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Ms. Louise Arbour  
 October 28, 2009  
 President and CEO  
 International Crisis Group  
 149 Avenue Louise Levels 24  
 B-1050 Brussels, Belgium  
 Via mail and facsimile

**Urgent: The ICG Recommendations Urging Support for the 2010  
 Elections in Burma Conflict with States' Erga Omnes  
 Obligations Under International Law**

Dear President Arbour,

The International Crisis Group plays a unique and critical role in resolving and preventing conflict globally. Central to the ICG mission is its commitment to ensuring respect for the principles of international humanitarian law. We are writing this letter to call your attention to ICG's radical departure from those principles in its August 2009 Report (the Report), "Myanmar: Towards the Elections." The Report urges that States and the United Nations endorse the military drafted Constitution of the Republic of the Union of Myanmar (2008) (hereinafter 2008 constitution), assist Senior General Than Shwe with the 2010 elections, and engage as fully as possible with any "new" government in Burma.<sup>1</sup> These recommendations are fundamentally incompatible with jus cogens rules requiring States to take all possible measures to stop the ongoing violations of the Geneva Conventions and other serious breaches of peremptory norms in Burma.

The Global Justice Center (GJC) and the Burma Lawyers' Council (BLC) are deeply concerned about the impact of the ICG Report on the rule of law in Burma and globally.<sup>2</sup>

**States' existing non-derogable obligations in regard to Burma**

Burma is a country in armed conflict governed by Article 3 of the Geneva Conventions, international rules of customary law and other precepts of international humanitarian law.<sup>3</sup> The longstanding nature of the hostilities is



such that United Nations officials, carrying out Security Council mandates, independently engage with Generals from ethnic armies around issues of compliance with the laws of war.<sup>4</sup>

The developments in international law governing internal armed conflict, including the seminal Tadic decision by the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Rome Statute for the International Criminal Court, make clear that Senior General Than Shwe and other top military officers in Burma are individually criminally responsible for the commission of war crimes.<sup>5</sup>

The military government in Burma has systematically committed serious violations of the Geneva Conventions for over twenty years. Tatmadaw Kyi officers and soldiers (government armed forces) routinely perpetrate heinous crimes against ethnic civilian populations including using rape as a weapon of war, all which have been extensively documented by the United Nations.<sup>6</sup>

Most recently, on August 20, 2009, the Secretary-General's Report to the Security Council on Security Council Resolution 1820 (SCR 1820) cited Burma as a violator country, noting both the ongoing sexual violence perpetrated against ethnic women in conflict and the longstanding impunity afforded military perpetrators.<sup>7</sup> SCR 1820 prohibits any amnesty for rape and other crimes targeting women in conflict, requiring that all such perpetrators, whether the country is in conflict or post-conflict, be prosecuted and punished.<sup>8</sup>

The ICG Report fails to grapple with the fundamental incompatibility of certain of its recommendations with States' current non-derogable obligations, including those recalled by the International Committee of the Red Cross (ICRC) in regards to Burma. The ICRC, the global monitor of international humanitarian law, can issue what is termed a "public condemnation" when all subsidiary measures undertaken to protect victims of armed conflict have failed and the violations are "major and repeated or likely to be repeated."<sup>9</sup>

On June 29, 2007, in reaction to the heinous crimes being committed against ethnic civilian populations in Eastern Burma, the ICRC issued a "public condemnation" of Burma, a step taken less than four times in its history, reminding "all States party to the Geneva Conventions of their obligation, under Article 1, to respect and to ensure respect for the Conventions".<sup>10</sup>

