rice that was not well cooked, chili or fish paste that was not fresh. Some people tried to escape during the training, but some were recaptured and were severely punished.

When I was in the training camp and also in the training recruitment center, I never wrote to my parents because it was so difficult. In addition, whenever I thought of writing to them I wanted to cry. Again when I saw my friends' parents visit them, they were crying so I didn't want my parents to cry. The worst thing that happened was even though I wrote to my parents, the letters never arrived to my parents, because most of the time the officers in charge of the mail never sent out the letters, and they didn't deliver the letters that were sent to us. I hardly came through the training, and after that training I was sent to artillery training for another two and half months at Mit Htee La. After that I was sent to Artillery Battalion 324 based in Tavoy. It was early 1999 when I arrived to Ta Bay Chang in Tavoy where the battalion was based. When I arrived to the base there are about 55 soldiers in the camp.

The Burmese government is obligated under the Convention on the Rights of the Child, which it signed in 1991, not to allow children younger than 15 to be soldiers. Under Burma's own domestic law, that

standard is raised to the age of 18.<sup>76</sup> Burma has further obligations under customary international law to restrict the recruitment and use of child soldiers, despite having not yet signed many of the specifically relevant individual agreements.<sup>77</sup>

### **The Junta's Response to the Allegations: Security Council Resolution 1612**

The recruitment and use of child soldiers is generally treated as a separate category of human rights violation. However, because it is also a form of forced labor, monitoring child soldiering has fallen to the ILO. The incidents of child soldiering understandably have increased in combat areas. Because the ILO's mechanisms to address forced labor include child soldiering, the previous discussion of the junta's response to the ILO on issues of forced labor are relevant here as well. However, some interactions related specifically to child soldiering deserve some additional discussion.

While the ILO and SPDC were negotiating mechanisms to prosecute forced labor, the UN began to increase pressure on the SPDC for child soldiering. The UN Security Council has passed several resolutions that directly address children and armed conflict, and UN Security Council Resolution 1612 established a monitoring and reporting mechanism on the use of child soldiers.<sup>78</sup> Resolution 1612 and the previous resolutions called on the UN Secretary General to report to the Security Council a list of parties that recruit and use child soldiers. The resolutions also called on those parties to develop an action plan to address conflict-related violations against children.<sup>79</sup>

Before Resolution 1612 passed in July 2005, the SPDC began developing a plan to address child soldiering. In 2004, it established the Committee for the Prevention of Military Recruitment of Underage Children. That committee's Plan of Action outlines five activities to carry out: demobilization and reintegration of child soldiers, raising public awareness about the problem, cooperation with international agencies on ending the practice of child soldiering, and, most significantly with regard to impunity, punishment for recruitment.

In a 2005 press statement, the SPDC claimed it discharged 213 child soldiers between 2002 and February 2005.<sup>80</sup> By Human Rights Watch estimates, demobilization actually took place between 2002 and 2006 at an average rate of 41 child soldiers per year, a very small percentage of the likely total of child soldiers in Burma.<sup>81</sup>

The Secretary-General's Special Representative for Children and Armed Conflict visited Burma in June 2007. During her visit, she recommended that:

A transparent complaints procedure for incidents of recruitment of underage children be instituted and disciplinary action be taken against responsible parties (both military agents and local...officials

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76 According to correspondence sent to Human Rights Watch from the Permanent Mission of the Union of Myanmar to the United Nations, Burma's "Regulation for the Persons Subject to the Defense Services" sets 18 as the minimum age for military recruitment. See Human Rights Watch, *Sold to be Soldiers*, October 2007.

77 These include Optional Protocols I and II to the Geneva Conventions, the Worst Forms of Child Labour Convention (No. 182), and the Rome Statute. In the summary of decision on Preliminary Motion on Lack of Jurisdiction (Child Recruitment), *Prosecutor v. Samuel Hinga Norman*, May 31, 2004, Case Number SCSL-2003-14-AR72 (E), the Appeals Chamber of the Special Court for Sierra Leone affirmed that recruiting child soldiers, as defined by the Rome Statute, was part of customary international law as early as 1996.

78 United Nations Security Council, Resolution 1612, July 16, 2005. S/RES/1612 (2005).

79 The relevant UNSC resolutions are 1261 (1991), 1314 (2000), 1379 (2001), 1460 (2003), and 1539 (2004). A helpful summary and analysis of legal obligations can be found in the Human Rights Education Institute of Burma's *Forgotten Future: Children Affected by Armed Conflict in Burma* (2008).

80 "Alleged forced recruitment of soldiers especially child conscriptions are based on false information," Information Committee of the State Peace and Development Council, Rangoon, March 16, 2005.

81 Human Rights Watch, *Sold to be Soldiers*, October 2007.

or other parties aiding and abetting underage recruitment) and information shared with the monitoring and reporting mechanism.<sup>82</sup>

The special representative found that the complaints mechanism established to prevent recruitment of child soldiers did not meet international standards, and she encouraged the SPDC to work with the UN Country Team to update the action plan and its implementation. Regarding accountability measures, she said the UN Country Team should be “more closely informed of any actions in this regard.”<sup>83</sup>

The UN Security Council has a mandate under Resolution 1612 to consider imposing “graduated measures, such as, inter alia, a ban on the export and supply of small arms and light weapons, other military equipment, and on military assistance.”<sup>84</sup> Under the weight of this mandate, the SPDC agreed, in principle, to a complaints mechanism, to a disciplinary procedure for parties responsible for aiding and abetting recruitment of child soldiers, and to cooperation with UNICEF on reintegrating former child soldiers.<sup>85</sup> That agreement has been largely included in the framework of the forced labor complaints mechanism.

