

2011

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### Recommended Citation

Levin, Ari M. "Transitional Justice in Burma: A Survey of Accountability and National Reconciliation Mechanisms after Aung San Suu Kyi's Release." *Human Rights Brief* 18, no. 2 (2011): 21-25.

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# Transitional Justice in Burma: A Survey of Accountability and National Reconciliation Mechanisms after Aung San Suu Kyi's Release

by Ari M. Levin\*



Courtesy of the Extraordinary Chambers of the Courts in Cambodia.

The first day of closing statements in the trial against the head of one of the Khmer Rouge's secret prisons.

## INTRODUCTION

Burma is unquestionably one of the world's most repressive countries. The military junta, the State Peace and Development Council (SPDC), has controlled the country since 1962, stifling political and ethnic opposition. Although Aung San Suu Kyi's National League for Democracy (NLD) won the 1990 national elections in a landslide victory, the SPDC refused to relinquish power and forced Suu Kyi into house arrest for 15 of the past 21 years.<sup>1</sup> During that time, the military regime systematically committed gross abuses of human rights and humanitarian law, including arbitrary arrest and detention, extra-judicial execution, torture, forced labor, human trafficking, and sexual violence against women.<sup>2</sup> Burmese ethnic minorities in particular, have suffered in their struggle for self-determination.<sup>3</sup>

With Aung San Suu Kyi's recent release on November 13, 2010, however, there is cautious optimism in Burma. The Nobel Peace Prize laureate symbolizes freedom and democracy, and her release carries transformative potential. Yet, this moment of triumph is tempered by the estimated 2,200 political prisoners in Burma still enduring grave abuses.<sup>4</sup> In addition, her release

coincided with renewed fighting in Karen State by a brigade of the Democratic Karen Buddhist Army (DKBA), demonstrating that the armed struggle continues.<sup>5</sup>

The junta strategically waited to release Suu Kyi until after conducting fraudulent democratic elections on November 7, 2010.<sup>6</sup> Consequently, the junta entrenched the military's Union Solidarity and Development Party (USDP) within the government structure under the guise of legitimacy. After the junta drafted the 2008 Constitution without democratic input and prevented many opposition candidates from participating in the November elections, the military bloc – the USDP and the military (*Tatmadaw*) – controls over eighty percent of the seats in parliament.<sup>7</sup> Of the top five politicians in the new system – the president, two vice presidents, and the speakers of the upper and lower houses of parliament – four are career army bureaucrats, including the new president Thein Sein.<sup>8</sup>

While this is undoubtedly an exciting time in Burma, democracy and human rights are by no means imminent. Accordingly, this paper reviews the available transitional justice mechanisms that could help guide Burma out of the legacy of mass atrocities and into a peaceful democracy. Although a democratic transition does not seem plausible in the near future, it is important for local stakeholders to prepare a transitional justice process in case political space opens – either gradually or suddenly – for democratic reforms.

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## DESIGNING A TRANSITIONAL JUSTICE PROCESS FOR BURMA

Transitional justice is a “response to systematic or widespread violations of human rights.”<sup>9</sup> The concept refers to a country’s transition out of conflict and into democracy, peace, and reconciliation. A transitional justice process holistically integrates many different mechanisms, such as criminal prosecutions, truth commissions, reparations programs, traditional justice mechanisms, institutional reform, and memorialization initiatives.<sup>10</sup> To be successful, these processes should be tailored to appropriately address the particular political, cultural, and socio-economic context. Best practice involves community ownership in the design process and implementation.

In designing a transitional justice process for Burma, pro-democracy and ethnic leaders should seek to implement retributive and restorative justice mechanisms in consultation with international experts. Retributive justice mechanisms focus on accountability for mass abuses and are necessary to prevent a culture of impunity and to restore the rule of law. By contrast, restorative justice mechanisms are intended to rehabilitate victims of human rights abuses and reintegrate them back into their communities. Reparations programs, truth commissions, and memorialization efforts are examples of restorative justice. Retributive and restorative justice mechanisms work in tandem and should both be incorporated in a comprehensive Burmese transitional justice process.