The ICG recommendations further abut States' nontransgressible obligations to take all possible measures "to prevent" genocide, a distinct and segregable obligation from the duty "to punish" under the Genocide Convention.<sup>11</sup> In February 2007, the International Court of Justice for the first time determined that, under the Genocide Convention, all States have positive erga omnes obligations to act once a serious risk of genocide is made known.<sup>12</sup> States'



obligations to take all possible measures “to prevent” genocide are triggered even prior to any official court or UN finding.<sup>13</sup> These obligations exist with regard to Burma given authoritative global indices listing Burma as one of eight “red alert” States at risk of genocide,<sup>14</sup> the inclusion of Burma as a State monitored by the UN Special Advisor on the Prevention of Genocide,<sup>15</sup> and the fact that the Special Advisor has initiated at least one confidential briefing on Burma to the Security Council. In the briefing on December 16, 2005, the Council was informed that the allegations of core crimes in Burma appeared to “[affect] particular ethnic and national groups...and that under the prevailing circumstances in Myanmar, civilian populations may be identified as enemies or as sympathetic to enemies, solely on the basis of their ethnicity.”<sup>16</sup>

To date, States have not complied with their *erga omnes* obligations to act collectively to ensure that the crimes in Burma cease and military perpetrators are prosecuted and punished. Nor have States complied with their nonderogable obligations under the Genocide Convention, detailed by the ICJ and expanded under the Stockholm Declarations, to take every possible legal measure to avert what has been found to be a serious risk of genocide in Burma.

### **The 2008 constitution embodies serious breaches of peremptory norms**

The 2008 constitution in Burma seriously breaches peremptory norms by providing general amnesties and permanently removing all military from any civilian oversight including by the President or Supreme Court.<sup>17</sup> The same *jus cogens* rules apply to the 2008 Burma constitution as were applied to the 1983 constitution of apartheid South Africa.<sup>18</sup> The amnesty provision ensures permanent disrespect for international humanitarian law. Neither civilian nor military courts can ever prosecute the perpetrators of *jus cogens* crimes including genocide, war crimes, and crimes against humanity, nor can victims, including women sexually assaulted during conflict, ever sue for civil damages.<sup>19</sup>

This aggressive and deliberate act by Senior General Than Shwe to enshrine impunity as a “right” is a serious breach of peremptory norms striking at the heart of Burma’s nontransgressible obligations under the Genocide and Geneva Conventions, customary international law, and such accountability mandates as in SCR 1325 and SCR 1820.<sup>20</sup> Further, the United Nations is clearly prohibited from recognizing the legitimacy of the constitution in any way given its amnesty provisions.<sup>21</sup> In a clear departure from earlier constitutions, the 2008 Burma constitution removes power over the military from the President, entrenching the current structure whereby the non-elected Commander-in-Chief remains the most powerful person in Burma.<sup>22</sup> Jurisdiction over police and military matters is removed from all civilian courts, with the Commander-in-Chief’s decisions in legal cases deemed “final and conclusive.”<sup>23</sup>



The mandates in Common Article 3 and Additional Protocol II of the Geneva Conventions require that States Parties provide courts with “essential guarantees of independence and impartiality” that “[afford] all the judicial guarantees which are recognized as indispensable by civilized peoples.”<sup>24</sup> The permanent removal of all military crimes from any civilian judicial review or constitutional oversight constitutes a formal repudiation of the Geneva Conventions and, as such, is a serious breach of peremptory norms.<sup>25</sup>

**International law prohibits States and the United Nations from assisting with the 2010 elections and from supporting any government or officials resulting from that election**

Burma, as the responsible State, is required under international law to immediately cease all conduct leading to serious breaches of peremptory norms and, as an independent obligation, provide full reparations.<sup>26</sup> The legal consequences on third-party States include a duty of non-recognition and in addition, States are prohibited from providing any aid or assistance which would serve to maintain situations arising from the breaches.<sup>27</sup>