According to Burmese government reports, 68 children in military training schools were released to their parents and guardians in 2008. While the Secretary General noted that the Government Working Group for the elimination of forced labor dealt with these complaints expeditiously, he also acknowledged that they “represent only a portion of the actual cases.”<sup>86</sup>

Impunity for recruiting child soldiers remains a problem, although the SPDC has taken some positive steps. The government claimed that it has discharged nine military recruitment officers, and the ILO verified that three members of the military received administrative penalties (such as demotion or loss of salary) in relation to child recruitment violations in 2008. However, the government does not appear to have applied the penal code of military regulations in any child soldiering cases, which could have resulted in imprisonment.<sup>87</sup>

## Patterns and Analysis in the Record of Impunity

A review and analysis of impunity for violations related to sexual violence, forced labor, and child soldiering highlights several patterns. The first is that impunity for the abuses committed by the military appears to be most prevalent when the abuses are related to activities surrounding ongoing armed conflict. The second is that the government actively discourages complaints regarding military abuses by retaliating against anyone who speaks up through punishments and smear campaigns. Third, the complaints mechanisms are too limited in scope and capacity to address the vast number of abuses taking place.

The Burmese government has attempted to provide some semblance of justice. While the recognition that abuses are wrong may be interpreted as an important first step in what is often a long, slow process of transition toward broader accountability, this progress must be seen as being mitigated by larger political and military priorities that undermine those very efforts.

## Impunity Is Related to Armed Conflict

The human rights violations outlined in this report have occurred throughout Burma, but are most severe

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82 Report of the Visit to Myanmar of the Special Representative of the Secretary-General for Children and Armed Conflict, June 25-29, 2007.

83 Ibid.

84 UN Security Council Resolution 1612, par. 9, July 26, 2005 (S/RES/1612 (2005)).

85 Report of the Secretary-General on Children and Armed Conflict A/62/609-S/2007/757, Dec. 21, 2007, 15-17.

86 UN General Assembly, Children and armed conflict: report of the Secretary-General, March 26, 2009. A/63/785-S/2009/158, para. 72 (available at [www.un-casa.org/bulletinboard/Default.aspx?g=posts&t=205](http://www.un-casa.org/bulletinboard/Default.aspx?g=posts&t=205)).

87 Ibid.

in rural ethnic areas. They are directly related to the military's attacks on the people it sees as supporting armed opposition. The scale of reported violations, and the associated tolerance and impunity for them, indicates the SPDC's acceptance of sexual violence as a legitimate part of the strategy to intimidate people in areas of armed conflict or potential resistance, and to punish communities for appearing to support the government's opposition.

Forced labor and child soldiering are also associated with areas of continuing armed conflict. The military has grown from 180,000 soldiers in 1988 to an estimated 300,000 in 2007.<sup>88</sup> This expansion has forced commanders to rely on local communities to supply labor for building infrastructure and for portering. The pressure to fill recruitment quotas has led to a situation in which the Burmese armed forces are believed to include the highest numbers of child soldiers in the world.

### Impunity Is Reinforced by Attacking Those Who Complain

The authorities maintain a culture of impunity not only by restricting access to complaints mechanisms, but by harassing and taking legal action against those who bring complaints against the military. As noted above, rape victims have been imprisoned after making formal complaints or bringing their story to the press. The ILO has also developed a detailed record of this tactic in relation to forced labor.

Considerable progress has been made in relation to this issue, especially through the ILO's formal complaints mechanism for forced labor. Yet it is clear that the fear of retribution is deeply rooted in the minds of Burmese victims. Human Rights Watch gives one example of this fear, familiar to any activist or researcher who has talked with victims of human rights violations in Burma. A researcher for the organization asked a community leader whether parents report their children's forced conscription into the army. The man responded that it was too dangerous because local authorities would punish the parents, and the ILO and the UN would be powerless to protect them.<sup>89</sup>

The regime reinforces this fear by using the press and other propaganda techniques to smear victims, based on their political or ethnic affiliations. Accusations that insurgents made up the allegations in the Shan *License to Rape* report were echoed in the mass rallies in 2005 calling for a withdrawal from the ILO because of the organization's connection with alleged "terrorist" elements. Similarly, the SPDC denied conscripting child soldiers and dismissed allegations as the fabrications of neo-colonialists supported by "alien-reliant national traitors at home and abroad."<sup>90</sup> Press attacks on the people or organizations involved in the complaints mechanisms have also strengthened perpetrators' sense of impunity.<sup>91</sup>

### Complaints Mechanisms Are Too Limited

The existing complaints mechanisms are too limited in scope and capacity to deal with the vast number of abuses taking place. As of November 6, 2008, 121 complaints of forced labor had been filed under the ILO's complaints mechanism, and the ILO determined that 70 of them met the requirements. Thirty-nine of those cases involved child soldiering.<sup>92</sup> Because Burmese authorities handle cases of sexual violence, including rape, in an ad-hoc way, official numbers are unavailable.

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88 Christina Fink, "Militarization in Burma's ethnic states: causes and consequences," *Contemporary Politics*, 14:4, 2008, 450, citing Mary Callahan, *Political authority in Burma's ethnic minority states: devolution, occupation, and coexistence* (Washington, DC: East-West Center, 2007), 7.

89 Human Rights Watch, *Sold to be Soldiers*, October 2007.

90 Ibid., citing Information Sheet NO. D-3936(I) Feb. 2, 2007, Myanmar Information Committee, Rangoon; "Myanmar still facing unjust accusations of child soldiers as only slanders and falsehood reach UN."

