



(A.5)



July 1, 2009

Dear Secretary General Ban Ki-moon:

Your upcoming visit to Myanmar is a historic opportunity to underscore to Senior General Than Shwe the utmost seriousness with which the United Nations regards Myanmar's failure to address violations of international humanitarian law. You should make clear that ending impunity is necessary to ensure the maintenance of peace and security.

Under the direction of Senior General Than Shwe, the regime's use of the judiciary to eliminate political opponents constitutes a crime against humanity. The arrest and imprisonment of Daw Aung San Suu Kyi and other political prisoners must be addressed in this context in order to ensure that the cycle of crime is not perpetuated.

International law clearly imposes a duty on the United Nations, and you as its representative, to abstain from any discussion of the 2010 elections, which arise out of a constitution that includes "serious breaches of obligations under peremptory norms of general international law."¹ Specifically, Article 445 of the Myanmar 2008 Constitution grants general amnesty, including for the most serious crimes of concern to the international community, and as such is a breach.² States have an obligation not to "recognize as lawful a situation created by a serious breach...nor render aid or assistance in maintaining that situation."³ The Security Council applied an earlier form of this doctrine in 1984 when denouncing the constitution drafted by the apartheid government of South Africa. The Council declared that the "so-called 'new constitution' is contrary to the principles of the Charter of the United Nations...that the results of the referendum...are of no validity whatsoever," and rejected the subsequent elections as "null and void."⁴ As you stated on the tenth anniversary of the Rome Statute of the International Criminal Court, "[i]mpunity for crimes can never be tolerated: amnesties for international crimes are unacceptable."⁵

Further, as Myanmar is the site of one of the world's longest running internal armed conflicts, it falls under the legal requirements of Security Council Resolutions 1325 and 1820, which impose additional obligations including criminal ac-



countability and exclusion of amnesty provisions for sexual violence as a tactic of war.⁶

We urge you to make clear to Senior General Than Shwe that impunity for international crimes inflicted on the people of Myanmar has now come to an end. You should call upon the Security Council to address the situation of ending impunity as a threat to peace in Myanmar and urge the government to accept the jurisdiction of the International Criminal Court and cooperate with any ensuing investigation.

Sincerely,

Aung Htoo
General Secretary,
Burma Lawyers' Council

Janet Benshoof
President, Global Justice Center

The Burma Lawyers' Council is an independent organization which was formed in a liberated area of Burma in 1994 to promote and assist in the educating, implementing, restoring, and improving basic human rights, democratic rights, and the rule of law in Burma.

The Global Justice Center is an international human rights organization that provides strategic and timely legal expertise to leaders in transitional democracies as part of a global, transnational strategy to enforce international equality guarantees.

(Endnotes)

1. ILC Articles on the Responsibility of States for Internationally Wrongful Acts in *Report of the International Law Commission on the Work of its Fifty-third Session*, U.N. GAOR, 56th Sess., Supp. No. 10, at 43, U.N. Doc. A/56/10 (2001) Ch. 3. Commentaries to the ILC Articles, Ch. 3, para. 1, “Chapter III of Part Two is entitled Serious Breaches of Obligations Under Peremptory Norms of General International Law. It sets out certain consequences of specific types of breaches of international law, identified by reference to two criteria: first, they involve breaches of obligations under peremptory norms of general international law; second, the breaches concerned are in themselves serious, having regard to their scale or character.” *See also*, M.C. Bassinouni & E.M.



Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (1995) (**International crimes that rise to the level of *jus cogens* violations create inderogable legal obligations including to prosecute or extradite. A general amnesty for those crimes is in direct violation of this obligation.**)

2. Myanmar Constitution [April 2008]. Chapter XIV. *Transitory Provisions*, Provision No. 445. "All policy guidelines, laws, rules, regulations, notifications and declarations of the State Law and Order Restoration Council [SLORC] and the State Peace and Development Council [SPDC] 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 of any act done in the execution of their respective duties."

3. ILC Articles, Art. 41.

4. UNSC. Res.554, U.N.Doc.No.S/RES/556 (17 August 1984), Para.1, 2.

5. H.E. Mr. Ban Ki-moon, Secretary General of the United Nations, Remarks at the commemoration of the 10th Anniversary of the adoption of the Rome Statute of the International Criminal Court (ICC), 17 July 2008, http://www.iccnw.org/documents/Secretary_General_Ban_Ki_moon_Remarks_Commemoration_17_July_2008.pdf (accessed 1 July 2009).

6. UNSC. Res.1325, U.N. Doc.No. S/RES/1325 (31 October 2000), Para.11; UNSC. Res.1820, U.N. Doc.No. S/RES/1820 (19 June 2008), Para.4.

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