The ICG urges that States support the elections and that the UN Secretary-General and relevant UN agencies consider providing assistance with the 2010 elections. Further, ICG urges the UN, in particular the United Nations Development Programme, to undertake activities to strengthen “the capacity of civilian institutions of governance...”<sup>28</sup> ASEAN States are urged to “[c]onsider offering, as and when appropriate, parliamentary exchanges with the newly elected government, assistance in setting up parliamentary committees and other steps...”<sup>29</sup> Western Governments should “send clear messages before the post-election government is in place that a process of normalising relations is possible...” and that such governments should “[s]uspend restrictions on high-level bilateral contacts with the new government...”<sup>30</sup>

These ICG recommendations are oppositional to the United Nations International Law Commission’s “Draft Articles on the Responsibility of States for Internationally Wrongful Acts,” which codify States’ legal duties towards the State responsible for committing serious breaches of peremptory norms.<sup>31</sup> The global community can neither support the 2010 elections, nor any new government elected on the basis of the 2008 constitution without abridging the most fundamental precepts of international law.<sup>32</sup>

The ICG recommendations, if adopted by the United Nations, could serve to undermine the integrity of UN leaders as “chief standard bearers” for the principles of human rights in the UN Charter. Further, given that the government of Burma engages in active victimization, UN activities could be seen as complicit, rendering the UN itself legally responsible. See Mac Darrow & Louise Arbour,



The Pillar of Glass: Human Rights in the Development Operations of the United Nations, 103 AM. J. INT'L L. 446, (2009). (Noting the human rights issues raised when members of the UNDP were eyewitnesses to government-perpetrated killings of monks in Myanmar in 2007. id. 448).

The Security Council enforced these legal precepts in 1984 when it declared as “null and void [South Africa’s] so-called ‘new constitution’,” noting it was contrary to the principles of the UN Charter, and called for States not to assist or recognize the elections or any resulting government.<sup>33</sup> The ICG recommendations directed to Western Governments fail to take account of the position of the European Parliament in its Resolution of May 22, 2008, condemning the junta’s referendum on the constitution, calling for members to reject the “the sham constitution, and... the implausible outcome” and calling for EU members to press for a Security Council referral of Burma to the International Criminal Court.<sup>34</sup>

The ICG recommendations, which include lifting all existing travel restrictions, would undermine the integrity of States’ national legislation implementing international humanitarian law. Measures of lustration and vetting, which are not only central to any democratic transition, but now mandated by the Security Council under resolutions 1820 and 1888, are totally absent in Burma.<sup>35</sup> In fact, the constitution reverses the very concept of lustration by ensuring that key positions in any new government, including on the Supreme Court, will be occupied by men potentially criminally culpable for perpetrating crimes of concern to the global community.<sup>36</sup> The prospect of war criminals occupying major positions in any post-2010 government in Burma presents a serious problem for those States with laws requiring prosecution or extradition for prosecution of perpetrators of jus cogens crimes should they be present in the jurisdiction.<sup>37</sup> Other States’ penal codes provide for discretionary prosecutions of perpetrators of certain core crimes under universal jurisdiction principles. In either case the integrity of national legal systems would be severely tested by States fostering “bilateral contacts” with individuals they are under a legal and moral duty to prosecute and punish.<sup>38</sup>

## Women

The 2008 constitution is sui generis in modern history for its formal guarantees enforcing women’s inequality, amounting to de jure and de facto gender apartheid.<sup>39</sup> Women are not allowed in the military except in honorary positions, and are thus precluded from holding the top offices reserved for active military including Commander-in-Chief, several ministries, and 25% of all parliamentary seats. The qualification of “military experience” effectively renders women ineligible for the Presidency or Vice Presidency.<sup>40</sup> This singular form of gender apartheid has been the focus of protests to the Secretary-General, including by U.S. Congresswomen (“[the] constitution...violates international



law and entrenches gender discrimination...”), the Global Justice Center, the Society for American Law Teachers (SALT), and the Women’s League of Burma, along with other civil society groups.<sup>41</sup>

The historic measures taken by the Security Council to address the endemic sexual violence against women in conflict, including SCRs 1325 and 1820, are premised on gender equality as key to maintaining international peace and security. By formalizing inequality and providing for amnesty for sexual crimes, the 2008 Burma constitution flouts the Security Council resolutions and precludes Burma from ever complying with its obligations under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).<sup>42</sup> Moreover, supporting the 2010 elections sends a message to women globally that their rights are fragile; even in the face of formal evisceration of the rights of over twenty-five million women in Burma the global community feels free to choose to legitimate this moral wrong.