### RETRIBUTIVE JUSTICE MECHANISMS

#### *Breaking the Culture of Impunity: International Criminal Prosecutions*

Prosecutions for mass crimes promote justice and victims’ rights. Key leaders of the junta should be investigated and prosecuted for their involvement in torture and other international crimes for which a duty to prosecute exists under international law.<sup>11</sup> However, without an independent judiciary, effective prosecutions are not viable. International involvement in criminal prosecutions is necessary in order to address crimes committed in Burma under the junta’s rule because the judiciary in Burma is controlled by the military regime.<sup>12</sup> Any domestic prosecutions are also hampered by the amnesty afforded to SPDC leaders under Article 445 of Burma’s 2008 Constitution.<sup>13</sup>

Although criminal prosecutions in Burma are not realistic in the short term, many mechanisms for prosecutions require substantial preparations, and therefore it is worth considering them now. There are three methods by which international prosecutions of Burmese officials could occur: the establishment of an ad hoc tribunal under the authority of the UN Security Council, the establishment of a hybrid tribunal, or the referral of select high-level cases to the International Criminal Court (ICC).

The first option is that the UN Security Council could exercise its Chapter VII power to establish an independent tribunal for Burma. Examples of ad hoc tribunals created under Chapter VII include the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY/R). However, the ad hoc tribunal model is not well suited for Burma. The ICTY/R are very costly. Additionally, the formation of an ad hoc tribunal under Chapter VII necessitates tremendous political will within the Security Council.

The creation of a hybrid tribunal in Burma is a second option. Hybrid tribunals combine elements of domestic and international criminal justice systems. They are often implemented where domestic political will to prosecute prior abuses exists, but there is insufficient judicial capacity or other obstacles to domestic prosecutions.

Regionally relevant contemporary examples of hybrid criminal justice systems include the Special Panels for Serious Crimes in East Timor, and the Extraordinary Chambers in the Courts of Cambodia (ECCC). The experiences of the Special Panels and the ECCC may be instructive to Burma. In June 2000, the United Nations Transitional Administration in East Timor (UNTAET) established the Special Panels for Serious Crimes, granting them exclusive jurisdiction over genocide, war crimes, crimes against humanity, murder, sexual offenses, and torture.<sup>14</sup> The regulation that established the ECCC called for three Special Panels—

two at the district court level and one appeals court—and required that two international judges and one East Timorese judge preside over each panel.<sup>15</sup> UNTAET also created the Department of Prosecution of Serious Crimes, staffed almost exclusively by international experts and funded by the UN.<sup>16</sup>

The ECCC is an example of a hybrid tribunal with less UN involvement. After four years of negotiations, the UN and the government of Cambodia agreed to create the ECCC in June 2003 to prosecute those most responsible for crimes committed during the Khmer Rouge regime from 1975-1979.<sup>17</sup> The ECCC is rooted in Cambodian domestic law, but its judicial composition includes a mix of Cambodian and foreign judges.<sup>18</sup> Like Burma today, Cambodia lacked judicial independence and had a culture of impunity.<sup>19</sup>

The East Timorese and Cambodian case studies suggest that hybrid tribunals may have some success where the UN either administers the territory in question or wields substantial bargaining power with the local government. The UN directly administered East Timor and assisted efforts to rebuild the East Timorese judicial system following a vote for independence in a UN-led referendum.<sup>20</sup> In Cambodia, the UN negotiated the establishment of the ECCC after the collapse of the Khmer Rouge. Given that the military junta maintains a firm grip on power in Burma, and that the UN lacks bargaining power with-

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## Although a democratic transition does not seem plausible in the near future, it is important for local stakeholders to prepare a transitional justice process in case political space opens — either gradually or suddenly — for democratic reforms.

out China's support, the time does not appear ripe for a hybrid judicial solution. A hybrid tribunal may be possible, however, if political circumstances change and a new Burmese government assumes power and supports accountability.

