(C.2) International Lawyers Call for Criminal Accountability for Myanmar Regime

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INTERNATIONAL LAWYERS CALL FOR CRIMINAL ACCOUNTABILITY FOR MYANMAR REGIME

The Burma Lawyers' Council and the Global Justice Center urge the United Nations Security Council to take all actions necessary to stop the murders of innocent people in Burma and hold the military junta commanders criminally accountable. This includes authorizing peacekeeping forces and creating an independent commission of inquiry to investigate on-going crimes. Violence is a tool of the military junta, the State Peace and Development Council (SPDC), to retain control over the people of Burma who are prisoners, not citizens. The latest massacre in Burma must be the last, no more impunity for criminal actions such as the massacre of student protestors in 1988 and of supporters of pro-democracy leader Daw Aung San Sui Kyi in 2003 in Depayin. It is the obligation of the international community to stop the junta from using murder, torture, and rape as tools to maintain power. The Security Council has an obligation to act under its Chapter VII mandate to maintain international peace and security as well as UNSCR 1674 on the Responsibility to Protect, UNSCR1325 on Women, Peace and Security, and the Genocide Convention.

Crimes perpetrated by the Burmese military leaders should not be buried under the rubric of human rights violations, but called what they are: war crimes, crimes against humanity and potentially even genocide. The perpetrators listed below should be held criminally accountable by the international community.

Commanders who are responsible under international criminal law for ordering the recent heinous crimes against peaceful protestors in Burma include:

- **Than Shwe, Chairman, State Peace and Development Council and Commander-in-Chief, Tatmadaw**
- **General Kyaw San, Minister of Information**
- **Colonel Tint San (Infantry No. 16)**
- **Major Ye Zaw Zaw (Infantry No. 16)**

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(C.3) "BLC's Position on Mr. Ibrahim Gambari's October 5, 2007 Briefing to the UN Security Council"

STATEMENT ON MR. IBRAHIM GAMBARI'S OCTOBER 5, 2007 BRIEFING TO THE UN SECURITY COUNCIL

(October 10, 2007)

The Burma Lawyers' Council (BLC) would first like to express on behalf of the people of Burma their sincere gratitude for Mr. Gambari, Special Advisor to the Secretary-General, and the United Nations' efforts to recognize and achieve the Burmese peoples' aspirations for an end to a tyrannical rule by a murderous and illegitimate regime. The BLC agrees with Mr. Gambari's conclusion in his briefing that "[a]dvancing the causes of all-inclusive national reconciliation, democratization, and full respect for human rights will require *sustained engagement by the United Nations, including through the Secretary-General's good offices, with active support of Myanmar's neighbors, ASEAN countries and the international community, including a united Security Council."* (emphasis added). Furthermore, the BLC strongly concurs with the comments of Mr. Zalmay Khalilzad, the U.S. Ambassador to the U.N., on Mr. Gambari's briefing: "It is time for the Council to do more than simply listen to a briefing".

Secondly, the BLC would like to express its agreement with Mr. Gambari's nine key messages to the Burmese military junta:

(1) Putting an end to night raids and arrests during curfew;
(2) Lifting the curfew;
(3) Releasing all those arrested during the demonstrations;
(4) Allowing access to clinics for those wounded during the demonstrations;
(5) Withdrawing military forces from the streets;
(6) Ensuring respect for human rights and the rule of law during law enforcement;
(7) Complying with international standards;
(8) Allowing the ICRC to access detained persons and assist in tracing missing persons; and
(9) Putting an immediate end to raids on monasteries.

Additionally, the BLC supports Mr. Gambari's insistence that the military junta progress in key areas such as:

(a) The release of all political prisoners, including those arrested in the course of the recent demonstrations;
(b) The promotion of an all-inclusive national reconciliation process;
(c) Full cooperation with and better access for humanitarian organizations;
(d) The cessation of hostilities in conflict areas, including Kayin State ; and
(e) Continued cooperation with the ILO.

While the BLC recognizes Mr. Gambari's tenuous position in utilizing subtle diplomacy through engagement with the military junta, the BLC cannot help but express on behalf of the Burmese people disappointment with the absence in Mr. Gambari's briefing of a condemnation of the junta's willingness to commit crimes with manifest impunity. Secretary-General Ban Ki-moon's comments on the visit were accurate: "You cannot call it a success." The courage of the Burmese demonstrators and Buddhist Monks, who risked life and limb for the principles of freedom with full knowledge of the danger, will be marked in the annals of human history as one of humankind's finest hours and deserves a more resolute response on the part of the contemporary international community.