91 UN General Assembly, Report on the situation of human rights in Myanmar, Special Rapporteur, Sept. 21, 2006, A/61/369, par. 31.

92 Report of the Liaison Officer, ILO Governing Body 303rd Session, November 2008. (GB.303/8/2). Recent statistics from the SPDC's Committee for the Prevention of Military Recruitment of Underage Children are unavailable, and the ILO mechanism is handling most of the child soldiering cases.



The number of complaints pales in comparison to the actual number of violations. Thousands, if not tens of thousands, of child soldiers are believed to be serving in the army.<sup>93</sup> The number of cases of forced labor is likely to be at least that high. Burmese women's organizations have documented 875 cases of rape from 1988 to 2006 and believe that number is a mere fraction of the total number because of the difficulty in accessing communities under SPDC control and the fear and stigma that keeps women and girls from reporting rape.

The complaints mechanisms are not sufficient to address the breadth of the abuses. According to a 2007 report on eastern Burma by Amnesty International, the ILO did not receive any official complaints of forced labor in Karen State where local organizations have documented some of the most severe cases of human rights violations linked to forced labor. The ILO attributed this gap to fear, a lack of awareness about the complaints mechanism, and difficulty getting to Rangoon to file a complaint in the ILO's office.<sup>94</sup>

### Are There Indications of Progress?

#### *Moves Toward Accountability*

In a context where impunity and lack of accountability dominate, change may require relatively small advances that could stimulate broader institutional improvement. The Burmese regime has taken steps that should be recognized as important moves away from total impunity. Recognizing that members of the security forces have committed some serious crimes and that the perpetrators deserve punishment are steps in the right direction, even though the manner in which the perpetrators and victims have been handled has been highly inadequate.

An example of such recognition is the compensation that the military has made to victims of sexual violence and their families. Although these payments are not consistent, sufficient, or the most appropriate means of redress, they do suggest that the military may recognize that sexual violence is wrong and should be redressed. Similarly, creating the ILO's complaints mechanism for forced labor also is at least a rhetorical recognition that the practice, as well as child soldiering, is wrong.<sup>95</sup>

The military's recognition of these crimes is a necessary precondition for it to take steps to avoid or address such violations in the future. These small steps taken to date reflect an inconsistent approach to crimes and victims that is often determined by the real or perceived political views of the victim (i.e. whether or not they are supportive of the regime). Hence, they are grossly inadequate and inappropriate when considering the gravity of the victims' suffering. However, considering that the Burmese government before was in a state of total denial about any wrongdoing, the steps may indicate a growing openness to accountability.

Many transitions move in fits and starts, and they may be influenced considerably by both internal and external pressures. But experience shows that progress in transition often happens through such slow cultural, structural, and institutional changes.

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93 Human Rights Watch's *My Gun Was As Tall As Me* gave a rough estimate of 70,000 and cited a 1996 UN study on children in armed conflict that put the number at more than 50,000. The Coalition to Stop the Use of Child Soldiers said thousands were involved in its 2008 *Global Report on Child Soldiers*. Human Rights Watch's *Sold to be Soldiers* does not offer an estimate, but relates credible eyewitness accounts of at least 30 percent of soldiers in recruiting centers being underage.

94 Amnesty International, *Crimes against humanity in eastern Myanmar*, June 2008 (ASA 16/011/2008).

95 Attention to the issue, however, needs to remain in the context of the larger reality of ongoing widespread and systematic forced labor, especially in highly militarized zones. The army continues to impose forced labor for portering, military operations, and other military and infrastructure-related projects. See United Nations Human Rights Council, Report of the Special Rapporteur on the situation of human rights in Myanmar, March 7, 2008 (A/HRC/7/18), par. 33. According to Human Rights Education Institute of Burma's *Forgotten Future: Children and Armed Conflict in Burma* (November 2008), recruiting child soldiers is still common. According to Human Rights Watch's *World Report 2007*, the ongoing military offensive in northern Karen State and eastern Pegu Division has led to massive human rights abuses, including forced labor and use of child soldiers. Because of the offensive, the military has used forced laborers and convicts to build at least 43 new army bases.

### *Responsiveness to the Imminent Threat of International Punishment*

Analysis of the limited progress suggests that the Burmese regime responds to threats from the international community. After considerable negotiations, the regime agreed to the ILO mechanism to address forced labor and child soldiers. (Yet no effective mechanisms exist to address other violations, such as rape, torture, arbitrary arrests, and detention.) As noted in the case of forced labor, 10 days before the ILO Governing Body was due to consider the legal remedies it could take before the International Court of Justice, the UN Security Council, and the ICC, Burma concluded the Supplementary Agreement with the ILO.

The UN has monitoring mechanisms and agencies that address the wide range of human rights that the Burmese people have suffered, including violations of the right to food, internal displacement, freedom of religion and belief, and extrajudicial, summary, and arbitrary executions. However, the SPDC has not allowed UN personnel who report on these issues into the country.<sup>96</sup> Why then has the regime been willing to work with the UN's special representative on Children and Armed Conflict? The representative was allowed to visit Burma in June 2007, as she was preparing a report for the secretary-general so he could brief the UN Security Council's Working Group on Children and Armed Conflict later that year. During her visit, the SPDC made commitments to revise the Plan of Action, to improve the complaints mechanism, and to ensure that the disciplinary procedures for child soldiering complied with UN Resolution 1612. If the Security Council found that Burmese officials were not complying with the resolution, it could impose measures such as bans on supplying arms, military equipment, and military assistance to the junta.<sup>97</sup>

The working group submitted its conclusions to the Security Council the following July. They reflected relative weaknesses in the special representative's language and did not include any concrete recommendations that would prompt the SPDC to take concrete actions. In Human Rights Watch's comments on the conclusions, the group explained that the "Security Council's failure—in large part due to efforts by China to block a more principled response—was particularly glaring given its previous pledges to seriously consider arms embargoes and other targeted measures against parties that repeatedly recruit and use child soldiers."<sup>98</sup> So while the threat of sanctions prompted a small step in the right direction—consenting to the special representative's visit—neither the working group nor Security Council members capitalized on that step.