The third retributive justice option is that the Security Council could refer the situation in Burma to the ICC. Although there are four ways in which the ICC can hear a case—State Party referral, non-State Party referral on an ad hoc basis for crimes committed in that state's territory, Security Council referral, and through the prosecutor's own initiative—Security Council referral would be necessary for Burma. Since Burma is not a party to the Rome Statute, another state could not refer the matter, and the ICC prosecutor could not independently exercise his *proprio motu* powers to investigate the situation.<sup>21</sup> Further, while Burma could theoretically self-refer particular matters to the ICC, the SPDC is not going to seek accountability for alleged crimes committed by junta leaders. Security Council referral to the ICC is thus the only plausible scenario at the present time. This is problematic, however, because China, a permanent member of the Security Council, would most likely veto such a proposal due to its strong economic ties with Burma.<sup>22</sup>

### *Commission of Inquiry*

To build support for prosecutions in any of the aforementioned venues, the UN could establish a commission of inquiry (CoI) to document mass crimes committed by the junta.<sup>23</sup> While the documentation of mass atrocities by a CoI could pave the way for prosecutions before the ICC or elsewhere, a CoI is a distinct and independent mechanism.

A review of UN human rights reports since 2002 demonstrates that the UN has characterized crimes committed in Burma as widespread and systematic.<sup>24</sup> In August 2009, fourteen Nobel laureates, including the Dalai Lama and Archbishop Desmond Tutu, urged the members of the Security Council to create a CoI for Burma.<sup>25</sup> The Special Rapporteur for the situation of human rights in Burma, Tomás Ojea Quintana, also recommended such a commission in his most recent report.<sup>26</sup> The establishment of a CoI would be an important step toward justice and accountability in Burma. Unfortunately, however, very few states have pushed on the international level for the establishment of a CoI.<sup>27</sup> Even the United States, which publicly endorsed a CoI in August 2010, has failed to actively champion its establishment.<sup>28</sup>

The UN has used CoIs to uncover serious violations of international human rights and humanitarian law. CoIs can be established directly by the UN Secretary General, as evidenced by Ban-Ki Moon's creation of a CoI to address the September 29, 2009 killings and rape in Guinea.<sup>29</sup> The General Assembly and Security Council can also initiate a CoI through resolutions. For example, the Security Council requested that the Secretary General establish a CoI on Darfur through Resolution 1564 (2004).<sup>30</sup> A CoI into crimes committed in Darfur established in 2005 likely contributed to the Security Council's referral of the situation in Darfur to the ICC for investigation.<sup>31</sup> Former Secretary of State Colin Powell's 2004 declaration that the conflict in Darfur amounted to genocide was one factor leading to the establishment of the CoI.<sup>32</sup>

The UN Human Rights Council (HRC) is also empowered to create a CoI or fact-finding mission. The UN Fact-Finding Mission on the Gaza Conflict is one such example.<sup>33</sup> Given that Burma appeared before the HRC on January 27, 2011 for its first ever Universal Periodic Review (UPR), a process that assesses a country's human rights compliance, the HRC could seek to implement a CoI for Burma to better ascertain the situation on the ground.

In 1997, the International Labor Organization (ILO) formed a commission to investigate forced labor in Burma.<sup>34</sup> Although the SPDC refused to participate in hearings and prohibited the commission from formally visiting Burma to conduct research, the ILO commission's report was one of the factors that led to the junta's 1999 amendments of two British colonial labor laws legalizing forced labor.<sup>35</sup> The amended laws now prohibit forced labor, in conformity with section 374 of the Burmese penal code.<sup>36</sup> A CoI on war crimes and crimes against humanity could similarly generate pressure on the junta to pass legal reforms.