The ICG acknowledges that the military can “ignore or override constitutional provisions...or even abrogate the constitution...”<sup>43</sup> premising its support for the 2010 elections solely on the speculation that it might “inadvertently” open up political space.<sup>44</sup> This rationale, absent any considerations of either peace or justice, can never provide the basis for abandoning the legal principles foundational to our world order. We call on you, as President of the ICG, to rescind the organization’s recommendations regarding Burma, to withdraw the flawed constitutional analysis, and to articulate States’ legal obligations with regard to Burma, including taking all possible steps, individually and collectively, to end impunity for the ongoing criminal breaches of international humanitarian law. Burma presents the global community with the opportunity to demonstrate that the global rule of law is a reality and not an illusion. We call on the International Crisis Group to lead the effort to make this happen.

Sincerely,

Janet Benshoof  
President  
Global Justice Center

U Thein Oo  
Chairman  
Burma Lawyers’ Council

CC: ICG’s Board of Directors and Executive Committee.

**(Endnotes)**

1 International Crisis Group, Asia Report N° 174, and Myanmar: Towards the Elections, Aug 20, 2009, ii-iii, 25-26 {hereinafter ICG Report}.



2 The Global Justice Center is a human rights organization focused on the enforcement of international humanitarian and human rights law. The Burma Lawyers' Council, the legal arm of the Burma democracy movement, publishes extensively on Burma's military regime and the history of constitutionalism in Burma, including comparative analyses of the 2008 constitution. Both organizations are internationally recognized for their expertise on Burma and regularly brief civil society groups, United Nations bodies, and governments on issues involving Burma and international law.

3 See generally International Committee of the Red Cross, *How is the Term 'Armed Conflict' Defined in International Humanitarian Law?*, Mar. 2008; International Committee of the Red Cross, *International Review of the Red Cross: Customary Law*, 189, Vol. 87, No.857, March 2005. Burma ratified the Geneva Convention on August 25, 1992, the Genocide Conventions on March 14, 1956, the Convention on the Rights of the Child on July 15, 1991, and the Convention on the Elimination of all Discrimination against Women (CEDAW) on July 22, 1997. See United Nations Treaty Collection, <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>.

4 The March 2009 Report by the Secretary-General to the Security Council on children in armed conflict noted that the Government of Myanmar prevented the United Nations from concluding the action plans it had negotiated and which were agreed upon by the Karen National Liberation Army (KNLA) and Karenni Army (KA) in line with Security Council Resolutions 1539 (2004) and 1612 (2005). The Secretary-General, Report of the Secretary-General on Children and Armed Conflict, 33-34, U.N. Doc. A/63/785-S/2009/158 (Mar. 26, 2009). The Report further noted that the Karen National Union (KNU)/KNLA and the Karenni National Progressive Party (KNPP)/KA signed deeds of commitment on 6 April and 13 April 2007 respectively. *Id.* In regards to the military government violations, the Secretary-General reported that no perpetrators had ever been criminally prosecuted, that the Tatmadaw Kyi was a persistent violator from the date such UN reporting started, that the government denied all UN humanitarian access to children during the reporting period, and that the action plan on the use of child soldiers proposed by the government had to be Rejected as not meeting international standards. *Id.* at 34.