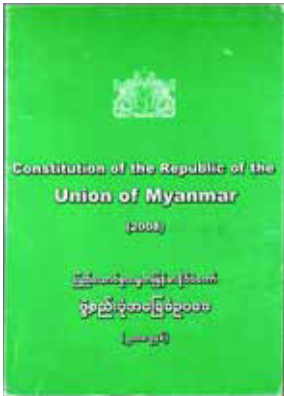
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96 Amnesty International, *Crimes against humanity in eastern Myanmar*, June 2008, 40-41.

97 UN Security Council Resolution 1612, par. 9, July 26, 2005 (S/RES/1612 [2005]).

98 Human Rights Watch, *World Report 2009 (Events of 2008)*.

### 3. The 2008 Constitution: Entrenching Impunity



The 2008 Burma Constitution

The most recent step along the Burmese regime’s “roadmap to democracy” has been the passage of the new constitution through referendum in May 2008. The Burmese constitution’s “basic principles,” as outlined in its first chapter, state that among the country’s objectives is the “flourishing of a genuine, disciplined multi-party democratic system.”<sup>99</sup>

Experience in other transitional regimes has proven that passing a constitution is an important step in the long process toward democratic reform. To cite just one example from the region, after Indonesia’s military dictator General Suharto fell in 1998, that country’s constitution was amended to include a comprehensive “bill of rights.” Despite the ongoing challenges of massive corruption, impunity, and lack of accountability, the constitution is one of the most powerful tools available to human rights advocates in Indonesia.

Indonesia’s example is particularly applicable to Burma. One of the fundamental reasons Indonesia has been able to move forward in its transition from military dictatorship to democracy is that the previous guarantee that 30 percent of seats in parliament go to military officers was not entrenched in the constitution. Therefore, those laws could be amended. The quota gradually decreased over seven years and now no longer applies.

Supporters of the Burmese constitution argue that it makes significant advances toward a democratic state by declaring new norms and advancing certain democratic reforms. However, the constitution was passed without genuine consultation with any sector of society except the military elite or true democratic participation or acceptance. This suggests that the document is based on the junta’s interests, not those of the people.

Such concerns are buttressed by the fact that the constitution includes objectionable elements that reinforce the existing culture of impunity for those who commit human rights violations. One such element is a substantive immunity clause, which appears to provide blanket amnesties for human rights abuses committed by junta members. Another element is the structural entrenchment of the military in the government by giving its members perpetual and disproportionate influence in the legislature and the ability to single-handedly veto any constitutional amendments. And the third element is the complete separation of the military from civilian justice, which permits members of the military to be tried for violations against civilians in military courts with separate rules.

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99 2008 Constitution, Article 6(d).

## The Flawed Constitutional Process

The manner in which the 2008 constitution was drafted and adopted was fundamentally flawed. Professor Yash Ghai, a constitutional expert from Kenya, notes that the process of writing a constitution is as important as the outcome and, in fact, determines the outcome. He also says that constitutions drafted in conflict or post-conflict situations should be the result of negotiations if they are to succeed in fostering reconciliation or building trust.<sup>100</sup>

The Burmese government's resistance to any initiatives not prescribed by the SPDC demonstrated a lack of commitment to basic democratic processes and foreshadowed potential difficulties in amending the constitution. The influence that the military authorities exerted over the National Convention means that the constitution may not provide a stable foundation for further democratic transition. Rather, the flawed drafting process may actually increase short-term conflict as opponents question its legitimacy.

A similar issue arises in relation to the adoption of the constitution during the May 10, 2008, constitutional referendum. The draft constitution became available to the public only five weeks before the scheduled referendum. It was published only in Burmese, which many ethnic minorities could not read, and was only available in Rangoon bookstores for 1,000 Kyat (about U.S. \$1).<sup>101</sup> As a result, most people did not know what it said. The few people who had been able to study the contents were barred from commenting critically about the draft in public, publishing articles that carried any criticisms, or bringing people together to discuss it.<sup>102</sup>

Significant portions of the population were prohibited from voting on the referendum, including 500,000 Buddhist monks and over a million people who were out of the country without the government's permission. There were no official policies on what would happen if voters rejected the draft constitution and no independent monitoring of the voting.

A week before the referendum, Cyclone Nargis hit Burma, killing thousands and causing thousands more to lose their homes. Despite the urgent need to direct resources and attention to disaster relief, the SPDC went ahead with the constitutional referendum in all but the 47 townships most severely affected by the cyclone. When the final tallies were announced, the regime claimed that 92.4 percent of the voters approved the new constitution and that 26 million out of 27 million eligible voters (96 percent) had turned out to vote.

It is unlikely that a new constitution in any country would garner this level of support. And given the recent widespread anti-government protests, the various ongoing conflicts, and the chaos and devastation caused by the cyclone, these numbers appear to bear little resemblance to the truth.