### RESTORATIVE JUSTICE MECHANISMS

#### *Burmese Truth-seeking Initiatives*

As a complement to accountability mechanisms, truth-seeking initiatives in Burma could allow victims to voice their grievances and share their experiences of abuse and trauma. One such initiative is a truth and reconciliation commission. A truth and reconciliation commission is a formal body mandated to hold proceedings in which victims—and sometimes perpetrators

in exchange for amnesty—voluntarily testify. An official report is generally published with a record of the testimony.

The Timor-Leste Commission for Reception, Truth, and Reconciliation (CAVR, in Portuguese) is an instructive regional model that involved substantial community participation. The CAVR promoted reconciliation at the grassroots level through community hearings in which victims and perpetrators could collaborate and formulate just solutions. This victim-offender mediation was coupled with a documentation effort to uncover the truth about past abuses through victim statements and a traditional justice philosophy unique to East Timor known as *alcohimento*, which promotes accepting the human dignity of one another and offering victims support. Under this guiding spirit, victims and perpetrators of minor offenses in East Timor were provided the opportunity to reconcile their grievances and reintegrate into the community.<sup>37</sup>

Burmese communities may consider lessons learned from East Timor in shaping a similar commission in Burma. Victims who choose to testify before the truth commission may find catharsis and healing by having a chance to publicly acknowledge how they have suffered and to have the junta acknowledge their suffering by allowing them the space to share. Similar to the truth-seeking effort in the CAVR, a truth and reconciliation commission could record victims' stories and publish them as form of historical memory.

Alternative truth-seeking initiatives may also help Burmese citizens deal with the legacy of past abuses. Documentation of abuses through location-based engagement is critical as close to the time of the crimes as possible in order to compile credible evidence for future reconciliation and accountability.<sup>38</sup> The Network for Human Rights Documentation—Burma (ND-Burma), is a coalition of local Burmese groups whose members collaborate on human rights training, data collection and management, and documentation methodology.<sup>39</sup> By collecting standardized human rights data using the ND-Burma model, pro-democracy activists could effectively promote restorative justice.<sup>40</sup>

### *Ethnic Minority Integration Programs*

Restorative justice initiatives should focus on ethnic minorities in Burma that the junta has discriminated against and exploited for many years.<sup>41</sup> Human rights reports reveal that many of the more than 100 ethnic groups in Burma have suffered from abuses committed by the Burman-dominated military regime.<sup>42</sup> For example, a recent report documented crimes against humanity committed against the Rohingyas in Western Burma.<sup>43</sup> The Rohingyas are a Muslim group to whom the Burmese government refuses to grant citizenship. As a result, the stateless Rohingya people are vulnerable to forced displacement, human trafficking, and forced labor campaigns in Burma as well as in Bangladesh, Malaysia, and Thailand, where hundreds of thousands have fled since 1962.<sup>44</sup>

Localized transitional justice programs may be one way to unify Burmese citizens and form an inclusive society. For example, in the 2007 "Open Heart Campaign," the '88 Generation Students group, a network led by former political prisoners, encouraged Burmese citizens throughout the country to express

their grievances with the junta.<sup>45</sup> The group received more than 2,500 letters.<sup>46</sup> The success of this unofficial truth-seeking mechanism suggests that similar initiatives could lay the groundwork for dialogue and reconciliation.