The BLC, as an organization made up of Burmese and international lawyers, has analyzed Mr. Gambari's briefing from a legal perspective and produced the following critique. The international communities' failure to confront the Burmese military junta over past atrocities, i.e., the 2003 Depayin Massacre, along with the current circumstances, continues to embolden the illegitimate regime and support its ability to commit crimes against humanity, war crimes, and genocide with impunity. The BLC's analysis concludes that a lack of consequences and criminal accountability for the atrocities committed by the junta in full view of the international community reduces any incentive for the illegitimate regime to make progress towards genuine national reconciliation and emboldens the regime to commit further crimes while additionally giving encouragement to other oppressive regimes around the world. Specifically, not one sentence in Mr. Gambari's briefing alludes to violations of Burmese domestic law or the fundamental norms of international human rights law that have been committed by the junta in the present or past. Nor does Mr. Gambari's briefing contain even the slightest suggestion that there are consequences and criminal accountability for those responsible for what surely amounts to prime facie cases of crimes against humanity. Without any consequences for their past crimes and current criminal acts in crushing the peaceful September demonstrations, what incentive can those who have showed their willingness to shed the blood of innocent women, children, and monks have in reconciling with those who they may simply make disappear? The international community has a responsibility beyond simply returning democracy to the peoples of Burma – it must also uphold the mandates of the international rule of law and prohibitions against crimes against humanity and ensure that those who commit these crimes with impunity are brought to justice for humankind's sake.

To begin, the BLC disagrees with Mr. Gambari that the demonstrations are merely the result of "deep and widespread discontent about socio-economic conditions in the country". Rather, the roots of the crisis are a combination of the Burmese government's failure to build the foundations for a genuine open market economy, the lack of a transparent and accountable societal structure (magnified by the non-existence

of genuine civil society organizations), a disregard for the rule of law and the outright refusal to implement a democratic government.

No genuine open market economy. Despite the SPDC's superficial efforts to create a free market with new laws and tax breaks, the economy in Burma continues to be dominated by the government and riddled with corruption. Fair competition and restraint from excessive governmental interference, key components of a market economy, do not exist in Burma .

No transparency and accountability. The SPDC's decision-making process continues to be shrouded in secrecy. No one has the right to request information, for instance, about how the government is spending the country's money or what the salaries and perks are of high ranking military officials. The absence of genuine civil society organizations makes this problem worse because there is no one to criticize or even monitor the government's lack of transparency and accountability. As a result, the economic conditions of the country have deteriorated as the government steadily misuses the nation's treasury and is accountable to no one.

No rule of law. The judiciary in Burma is completely controlled by the regime. There is no independent judiciary to adjudicate citizens' complaints and lawsuits against the government. With a judiciary that is not independent, the prevalence of unjust laws and the regime's illegal practices, the result is a complete lack of the rule of law. The rule of law is also essential for the achievement of a market economy. Without the rule of law there will be no independent civil society organizations to act as a check against government abuse and thus the regime will continue to mismanage the country's budget and take the economy into further crisis.

No democratic governance. The lack of democracy is another important factor that has lead to the current economic crisis. In a democracy, the government is accountable to the people. The executive's acts are watched closely by an independent legislature and the judiciary. In a democracy, strong civil society organizations constantly monitor the government and report their findings to an independent media and directly to the people. In Burma , there are no checks and balances. There is no independent media. The SPDC runs the country unhindered by institutional structures that protect the interests of the people. In such a political environment, the SPDC has committed great abuses which have led to the dire economic circumstances that triggered the demonstrations.

As previously stated, the international communities' failure to respond to the crimes against humanity committed by the Burmese junta in the 2003 Depayin Massacre, which was painstakingly documented in the report produced by the Ad Hoc Commission of the Depayin Massacre, was a green light for the junta to brutally crush the September demonstrations with no concern of criminal accountability. Likewise, without any

indication of criminal accountability or consequences for their current criminal actions, the Burmese junta will only be further emboldened to commit other crimes against humanity, war crimes, and genocide with no fear of future repercussions.