## Reinforcing Substantive and Structural Impunity

Despite the regime's claims that the constitution supports democratic transition in Burma, several substantive elements within the document reinforce and entrench impunity for the junta's past and present human rights violations.

### The Immunity Clause

The final article in the constitution's chapter on transitory provisions effectively provides amnesty for the

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100 Yash Ghai, "The 2008 Myanmar Constitution: Analysis and Assessment," unpublished.

101 Since the average Burmese worker earns less than \$200 a year, buying a copy of the constitution would cost two days' wages. The constitution was later published in both Burmese and English.

102 National Convention Law (No. 5/96).

conduct of the SPDC and its predecessor. Article 445 in Chapter 14 (herewith “immunity clause”) states, “All policy guidelines, laws, rules, regulations, notifications and declarations of the State Law and Order Restoration Council and the State Peace and Development Council or actions, rights and responsibilities of the State Law and Order Restoration Council and the State Peace and Development Council shall devolve on the Republic of the Union of Myanmar. No proceeding shall be instituted against the said Councils or any member thereof or any member of the Government, in respect to any act done in the execution of their respective duties.”

The clause does not specify which acts would be covered by the amnesty. It only holds that it applies to “any act done in the execution of their respective duties.” This language could be interpreted widely to encompass administrative, civil, and criminal activities. Alternatively, it may be interpreted more restrictively, for example holding that any act done in violation of national or international law must, by definition, have been outside the scope of “their respective duties.” Such a restrictive interpretation of this immunity clause would permit criminal liability for severe human rights abuses. It is not clear whether the amnesty is intended to apply only to past actions or present and future actions. How these ambiguities are interpreted will likely depend on the new judiciary, discussed below.

The scope of this immunity clause may also be limited by international law and Burma’s international treaty obligations. There is a general consensus under international law that national laws or constitutions cannot provide amnesties for genocide, crimes against humanity, or other serious violations of international humanitarian law.<sup>103</sup> Burma is also party to the Convention on the Prevention and Punishment of the Crime of Genocide (ratified on March 14, 1956) and the Geneva Conventions (ratified on August 25, 1992), both of which require parties to punish perpetrators of genocide and grave breaches of the Geneva Conventions in national courts or tribunals, regardless of the perpetrators’ political affiliation or military status.<sup>104</sup> If Burma’s national courts decide to uphold this amnesty provision in relation to serious crimes, they may be violating the country’s international obligations. Moreover, such an amnesty probably would not affect possible international prosecutions against the Burmese regime for genocide, crimes against humanity, or serious violations of international humanitarian law.

There is growing international consensus that countries have an obligation to investigate gross human rights violations, hold those most responsible legally accountable, and provide victims with an effective remedy. These principles have emerged out of a range of treaties that have been almost universally ratified, as well as (nonbinding) UN declarations and resolutions, and dozens of decisions by treaty-monitoring

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103 See, e.g., the Secretary-General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, par. 22, U.N. Doc. S/2000/915 (noting that “the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.”) See also Decision of the Inter-American Court of Human Rights, Case of Almonacid-Arellano et al v. Chile, Judgment Sept. 26, 2006. Series C No. 154, par. 114 (holding that “States cannot neglect their duty to investigate, identify, and punish those persons responsible for crimes against humanity by enforcing amnesty laws or any other similar domestic provisions. Consequently, crimes against humanity are crimes which cannot be susceptible of amnesty.”); Decision of the Inter-American Court of Human Rights, Case of Barrios Altos v. Peru, Judgment March 14, 2001. Series C No. 75, par. 41 ([www.corteidh.or.cr/docs/casos/articulos/seriec\\_75\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf)), which states that Peru had violated the American Convention on Human Rights by enacting Amnesty Law No. 26479 because “the establishment of measures designed to eliminate responsibility are inadmissible because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.”).

104 See Convention on the Prevention and Punishment of the Crime of Genocide, Articles 1, 4, and 6; Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, Aug. 12, 1949, Articles 49-50; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, Aug. 12, 1949, Articles 50-51; Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, Articles 129-30; Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, Aug. 12, 1949, Articles 146-47. While grave breaches only relate to international armed conflicts, Burma’s constitutional clause makes no distinction regarding the context in which the acts are committed.

bodies and supranational tribunals.<sup>105</sup> Such broad recognition may mean that these principles could be customary international law,<sup>106</sup> and therefore they are binding on Burma's regime.

### The Legislature: Making the Law

The constitution creates seven regions (composed of what are now the seven divisions, consisting largely of ethnic Burmans), seven states, several self-administered areas within regions or states, and a Union territory.<sup>107</sup> It creates a bicameral legislature at the top-most "Union" level, composed of an upper and lower house.<sup>108</sup> In each one, the commander-in-chief of the military designates 25 percent of the membership (56 of 224 in the upper house and 110 of 440 in the lower house). At the state, region, and self-administered areas levels, the legislature has one chamber, and the commander-in-chief designates 25 percent of the membership of these bodies as well. Since all military representatives remain members of the armed forces, they are compelled to act on the instructions of the commander-in-chief.

This arrangement gives the military a perpetual voting block with significant control over the legislature and the numbers to obstruct any legislation that could threaten the military's power. While the new constitution requires the military to work with other "elected officials" to pass laws, it is very likely that a large contingency of former military and ex-government officials will become civilians and be elected through political parties.