In addition to reaching out to minority groups and encouraging their participation in a truth commission, bridging inter-ethnic divisions between disparate minority groups is critical. Dialogue groups could help ethnic minorities recognize their common victimhood. Independent conflict resolution experts could facilitate dialogue and train local leaders with the goal of forging minority community linkages. Columbia University's Interethnic Conflict Resolution Program for Burma's Ethnic Nationalities provides a useful model for interethnic community reconciliation. In 2002, the Center for International Conflict Resolution at Columbia partnered with the National Democratic Front, a union of eight Burmese minority groups, to create opportunities for peaceful coexistence among ethnic groups within Burma.<sup>47</sup> The group offered workshops to representatives from women's and youth organizations in Chiang Mai and Mae Sot, Thailand.<sup>48</sup> Consultative visits were also conducted with ethnic political leaders.<sup>49</sup>

Political dialogue between the military, democratic parties, and ethnic groups is also essential.<sup>50</sup> Suu Kyi has called for a second Panglong conference to promote national reconciliation.<sup>51</sup> This conference would succeed the 1947 Panglong Agreement between General Aung San (Suu Kyi's father) and representatives from Shan, Kachin, and Chin ethnic nationalities and could provide an opening for peace.<sup>52</sup> The first conference sought to unite various ethnic groups under the Union of Burma seeking independence from Britain.<sup>53</sup>

Memorials and museums could also be built in celebration of the ethnic and cultural heritage of the various groups. Inter-faith community centers could be built to create public space for social interaction. Bringing minority groups together in a neutral, welcoming environment could foster social peace-building and cultural integration. Along these lines, curriculum could be introduced in schools to celebrate the ethnic diversity within Burma and promote tolerance and understanding across ethnic lines. If the barriers between ethnic minority groups are removed, these groups could potentially increase their power within the country to produce meaningful change.

### **CONCLUSION**

This paper surveys the transitional justice mechanisms available to Burma in the aftermath of Aung San Suu Kyi's release from house arrest. In evaluating the feasibility of these mechanisms, one must consider the political reality of the current situation. The intransigent military junta has violently suppressed democratic opposition. With the recent sham elections, the regime is likely to tighten its grip on power rather than make compromises with minority resistance groups. It is problematic that the political opposition does not have leverage to influence the junta's policies. Those actors that do have leverage, notably China and ASEAN, have not displayed the political will necessary to institute reforms. Under this political landscape, the outlook for transitional justice is discouraging.

# In addition to documenting crimes for future accountability, restorative justice initiatives are critical for healing and reconciliation within Burmese society.

While Burma does not appear ready for a democratic transition at this time, there is an opportunity to address the junta's repression. Internal and external actors should leverage Aung San Suu Kyi's release to press the junta for democratic reforms. Even though the most of the available transitional justice mechanisms are not implementable in the short term, stakeholders could start the process via targeted individual mechanisms. Specifically, ICC prosecutions for top junta leaders will not come to fruition at the present time because of staunch resistance from China. As a preliminary step, however, the UN could successfully create a CoI.

In addition to documenting crimes for future accountability, restorative justice initiatives are critical for healing and reconciliation within Burmese society. A truth and reconciliation commission or other truth-seeking initiatives could provide a forum for victims to share their trauma and find catharsis. Dialogue

groups between persecuted ethnic groups could help forge a shared identity and collective bargaining power in negotiating with the junta for better treatment. Finally, memorials could be built and educational programs sponsored to celebrate the ethnic diversity within Burma.

For all of these initiatives, regional and international engagement is paramount. Sanctions, or the threat thereof, by ASEAN member states with strong economic ties to Burma could positively impact the SPDC's behavior. More robust support for a CoI by the United States could lead to its establishment. External actors should collaborate with Aung San Suu Kyi and other democracy activists and ethnic leaders to facilitate the peace and justice movement. If opposition parties are able to enter the political sphere and affect government policy, the mechanisms discussed could ultimately pave the way for a peaceful transition to a democratic Burma. *HRB*

## ENDNOTES: Transitional Justice in Burma: A Survey of Accountability and National Reconciliation Mechanisms after Aung San Suu Kyi's Release

<sup>1</sup> Lex Rieffel, *Elections in Burma: Don't Rush to Judgment*, BROOKINGS UP FRONT BLOG (Mar. 12, 2010), [http://www.brookings.edu/opinions/2010/0312\\_burma\\_elections\\_rieffel.aspx](http://www.brookings.edu/opinions/2010/0312_burma_elections_rieffel.aspx); *Burma releases pro-democracy leader Aung San Suu Kyi*, BBC NEWS, (Nov. 13, 2010, 2:21 PM), <http://www.bbc.co.uk/news/world-asia-pacific-11749661>.

