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The Junta's Criminal Constitution

(by Janet Benshoof and U Aung Htoo)

Burma's military dictators now say Nobel laureate Aung San Suu Kyi, under house arrest or in prison for 12 of the past 18 years, can cast her vote in the May 10 constitutional referendum—a bitter irony if ever there was one. Ms. Suu Kyi and her National League for Democracy are calling on voters to reject the military-backed constitution, calling it “undemocratic.” Meanwhile, the U.N. Security Council perpetuates the charade that the referendum is legitimate by asking the ruling junta to respect “fundamental political freedoms” at the polls.



The junta, led by Gen. Than Shwe, continues to deploy torture, rape, forced labor, murder and imprisonment as tools to consolidate its absolute power. Emboldened by impunity, Than Shwe is now trying to transform his rule by crime into a constitutional right by inserting criminal immunity for himself and his cohorts into the constitution. It is beyond discussion that blanket amnesties for all crimes—much less one issued via fiat, by a dictator, for himself—violates international law.

What's clear here is that the international community must stop engaging with the junta over their May referendum. The farcical constitutional process, now on its 15th year, is part and parcel of Than Shwe's “delay and deceive” tactics. These include periodic promises of reform, which Burma's trading partners are able to use to avoid grappling with the ruthless crimes being perpetrated in plain view. The “get out of jail free” passes for Gen. Than Shwe and his friends are typical provisions of a constitution that attempts to legitimize permanent military rule.

Further, the constitution, simply put, is possibly the worst ever drafted in regard to women in modern history. This road map for gender apartheid requires military experience for all positions of power, thus effectively disqualifying women from holding major government offices, including the



presidency and from participating in the block of military-only legislative seats. Countries like Russia who have praised the junta for this constitution should speak to the women in their countries.

What then, can be done with Burma? First and foremost the global community must uphold its obligations under international law and end the impunity enjoyed by Than Shwe and his henchmen. Although Burma is not a party to the treaty establishing the International Criminal Court (ICC), the Security Council can and should refer Burma to the ICC.

Unlike the U.N. Security Council Resolutions setting up the tribunals for Rwanda and the former Yugoslavia, such a referral to the ICC is a milder form of humanitarian intervention. First, it only serves to trigger the ICC Prosecutor's independent investigation into heinous crimes, genocide, crimes against humanity, and war crimes. Second, the ICC, unlike the other Tribunals is a back up court which can only take cases if the prosecutor can demonstrate that Burmese national courts are unwilling and unable to prosecute such crimes. Even then, States are given another opportunity to step up to the plate and try them at the national level. Finally, in response to concerns by State Parties that an ICC investigation may impinge on any parallel peace negotiations, the Security Council has the power to call for a one-year moratorium.

The ICC statute makes sitting head of states and top generals criminally liable as do the Genocide and Geneva Conventions which Burma ratified in 1956 and 1992 respectively. Under these treaties Burma has pledged to fully prosecute criminal violations, and consented to the Security Council's role as the ultimate treaty enforcer. Given this voluntary consent to a limit on sovereignty, the junta would be hard pressed to raise any legal objections to a simple referral to the ICC.

Advocating for an ICC referral is daunting only if the Security Council is viewed as a purely political entity. Fortunately, this is not the case. The Security Council's increased willingness to look past state sovereignty when confronted with lawless States is part of the growing consensus that perpetrators of heinous crimes are a threat to peace and security and must be punished.

Any Security Council Resolution on Burma must be narrowly drafted to request only action on heinous crimes. There is now a consensus that such crimes, unaddressed, constitute a "threat to peace." This was first evidenced by Resolution 688 in 1991 in reaction to Saddam Hussein's genocidal acts against the Kurdish people.

The Rome Treaty itself and the separate agreement between the Security Council and the ICC together frame the Security Council's legal commitment to promoting the ICC. In addition, a Security Council referral in



the case of Burma is even more compelling given four “legal triggers” any one of which arguably supports a presumption of a “threat to peace”:

- The International Committee of the Red Cross (ICRC), the global monitor of International Humanitarian Law (IHL), in a highly unusual move issued a global alert on Burma in June 2007. After following a set of legal guidelines detailing how the ICRC should respond to a violation of IHL, they condemned the regime’s “systematic abuse” of its own people. The ICRC announced that all confidential bilateral dialogue with the junta had broken down, that IHL violations had been documented based on thousands of interviews and personal observations of the ICRC delegates, and that these crimes are likely to continue. Most importantly, the ICRC rang a “clarion bell,” reminding the international community of their obligations “to respect and to ensure respect for the [Geneva] Conventions.” Could the international community have prevented the terror and killings of some 31 monks in October 2007 by a rapid response?
- A referral to the ICC, under the Security Council strongest Chapter VII powers, provides the critical legal response to the junta ignoring all efforts of the General Assembly. Since 1989 Than Shwe and his predecessors have flouted some 30 General Assembly and Human Rights Council resolutions, including those which called for an independent investigation of such crimes as the Depayin Massacre in 2003 and the rapes by the military of ethnic women. Some seven U.N. envoys dispatched to Burma have reported defeat, or as put more diplomatically by Special Envoy Ibrahim Gambari in March, his trips have “yielded no tangible outcome.” An ICC referral will serve to make dealing with the regime less savory and at the minimum, deter future Than Shwe wannabes.
- The third trigger is the historic milestone for women, Security Council Resolution 1325 (SCR 1325), passed in 2000 to address women’s inequality during and post conflict and to guarantee criminal accountability for gender crimes. SCR 1325 is binding law on the Security Council itself and the credible reports of the rapes of ethnic women by the military in Burma should create a presumption for Chapter VII review.
- Finally, Burma is a critical test for the Security Council pledge in Resolution 1674 to enforce the Responsibility to Protect Doctrine (R2P). R2P obligates the Security Council to take action when national authorities are unable or unwilling to protect their citizens in conflict situations. And an ICC referral is the ideal first step.



For over 40 years the people of Burma have been ruled by terror. Despite efforts by the global community Than Shwe and his gang of thugs are richer and more powerful than ever. It is time to fight crime by enforcing the law. By referring Burma to the ICC the Security Council will take a step to further the global justice system and will send a signal heard world-wide that military might can never trump legal rights.

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