5 See *Prosecutor v. Dusko Tadic (Jurisdiction)*, Case No. IT-94-1-AR72, Oct. 2 1995; Rome Statute of the International Criminal Court, Part 2, U.N. Doc. A/CONF.183/9 (July 17, 1998). See generally International Committee of the Red Cross Advisory Service on International Humanitarian Law, *National Enforcement of International Humanitarian Law: Information Kit, Command Responsibility and Failure to Act*, Dec. 31, 2003; William Fenrick, *The development of the law of armed conflict through the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 3 *J. ARMED CONFLICT L.*, 200, 200-210 (Dec. 1998). The International Criminal Court or the creation of an ad hoc tribunal are currently the only channels to prosecute Senior General Than Shwe and other military leaders in Burma as States are generally precluded from prosecuting sitting heads of state and foreign ministers. *Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)* 2002 *I.C.J.* 3, 8 (Feb. 14).

6 For an overview of the U.N. documentation on Burma, see THE INTERNATIONAL HUMAN RIGHTS CLINIC AT HARVARD LAW SCHOOL, *CRIMES IN BURMA* (May 2009) [hereinafter *Harvard Report*]. See also International Federation for Human Rights (FIDH), *ALT-ASEAN and Burma Lawyers' Council Report, Burma/Myanmar International Crimes Committed in Burma: the Urgent Need for a Commission of Inquiry*, Aug. 2009; and International Center for Transitional Justice, *Impunity Prolonged: Burma and its 2008 Constitution*, Sept. 2009.

7 The Secretary-General, Report of the Secretary-General Pursuant to Security Council Resolution 1820 (2008), ¶¶15, 19, 23, 26, U.N. Doc. S/2009/363 (Aug. 20, 2009) [hereinafter *1820 Report*]. Criminal violations in Burma are noted in four places in the report: In Myanmar, recent concern has been expressed at discrimination against the minority Muslim population of Northern Rakhine State and their vulnerability to sexual violence, as well as the



high prevalence of sexual violence perpetrated against rural women from the Shan, Mon, Karen, Palaung and Chin ethnic groups by members of the armed forces and at the apparent impunity of the perpetrators. *Id.* at ¶15. In Myanmar, women and girls are fearful of working in the fields or traveling unaccompanied, given regular military checkpoints where they are often subject to sexual harassment. *Id.* at ¶19. Furthermore, in countries such as Afghanistan, Côte d'Ivoire, the Democratic Republic of the Congo, Iraq, Kosovo, Liberia, Myanmar, Nepal, Sierra Leone, the Sudan and Timor-Leste, the effective administration of justice is hampered not only by a lack of capacity, but also by the fact that some justice officials do not give serious consideration to reports of sexual violence. *Id.* at ¶23. [I]n Myanmar, although there has been documentation and identification of military personnel who have committed sexual violence, including relevant dates and battalion numbers, disciplinary or criminal action is yet to be taken against the alleged perpetrators. *Id.* at ¶26. 8 S.C. Res. 1820, ¶ 4, U.N. Doc. S/RES/1820 (June 19, 2008) [hereinafter SCR 1820]. Prior to its adoption, the International Crisis Group argued to the Security Council that including a provision prohibiting all amnesties for sexual crimes was “non-negotiable”. See also International Crisis Group, Statement on Gender Violence ahead of UNSC 19 June Debate, June 18, 2008. See also Donald Steinberg, Deputy President, International Crisis Group, *Beyond Victimhood: Protection and Participation of Women in the Pursuit of Peace*, Testimony to the U.S Senate Foreign Relations Committee (Oct. 1, 2009)

9 For a detailed explanation of the ICRC protocol for addressing States’ violations see International Committee for the Red Cross, Action by the International Committee of the Red Cross in the Event of violations of International Humanitarian Law or of Other Fundamental Rules Protecting Persons in Situations of Violence, 397-98, Vol. 7, No. 858, June 2005.

10 See Press Release, International Committee of the Red Cross, Myanmar: ICRC denounces major and repeated violations of international humanitarian law (June 29, 2007) (on file with the ICRC), available at [http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/myanmarnews290607?OpenDocument&style=custo\\_print](http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/myanmarnews290607?OpenDocument&style=custo_print).