It is the BLC's position, as well as that of many other commentators, that this lack of will to hold the illegitimate regime in Burma accountable for their crimes comes from the false dichotomy that one may not have both criminal accountability and active engagement with the regime. However, this is a false dichotomy, as exemplified by the case of Sudan . In January 2005, an international commission of inquiry appointed by the UN recommended that the UN Security Council refer the situation in Darfur to the ICC - the only means by which the Court could assume jurisdiction in this instance. The main argument against this action prior to the referral to the ICC was that the referral would discourage national reconciliation and the acceptance of an international peacekeeping force by the government in Khartoum ; however, both of these arguments have been proven to be flat wrong.

Thus, we find in the case of Sudan that there is no dichotomy between active engagement with the principal parties and seeking accountability for the crimes committed by one or more of those principals. Likewise, we find in the example of Sudan the same international players in the Security Council, i.e. China and the United States , that had previously shown both distrust of the ICC and a willingness to shield perpetrators of crimes from justice. As Jared Genser, Esq., stated in his October 5th article for the Boston Globe: "This will be an uphill struggle, given China 's seat at the table. Beijing 's backing gives the junta little reason to change its behavior. So far, Beijing has refused to publicly condemn the military-led government. But pressure on China has worked before. A campaign to end China 's military sales to Darfur has yielded important results. Beijing only needs to signal to the Burmese junta that the price for continuing to defend its actions is too high".

On June 16, 2006, the BLC's General Secretary, U Aung Htoo, Esq., in an open letter to the Secretary General of the United Nations laid out a detailed case for how the 2003 Depayin Massacre could be referred to the ICC by the U.N. Security Council pursuant to Article 13(b) of the Rome Statute by means of a Security Resolution under Chapter VII, as had been done in the case of Darfur. Again, the BLC reaffirms that the 2003 Depayin Massacre along with the recent bloody crackdown against the peaceful demonstrations and the junta's other past crimes should be referred to ICC by the U.N. Security Council. As stated by Zalmay Khalilzad, the U.S. Ambassador to the U.N., the crisis in Burma is clearly having effects beyond its borders because it is closely tied to the flight of refugees, the growth in the trafficking of drugs and people and the spread of infectious diseases. As Mr. Gambari correctly stated in his briefing, the junta "also needs to know the world needs a peaceful, prosperous and democratic Myanmar that

can contribute to the development of the region and play a useful role in the international community".

In his briefing, Mr. Gambari states, "I have been informed by the Government that, as of today, a total of 2,095 persons arrested in the course of demonstrations have been released, including 728 monks, and that more releases will follow". The BLC is concerned that Mr. Gambari will erroneously rely on the numbers and information provided by illegitimate regime that has proven itself untrustworthy time and time again. The BLC urges the international community to demand an independent and international investigation of the events leading up to and the violent crackdown on the peaceful demonstrations of ordinary Burmese citizens and Buddhist monks to discover the true numbers of deaths, injuries, disappearances and arrests.

Unfortunately, the junta has learned from the bloody Depayin Massacre of 2003 how to conceal its crimes and fabricate alternative narratives to the real events on the ground. Even as this statement is being produced the regime is learning from its latest criminal acts and in the future the regime will act quicker to shut down mediums such as the internet so that they may further conceal their murderous crimes from the outside world. Thus, the BLC calls on the international community, where Mr. Gambari's briefing fails to do so, to demand an independent and international investigation of the regime's crackdown of the justified demonstrations and to hold those who committed criminal acts responsible for their crimes.

In conclusion, Mr. Gambari's briefing fails to confront the impunity of the illegitimate regime that has committed horrendous crimes before the very eyes of the world and in doing so only emboldens this tyrannical regime to continue their crimes against humanity, war crimes, and genocide. The absence of any challenge to this horrific impunity serves to further impede any possibility of a genuine national reconciliation by removing any incentive to make progress towards reconciliation and to encourage the brutal regime to simply crush its critics. Thus, the BLC calls for an independent and international investigation of the current situation in Burma and past atrocities such as the 2003 Depayin Massacre. Additionally, the BLC calls for the international community to hold the regime's leaders criminally accountable before the ICC pursuant to Article 13(b) of the Rome Statute by a Security Resolution under Chapter VII, as was done in the case of Darfur .

As the Preamble to the Rome Statute states: "Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity… [a]ffirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation". Thus, it is the stated goal of the statute

establishing the ICC to end the impunity that is so indignantly manifested in the brazen criminal acts of the Burmese military junta, as exemplified in the regime's bloody crackdown on the peaceful demonstrations of September 2007. It makes a mockery of such a lofty institution as the ICC to stand idly by while crimes against humanity, war crimes, and genocide are perpetrated with complete impunity in its shadow.

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