<sup>2</sup> See generally, U.N. Soc., Humanitarian, and Cultural Third Comm., *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar*, ¶ 13-60, U.N. Doc. A/65/368 (Sept. 15, 2010).

<sup>3</sup> See Patrick Falvey, *Local Transitional Justice Practice in Pretransition Burma*, in LOCALIZING TRANSITIONAL JUSTICE: INTERVENTIONS AND PRIORITIES AFTER MASS VIOLENCE 253, 255 (Rosalind Shaw et al. eds., Stanford Univ. Press 2010) (noting that while the political and ethnic conflicts are distinct, they are related in the push for democracy).

<sup>4</sup> See *Myanmar Should Free all Prisoners of Conscience Following Aung San Suu Kyi's Release*, AMNESTY INT'L. (Nov. 13, 2010), available at <http://www.amnesty.org/en/news-and-updates/myanmar-should-free-all-prisoners-conscience-following-aung-san-suu-kyi%E2%80%99s-release-2>.

<sup>5</sup> See TRANSNATIONAL INST. AND BURMA CENTRUM NEDERLAND, BURMA POLICY BRIEFING NR. 5: ETHNIC POLITICS IN BURMA: THE TIME FOR SOLUTIONS 11 (2011), available at <http://www.tni.org/sites/www.tni.org/files/download/TNI-BCN%20Burma%20policy%20briefing%20no.%205.pdf>.

<sup>6</sup> See David Mathieson, *Burma's Elections: Towards Realistic Hope*, HUM. RTS. WATCH (Nov. 24, 2010), <http://www.hrw.org/en/news/2010/11/24/burma-s-elections-towards-realistic-hope>.

<sup>7</sup> See TRANSNATIONAL INST. AND BURMA CENTRUM NEDERLAND, BURMA POLICY BRIEFING NR. 4: A CHANGING ETHNIC LANDSCAPE: ANALYSIS OF BURMA'S 2010 POLLS 2 (2010), available at <http://www.tni.org/sites/www.tni.org/files/download/bpb4final.pdf>.

<sup>8</sup> See Thomas Fuller, *Parliament Picks Insider as President of Myanmar*, N.Y. TIMES, Feb. 4, 2011, at A4, available at <http://www.nytimes.com/2011/02/05/world/asia/05myanmar.html>.

<sup>9</sup> INT'L. CTR. FOR TRANSITIONAL JUSTICE, WHAT IS TRANSITIONAL JUSTICE?, 1 (2008), available at [http://www.ictj.org/static/TJApproaches/WhatisTJ/ICTJ\\_WhatisTJ\\_pa2008\\_.pdf](http://www.ictj.org/static/TJApproaches/WhatisTJ/ICTJ_WhatisTJ_pa2008_.pdf). [hereinafter ICTJ].

<sup>10</sup> *Id.*

<sup>11</sup> See Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2551-2594 (1991).

<sup>12</sup> See U.N. GAOR A/65/368, supra note 2, at ¶¶ 17-18.

<sup>13</sup> *Id.* at ¶ 68.

<sup>14</sup> UNTAET, *On the Establishment of Panels with Exclusive Jurisdiction Over Serious Criminal Offences*, ¶ 1.3, U.N. Doc. UNTAET/REG/2000/15 (June 6, 2000).

<sup>15</sup> *Id.* at ¶ 22.1

<sup>16</sup> UNTAET, *On the Organization of the Public Prosecution Service in East Timor*, § 14, U.N. Doc. UNTAET/REG/2000/16 (June 6, 2000).

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