11 Article V of the Genocide Convention requires “The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article 3.” Convention on Prevention and Punishment of the Crime of Genocide art. V, Dec. 9 1948, 78 U.N.T.S. 277. Additionally, under Article VI, “Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction” *Id.* at art. VI.

12 See Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), 2007 I.C.J. 91, 155 (Feb. 26).

13 See Juan E. Mendez, Special Adviser to the Secretary-General on the Prevention of Genocide, Prosecution and prevention of genocide: current developments and historical experience, Address Before the Nuremberg Human Rights Center (Oct. 6, 2006), at 2 (transcript available at [http://www.responsibilitytoprotect.org/files/60\\_Nuremberg.pdf](http://www.responsibilitytoprotect.org/files/60_Nuremberg.pdf)) (“Governments are obliged to take all measures within their power to prevent the commission of the crime of genocide, even before a competent court determines that the Convention actually applies to the case at hand.”); See generally Stockholm Declaration on Genocide Prevention (Jan. 28, 2004), available at [http://www.aegitrust.org/index2.php?option=com\\_content&do\\_pdf=1&id=94](http://www.aegitrust.org/index2.php?option=com_content&do_pdf=1&id=94) (“We are committed to shouldering our responsibility to protect groups identified as potential victims of genocide, mass murder or ethnic cleansing [...]”)(issued by fifty-five governments at the Stockholm International Forum on Preventing Genocide; Threats and Responsibilities).





14 See Genocide Prevention Project, Mass Atrocity Red Alert, <http://www.preventorprotect.org/overview/watch-list.html> (last visited Oct. 21, 2009).

15 See UN Report from the Special Advisor on Genocide Prevention, Feb. 16, 2006, <http://www.ushmm.org/genocide/analysis/details.php?content=2006-02-16> (“I can say that I am following the situations in various countries and in some cases, I have already written notes to the Secretary-General, and through him to the Security Council. Those are Darfur, Ivory Coast and the Democratic Republic of the Congo, but in other cases short of going to the Security Council, we have made our concerns known via the Secretariat, and they include, as I said, Colombia, but also Burma, with the situation of indigenous populations that have been in armed conflict with the government of Burma—there have been intrusions also—but recently, the government has acted militarily against them, and apparently affected the civilian population...”).

16 Jared Genser, Op-Ed, The question of genocide in Burma, *Burma Digest*, Mar. 20, 2006, <http://burmadigest.info/2006/03/20/the-question-of-genocide-in-burma-2/> (quoting U.N. Under-Secretary Ibrahim Gambari’s private briefing to the Security Council on December 16, 2005).

17 Constitution of the Republic of the Union of Myanmar (2008) art. 445 [hereinafter Myanmar Constitution] (“No proceedings 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.”). The constitution states that “In the adjudication of Military Justice...the decision of the Commander-in-Chief is final and conclusive.” *Id.* at art. 343. It further provides that “The Commander-in-Chief of the Defense Services to whom the sovereign power has been transferred shall have the right to exercise the powers of legislature, executive and judiciary.” *Id.* at art. 419.

18 S.C. Res.554, ¶ 5, U.N.Doc. S/RES/556 (Aug. 17, 1984) [hereinafter SCR 554]. See also Draft Articles on Responsibility of States for Internationally Wrongful Acts in Report of the International Law Commission on the Work of its Fifty-Third Session, art. 40, 41, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (Nov. 2001) [hereinafter ILC Draft Articles] (“No State shall recognise as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation.”).