### The Judiciary: Enforcing and Interpreting the Law

The structure of the judiciary consists of ordinary courts, the courts-martial (military courts), and a constitutional tribunal. Within the ordinary courts, the Supreme Court is the highest and the only one at the national level, with a high court in each state and region, and courts at the levels of self-administered area, district, and township.<sup>109</sup> While the various judges are appointed by the president with the approval of the legislature, the constitution attempts to assert the independence of judiciary by requiring that all judges be free from political affiliation.<sup>110</sup>

Yet the constitution's provisions relating to the judiciary probably will not affect the culture of impunity that permeates the military because all cases against the military must be adjudicated in the courts-martial. The constitution includes just two articles on those courts. Article 20(b) in Chapter 1 states,

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105 See Diane Orentlicher, *Report of the independent expert to update the Set of Principles to combat impunity*, UN Doc. E/CN.4/2005/102/Add.1 (Feb. 18, 2005), 7. This notes every state's obligation to "to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations." See also Article 18 of the UN Draft Declaration on the Protection of All Persons from Enforced Disappearances ("[P]ersons who have or are alleged to have committed [disappearances]...shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction,") and Article 19 of the UN Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions ("In no circumstances, including a state of war, siege or other public emergency, shall blanket immunity from prosecution be granted to any person allegedly involved in extra-legal, arbitrary or summary executions.") Other relevant, albeit nonbinding, declarations include the following: UN General Assembly Resolutions 1583 (Dec. 15, 1969), 2712 (Dec. 15, 1970), 2840 (Dec. 18, 1971), and 3074 (Dec. 3, 1973). See also ECOSOC Res. 1989/65, Principle 19.2: "In no circumstances, including a state of war, siege, or other public emergency, shall blanket immunity from prosecution be granted to any person allegedly involved in extra-legal, arbitrary or summary executions."

106 For something to be considered customary international law, it must meet two criteria: state practice and *opinio juris*. Whether or not these principles truly meet the threshold required to become customary international law is the subject of legal debate that is outside the scope of this report.

107 According to Articles 49, 50, and 56, the states are Kachin, Kayah, Kayin, Chin, Mon, Rakhine, and Shan. The regions are Sagaing, Taninthayi, Bago, Magway, Mandalay, Yangon, and Ayeyawady; the capital, Nay Pyi Taw, is a union territory. Self-administered zones will be created for Naga, Danu, Pa-O, Pa Laung, and Kokang areas, and a self-administered division will be created for the Wa area.

108 The collective legislature is called the *Pyindaungsu Hluttaw*. The upper house is the *Amyotha Hluttaw*, and the lower house is the *Pyithu Hluttaw*.

109 Articles 293 and 294.

110 Articles 300(a), 301(f), 309(a), 310(f), 330(c), and 333(e).

“The Defense Services has the right to independently administer and adjudicate all affairs of the armed forces.” How this is handled is clarified in Article 319: “The Courts-Martial shall be constituted in accord with the constitution and the other law and shall adjudicate Defense Services personnel.” Under this formulation, major human rights violations including rape, forced labor, and recruiting child soldiers appear to fall under the jurisdiction of the courts-martial, with the commander-in-chief having the final say.<sup>111</sup> Given the history of impunity outlined above and the lack of trust in the armed forces, it is not clear that the military courts can be trusted to provide justice for human rights violations.

Ghai puts this in proper perspective, asserting that the trend internationally is to recognize that military personnel are entitled to the same sort of guarantees of a fair trial as civilians and that members of the military charged with human rights violations should be tried in ordinary courts, citing a ruling by the Constitutional Court of Colombia that gross human rights violations are not service-related acts.<sup>112</sup> The constitutional tribunal has sole authority to interpret the constitution. While it is impossible to know how the tribunal might address immunity issues, the fact that it will be made up of nine members—three chosen by the president and three chosen by both houses in the legislature—who cannot belong to a political party suggests at least a move in the right direction.<sup>113</sup> As noted above, the immunity clause in the 2008 constitution is ambiguous and may be open to interpretation by Burma’s courts. The clause could also be challenged in various serious criminal cases because amnesty for such crimes would either violate international law or contravene Burma’s treaty obligations.

### Amending the Constitution

Perhaps the most concerning element of the new constitution in relation to its effect on impunity is that it gives the military veto power over any prospective amendments. The procedure for amending the constitution is outlined in Articles 433 to 436. Ratifying any constitutional amendment requires a vote of more than 75 percent in the parliament, effectively giving the military a veto over any proposed amendment since it controls 25 percent of the seats.

The quota, combined with the facts that those who fill it will be bound to comply with orders from their superiors and that pro-military factions in other parties will win seats in parliament, render Burma’s government virtually impossible to change. The military’s entrenched power calls into question the regime’s rhetoric of supporting a true democratic transition.

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111 Article 343(b).

112 Yash Ghai, “The 2008 Myanmar Constitution: Analysis and Assessment,” unpublished, 30.

113 Article 333(e).

## 4. Transitional Justice in the Current Context

Real transition does not exist in Burma. The changes that the SPDC has proposed are cosmetic and have made actual transition to democracy even more difficult to achieve. In situations where impunity is so entrenched, achieving advances in terms of truth, justice, and victims' rights requires a great deal of strategically aligned work to bring slow, hard-fought, incremental change. The examples cited earlier in this report demonstrate clearly that widespread, systematic human rights violations continue to occur in Burma and those who commit them generally are exempt from punishment. The military's dominance is likely to continue because of the new constitution and changes in the government's structure.

Despite these difficulties, the plight of past and future victims dictates that transitional justice advocates consider what actions can be taken to move their agenda forward. On a more local level, even in a sustained culture of impunity, important preparations can be undertaken so that when the opportunity for justice arrives—however far in the future that may be—the necessary records are available to appropriately recognize victims and their families, and to hold those most responsible accountable.

### **International Options for Justice**

Given the SPDC's continued support for giving the military impunity for severe human rights violations, significant accountability on the national level probably will not occur any time soon. The prospect of justice for anyone responsible for mass violations depends on international prosecutions or pressure from the international community. Potential avenues include an international commission of inquiry and a UN Security Council referral of the situation to the ICC, and national jurisdictions that recognize universal jurisdiction for such crimes.

The evidence of the serious abuses against civilians within Burma suggests that the crimes are widespread and systematic; therefore they may constitute crimes against humanity. In Special Rapporteur Paulo Sérgio Pinheiro's 2006 report to the UN General Assembly, he described sexual violence, forced labor, and child soldiering as "widespread and systematic over the last decade [so] as to suggest they are not simply isolated acts of individual misconduct of middle or low rank officers but rather the result of the upholding of a system under which individuals and groups have been allowed to breach the law and violate human rights without being held to account."<sup>114</sup> These crimes would fall under the ICC's jurisdiction if such jurisdiction could be triggered in the absence of Burma's ratification of the ICC Statute. In such an event,

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114 UN General Assembly, Report on the situation of human rights in Myanmar, Special Rapporteur, Sept. 21, 2006, A/61/369, par. 32.



Burma's history of impunity and the new constitution's immunity clause would help meet the ICC's criteria for admitting a case, namely that a country is unwilling or unable to prosecute such crimes itself.<sup>115</sup> Since Burma has not ratified the Rome Statute, the ICC's jurisdiction could be triggered if the UN Security Council referred the situation to the ICC. In order to do so, the Security Council would need to determine that the situation constituted a threat to international peace and to exercise its powers under Chapter VII of the UN Charter to act to restore international peace and security. The Security Council demonstrated it is willing to exercise this power when it referred the situation in Darfur to the ICC in 2005. Monitors of the Security Council's internal workings indicate that Burma's case may be significantly more challenging. While the political realities of the Security Council referring Burma to the ICC are beyond this report's scope, there is certainly room for continued exploration of what may be possible on this front.<sup>116</sup>

If the Security Council does make such a referral and subsequent investigations lead the court to issue an arrest warrant, the Burmese leaders' ability to flee the country would be limited because they could be arrested in ICC member states. Leaders who cannot travel outside their country become increasingly susceptible to challenge from political opponents who may argue that this limitation weakens their ability to govern effectively. Though this tactic runs the risk of further isolating an already reclusive regime, it may also provide political pressure that has helped combat the junta's culture of impunity in the past.<sup>117</sup>

One of the primary principles behind the establishment of the ICC is that its jurisdiction is intended to complement those of national courts, which have the primary responsibility to prosecute perpetrators of mass crimes. Even if the UN Security Council does not refer the situation in Burma to the ICC, could the threat and accompanying international advocacy create enough pressure on the SPDC to take action on a national level? History has shown that the Burmese junta is sensitive to the possibility of imminent international sanctions, especially when backed by the UN Security Council. The serious prospect of the UN Security Council referring the situation to the ICC, implicating members of its government or military, may be enough pressure to spur the regime to stop committing violations and/or to prosecute members of the military for mass human rights abuses.

In such a situation, those accused could argue that the constitution's new immunity clause gives them immunity in national courts. As mentioned previously, the immunity clause covers acts "done in execution of their respective duties." It appears to be up to the national courts to decide that these serious crimes could not, by definition, have been part of an individual's official duties because such acts violated Burma's national laws, treaty obligations, or international law. Such a position appears unlikely, however, in the current context in which the Burmese courts function as an extension of military rule.

While a Security Council referral of the situation in Burma to the ICC may seem politically unviable at present, the UN could push for an assessment of the human rights situation. A UN commission of inquiry could be mandated to determine whether or not international crimes, including crimes against humanity, have been committed in Burma, to identify perpetrators, and to make recommendations on addressing those crimes. The UN Security Council should be prepared to carry out the recommendations of any such inquiry, including the declaration that the situation in Burma constitutes a threat to the peace and warrants further action and monitoring.

In addition to pursuing international justice with the UN and the ICC, it may be worthwhile to pursue the possibility of trying Burmese leaders in a country claiming universal jurisdiction. The doctrine of

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115 However, the complaints mechanism for forced labor cases may preclude cases based on crimes of forced labor.

116 Various initiatives aimed at bringing a Burmese case before the ICC are under way, including a campaign led by the Burma Lawyers' Council.

117 See section above on forced labor and the ILO.

universal jurisdiction is based on the theory that certain crimes may be tried by any country's court, regardless of where the crimes occurred or the nationalities of the victims or perpetrators, because the crime is considered to have affected the international community as a whole. Since World War II, universal jurisdiction has focused mainly on issues of war crimes, crimes against humanity, and genocide, and more than a dozen countries have relied on universal jurisdiction to investigate or prosecute people suspected of such crimes.<sup>118</sup> The specifics of how each country addresses such cases depend on the legal framework and domestic criminal system. Continued advocacy toward initiating a criminal investigation against Burmese leaders in any country claiming universal jurisdiction, especially a country with a connection to any potential perpetrators or victims, could help challenge Burma's culture of impunity.

## National Preparations

Despite some indications that Burma may be moving toward a more democratic future, the culture of impunity seems entrenched enough to continue for some time and threatens to pull the country back from a genuine transition. While history has shown that situations can change over time, such change is not inevitable and must be achieved through the proactive defense of human rights and concerted advocacy for measures to combat impunity. Countries with similar histories of abuse and repression demonstrate that authoritarian conditions generally have trouble sustaining themselves and that people eventually seek to recognize the suffering of victims and bring major perpetrators to justice, whether in national, international, or hybrid institutions. These outcomes result from the hard work of human rights advocates, other civil society actors, and at times progressive government officials.