19 See Myanmar Constitution, *supra* note xvii.

20 See S.C. Res.1325, ¶11, U.N. Doc. S/RES/1325 (Oct. 30, 2000); SCR 1820, *supra* note viii.

21 See Opening Statement of Patricia O’Brien, UN Under-Secretary-General for Legal Affairs, at the 36th Meeting of the Committee of Legal Advisers on Public International Law (Oct. 7, 2008) (“The UN does not recognize any amnesty for genocide, crimes against humanity, war crimes and other serious violations of international Humanitarian law.”). See also Statement by the President of the Security Council. U.N. Doc. S/PRST/2009/1\* (Jan.14, 2009) (“Stress the need for the exclusion of, and reject any form of, or endorsement of, amnesty for genocide, crimes against humanity, war crimes or other serious violations of human rights in conflict resolution processes and ensure that no such amnesty previously granted is a bar to prosecution before any United Nations-created or assisted court.”).

22 military government, and all law-making power was vested in the Parliament, even in times of war. The Constitution of the Union of Burma (1947) art. 59, 90, 94. In direct contrast to the 2008 constitution, the Supreme Court’s jurisdiction could not be removed on matters regarding the constitution and decisions of the Supreme Court. *Id.* at art. 138; Myanmar Constitution, *supra* note xviii, at art. 343. The 1974 constitution, even though enacted when Burma was under military rule, did not establish separate military power. The Constitution of the Socialist Republic of Burma (1974) art. 65, 66. The president, also Chair of the Council of State, was supreme over the military, the judiciary retained jurisdiction over military matters, and the parliament had the power to declare war. *Id.* at art. 13, 49, 105.



23 Id.

24 Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; see generally International Committee of the Red Cross Advisory Service on International Humanitarian Law, National Enforcement of International Humanitarian Law: Information Kit, Criminal Procedure, Dec. 31, 2003.

25 Id.

26 ILC Draft Articles, *supra* note xviii, at art. 31 (“The responsible State is under obligation to make full reparation for the injury caused by the internationally wrongful act.”)

27 ILC Draft Articles, *supra* note xviii, at art. 41.

28 ICG Report, *supra* note i, at ii-iii.

29 Id.

30 Id.

31 ILC Draft Articles, *supra* note ,viii.

32 Id. at art. 41 (“No state shall recognise as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation.”).

33 SCR 554, *supra* note xviii.

34 Paragraph 11 of the EU resolution contains two separate calls for an ICC referral directed at the denial of humanitarian aid access after Cyclone Nargis. The paragraph reads: “if the Burmese authorities continue to prevent aid from reaching those in danger, they should be held accountable for crimes against humanity before the ICC; calls on the EU Member States to press for a UN Security Council resolution referring the case to the Prosecutor of the ICC for investigation and prosecution....” Resolution on the Tragic Situation in Burma, EUR. PARL. DOC. P6\_TA (2008) 0231 (2008). See also the conclusions of the team of experts led by Johns Hopkins in September 2008 documenting the junta’s deliberate indifference to human life related to denial of aid after Cyclone Nargis. The report notes that the junta’s conduct may rise to the level of crimes against humanity, which would require a Security Council referral to the ICC. EMERGENCY ASSISTANCE TEAM (BURMA) & JOHNS HOPKINS UNIVERSITY CENTER FOR PUBLIC HEALTH AND HUMAN RIGHTS, AFTER THE STORM: VOICES FROM THE DELTA, March 2009. See also Gareth Evans, former President of the ICG, stating that the Burmese generals’ denial of relief after the cyclone, placing thousands of people at risk of immediate death, presents “at least a prima facie case” for crimes against humanity, which if established, would mean that “the responsibility to protect principle does indeed kick in.” Gareth Evans, Facing Up to Our Responsibilities, GUARDIAN.CO.UK, May 12, 2008, <http://www.guardian.co.uk/commentisfree/2008/may/12/facinguptoourresponsibilities>.

35 SCR 1820, *supra* note viii, at ¶ 3; S.C. Res. 1888, ¶ 3, U.N. Doc. S/RES/1888 (Sept. 30, 2009); 1820 Report, *supra* note vii, at ¶26 (“States must ensure that vetting processes exclude persons against whom there are credible allegations, and evidence of crimes, including sexual crimes; such persons should also be excluded from public institutions, including integrated armed forces.”).

36 The four military generals listed in the ICG Report as most likely to be the new President and Commander-in-Chief in 2010 are General Thura Shwe Mahn, Major General Htay Oo, Lt. General Myint Swe and ex-General Aung Thaung. ICG Report, *supra* note i, at 21 n.109. The Council of the European Union has imposed an offshore asset freeze, visa restrictions and restrictions on all diplomatic contact on all four of the candidates. Council Common Position (EC) No. 2009/351/CFSP of 27 April 2009, 2009 O.J. (L 108) 54.

37 States are increasingly enacting national legislation providing for prosecution of perpetrators of jus cogens crimes. In fact at least 54 states have criminalized war crimes in their domestic legislation. EVE LA HAYE, WAR CRIMES IN INTERNAL ARMED CONFLICTS 170 (Cambridge University Press 2008). In the U.S., for example, Charles Taylor’s son was prosecuted for torture under a U.S. law providing prosecution of perpetrators of torture who are U.S. citizens or on U.S. soil. See 18 U.S.C. §2340A. At least



32 of these states have incorporated domestic legislation allowing their courts to exercise universal jurisdiction over war crimes committed in foreign internal conflicts where both the perpetrator and victim are non-nationals. LA HAYE, at 254. Moreover, at least three ASEAN countries have incorporated and/or recognized universal jurisdiction principles. The Vietnam criminal code allows for prosecution of foreigners in accordance with international instruments that Vietnam has ratified. See LA HAYE, at 287, n. 124; Vietnam Penal Code, Art. 6(2), Dec. 1999 (“Foreigners who commit offenses outside the territory of the Socialist Republic of Vietnam may be examined for penal liability....”). In Indonesia, the Ad Hoc Human Rights Tribunal has found that “Punishment of the perpetrators of [serious human rights violations] is recognized as an obligation to the entire international community (erga omnes obligation).” Abilio Soares, Ad Hoc Human Rights Tribunal at the Human Rights Court of Justice of Central Jakarta, 65, Aug. 14, 2002. Cambodia, has ratified the Rome Statute of the International Criminal Court.

38 Internal States are generally precluded from prosecuting sitting heads of state and foreign ministers. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.) 2002 I.C.J. 3, 8 (Feb.14).

39 Committee on the Elimination of Discrimination against Women (CEDAW Committee), Concluding Observations of the Committee on the Elimination of Discrimination against Women: Myanmar, U.N. Doc. CEDAW/C/MMR/CO/3 (Nov. 7, 2008).

40 Myanmar Constitution, supra note xvii, art. 190.

41 See Letter from the Senate Women’s Caucus on Burma to Secretary-General Ban Kimoon, Apr. 9, 2009, available at [http://feinstein.senate.gov/public/index.cfm?FuseAction=NewsRoom.PressReleases&Content\\_Record\\_id=a5d1f98e-5056-8059-7692-63bda7b74dac&Region\\_id=&Issue\\_id=](http://feinstein.senate.gov/public/index.cfm?FuseAction=NewsRoom.PressReleases&Content_Record_id=a5d1f98e-5056-8059-7692-63bda7b74dac&Region_id=&Issue_id=); Letter from the Global Justice Center and SALT to Secretary-General Ban Ki-moon (on file with the author), Mar. 4, 2009, available at <http://www.globaljusticecenter.net/projects/burma/petition.html>; Letter from the Women's League of Burma to Secretary-General Ban Ki-moon, Aug. 7, 2009.

42 See Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee), Conclusion Observation, Principle Area of Concern and Recommendation, Myanmar, 22<sup>nd</sup> Session , para 133, U.N.Doc. CEDAW/C/SR.450,451 and 457 (2000).

43 ICG Report, supra note i, at 12.

44 Id. at i.

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