Societies may take years, even decades, to change significantly enough to begin addressing a legacy of human rights violations. During that time, valuable evidence may be lost, and witnesses, victims, and perpetrators may die or forget many important facts. Experience working in transitional justice institutions, including courts, truth commissions, reparations schemes, and vetting programs around the world has taught the importance of careful documentation during times of conflict or oppression. Too often crucial evidence has been lost because of insufficient methods of documentation, particularly when those involved in gathering information do not understand the requirements of future prosecutions, truth commissions, and other mechanisms.

For example, statements from victims need to be taken objectively in a consistent format that includes all relevant details. If such statements from various sources are recorded in a single format or form, they can be put into a common database. The database then provides a powerful, more accurate picture of the violations that is useful for advocacy, informs international policy, and assists future transitional justice mechanisms. In addition, if those involved in the risky activity of gathering such information understand such concepts as “widespread or systematic,” they can include them in their methodologies, resulting in more relevant evidence to support investigations and prosecutions.

As Burmese activist Khin Maung Shwe noted in 2007, “We can't predict when our transition will come, but whatever follows this long era of military oppression, it will be vital to be organized in advance—not only to steer the process in the right direction, but also to be ready with a historical record that can be used to secure justice for victims.”<sup>119</sup>

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118 These countries include Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Israel, Netherlands, Norway, Senegal, Spain, the United Kingdom, and the United States. Others, such as Mexico, have extradited people to countries for prosecution based on universal jurisdiction. For more information on universal jurisdiction, see ICTJ, “Universal Jurisdiction: The War on Terror,” April 17, 2009, available at [www.ictj.org/en/news/features/2532.html](http://www.ictj.org/en/news/features/2532.html).

119 ICTJ, Annual Report 2006/2007, 9.

## 5. Recommendations

In Pinheiro's 2008 report to the UN Human Rights Council, the special rapporteur found impunity in Burma was "deeply entrenched and cannot be attributed to lack of institutional capacity alone."<sup>120</sup> He asserted that the culture of impunity was the main obstacle to securing respect for human rights, and he brought the Human Rights Council's attention to the reports of widespread and systematic violations, including summary executions, torture, forced labor, sexual violence, and the recruitment of child soldiers that have not been investigated, prosecuted, or remedied.<sup>121</sup> His findings were consistent with his reports from the previous seven years as well as with those by Amnesty International, Human Rights Watch, and a host of local human rights organizations.

The following recommendations address that pattern of impunity that continues to be the main obstacle to developing a culture that respects human rights in Burma, a key component for a transition to genuine democracy.

### To the State Peace and Development Council

- Recognize the results of the 1990 general election and carry out the following recommendations with the guidance of the elected members of parliament.
- Adhere to the three conditions paraphrased below as enumerated in the NLD's April 29, 2009, "Shwegondaing Declaration."<sup>122</sup> In this declaration, the NLD stated it would participate in new elections only after "gravely considering" the elections as a special case and studying the Party Registration Act once it is published and the laws related to the elections.
  - (1) Unconditionally release all political prisoners, including the leaders of the NLD.
  - (2) Amend the provisions of the 2008 constitution that are not in accord with democratic principles.
  - (3) Allow international supervision of all-inclusive free, fair elections.
- Conduct a review of the constitution through an inclusive consultation process involving all political parties.
- Through that review, remove the provisions in the 2008 constitution that maintain impunity for human rights violations, particularly the immunity clause and the various articles that could exclude people from exercising their rights to fundamental freedoms.

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120 UN Human Rights Council, Report of the Special Rapporteur on the situation of human rights in Myanmar, March 7, 2008 (A/HRC/7/18), par. 42.

121 Ibid., par. 58.

122 Go to <http://euro-burma.eu/doc/NLD%20Statement%20-%20Shwegondaing%20Declaration%20-%202009.04.09.pdf>.

- Remove from the constitution the requirement that 25 percent of MPs be military officials, and allow the general population to elect MPs.
- Give the courts under the Supervision of the High Court of the Region or the High Court of the State the jurisdiction to hear and decide on criminal cases against members of the military if a civilian is filing the complaint.
- Conduct a new referendum for the updated constitution, permitting international observers to monitor the voting process.
- Work with the international community to establish an independent Commission of Inquiry into serious human rights violations, including sexual violence, the recruitment and use of child soldiers, and forced labor.

### **To the International Community**

- Withhold support for and recognition of the 2010 elections until a review of the constitution is conducted through an inclusive process that involves all political parties.
- Work with the Burmese government to establish an independent Commission of Inquiry into serious human rights violations, including sexual violence, the recruitment and use of child soldiers, and forced labor.
- Strengthen the application of mechanisms in place through Security Council Resolution 1612 and the Forced Labour Convention to address the government policy of imposing widespread, systematic human rights violations, including forced labor and child soldiering.
- Declare that the situation in Burma is one of grave international concern and that it constitutes a threat to international peace and security.
- Pursue possible avenues to hold Burmese human rights violators accountable in countries whose courts recognize universal jurisdiction.
- Take action to strengthen local capacity to conduct systematic collection and documentation of information on human rights violations in Burma in a fashion that could be useful to courts, truth commissions, reparation schemes, and vetting programs that may exist in the future. Insure that such training takes into account safety precautions for the interviewers and those they interview.



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