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Mr. Tomas Ojea Quintana
Special Rapporteur on the Situation
Of Human Rights in Myanmar

November 18, 2009

Urgent: The Activities of the Special Rapporteur on the Situation in Burma, including Endorsing the 2008 Constitution and the 2010 Election, are Inconsistent with the Obligations Erga Omnes of the United Nations

Dear Mr. Quintana,

The Global Justice Center (GJC) and the Burma Lawyer's Council (BLC)¹ acknowledge the dedicated efforts of the various Special Rapporteurs on the Situation of Human Rights in Myanmar. Central to the mandate of your office is furthering the international human rights and humanitarian precepts under the UN Charter. The human rights initiatives that currently frame your interaction with the military rulers of Burma are based on fully embracing the Constitution of the Republic of the Union of Myanmar (2008) (hereinafter the 2008 constitution).² We are writing this letter as a matter of urgency to alert you to the fact that by supporting the 2008 constitution, which facilitates Burma's serious and continuing breaches of peremptory norms, you are at risk of violating your mandate. Any acceptance of the 2008 constitution violates jus cogens rules³ and the UN's established policy⁴ since the constitution embodies permanent amnesties and other serious breaches in violation of Common Article 3 of the Geneva Conventions.

The GJC and the BLC are deeply concerned that your office, one of the United Nations' key "standard bearers", is compromised by your continuing support of the 2008 constitution and the 2010 elections. Any official contact between your office and the Burmese military leaders should address the serious breaches detailed in this letter. To do otherwise puts the Human Rights Council and your office at risk of perpetuating the government's breaches.⁵

Therefore we respectfully request that you cease any activities, such as an endorsement of the 2008 constitution, which would violate international law. Although we recognize this letter is written close to your November 22, 2009 trip to Burma, we recommend that you use this trip to lay the groundwork for



taking positive action to address impunity in Burma. We urge your office and the Human Rights Council to immediately consult with the Under-Secretary-General for Legal Affairs on how to ensure that your mandate activities are in conformance with jus cogens rules. Such compliance requires, at a minimum, that you retract your endorsement of the 2008 constitution, particularly in light of the Secretary-General finding Burma in violation of SCR 1820, which precludes any amnesties for sexual violence against ethnic women in conflict.⁶

I. The serious legal breaches embodied in the 2008 constitution impose a duty of non-recognition on the Special Rapporteur

The 2008 constitution breaches international humanitarian law and repudiates most, if not all, of Burma's existing treaty obligations.⁷ Your March 11 Report calls for "a review of national legislation in accordance with the new constitution..."⁸ This support of the 2008 constitution violates the duty of nonrecognition, given that the constitution embodies serious breaches of peremptory norms. The Security Council applied this jus cogens rule in 1984, when it called on States and the United Nations not to recognize the apartheid constitution of South Africa and any elections arising out of it declaring them "null and void."⁹

A. Complete amnesties for jus cogens crimes

Chief Justice U Aung Toe, working hand-in-hand with Senior General Than Shwe, drafted the constitution in his own words to ensure that "Tatmadaw (the military) [were given] the leading political role in the future of the state..."¹⁰ The 2008 constitution grants permanent amnesties for the crimes of government military leaders and their agents.¹¹ Civilian and military courts are prohibited from prosecuting those Tatmadaw (military) civilians or officials who are perpetrators of jus cogens crimes including genocide, war crimes and crimes against humanity.¹² Victims, including ethnic women systematically subjected to sexual assault in conflict areas, are forever precluded from seeking any remedies or reparations for their injuries, including civil damages, in violation of international law.¹³

This amnesty provision in the 2008 constitution violates Burma's nontransgressible obligations under the Genocide and Geneva Conventions and customary international law, as well as Security Council Resolutions 1674, 1612, 1325 and 1820.¹⁴

B. The Repudiation of Common Article 3 of the Geneva Conventions

A second serious breach of peremptory norms is that the 2008 constitution is constructed in such a way as to insulate the military and police from any oversight



by the executive, judicial, or legislative branches.¹⁵ All crimes by the military and police, including crimes perpetrated by active military officers serving as parliamentarians or in the civil service, fall outside of all civilian courts. Further, military court defendants, including those brought before military tribunals, are not entitled to any appellate or constitutional review by the Supreme or Constitutional Courts. The 2008 constitution entrenches the power of the non-elected, unaccountable, and perpetually male Commander-in-Chief, including declaring his decisions over all legal matters involving the military "final and conclusive."¹⁶

Common Article 3, supplemented by Additional Protocol II of the Geneva Conventions, mandates Burma to provide courts for protected persons with "essential guarantees of independence and impartiality" that "[afford] all the judicial guarantees which are recognized as indispensable by civilized peoples."¹⁷ The 2008 constitution, which does the opposite, is a formal repudiation of the Geneva Conventions and constitutes a serious breach of peremptory norms.¹⁸

Further, the 2008 constitution turns the very concept of lustration or vetting on its head. For example, the judicial qualifications ensure that the majority of judges who are "qualified" to fill the seats on the Supreme and Constitutional Courts are the same judges who are potentially culpable of the most heinous crimes. Security Council Resolutions 1820, 1888 and the Secretary-General's report on 1820 collectively recognize that without vetting any mandates on judicial reform are meaningless.¹⁹

II. Actions of the Special Rapporteur must be in conformity with existing obligations erga omnes of the United Nations

A. Geneva Conventions

Burma is a country in internal armed conflict and has for over twenty years committed systematic and major violations of the Geneva Conventions. These violations evoke Article 1 obligations on all States and the United Nations to take measures both "to respect and ensure respect" for the Geneva Conventions.²⁰ This duty was called upon by the International Committee of the Red Cross (ICRC) in its "public condemnation" of Burma (a step taken less than four times in its history) on June 29, 2007, reminding "all States party to the Geneva Conventions of their obligation, under Article 1, to respect and to ensure respect for the Conventions."²¹

B. The "obligation of means" to prevent genocide in Burma

The Genocide Convention, which Burma ratified in 1956, obligates State Parties to take measures "to prevent" genocide independent from punishing the actual



crimes of genocide. States' and the United Nations' obligations erga omnes are now triggered due to three factors: Burma is deemed "at risk" of genocide,²² Burma is included as a State being monitored by the UN Special Advisor on the Prevention of Genocide,²³ and the Special Advisor has initiated at least one confidential Security Council briefing regarding the military targeting Burma's ethnic civilian populations.²⁴

III. The United Nations must seek to end the impunity of the top war criminals in Burma including Chief Justice U Aung Toe

The Special Rapporteur's assertion that the 2008 constitution furthers judicial independence is inaccurate given that the constitution consolidates military power and structurally removes judicial independence. Chief Justice U Aung Toe is himself culpable of crimes against humanity and war crimes, including many counts of first degree murder for the deaths in prison of persons wrongfully imprisoned, as well as torture, gross medical neglect, rape and forced labor.²⁵

Additionally, Chief Justice U Aung Toe has perpetrated intentional breaches of international law in his capacity as sitting Chief Justice and in his capacity as Chair of the National Convention Working Committee since 1992, Chair of the Commission for Drafting the State Constitution beginning in 2007, and Chair of the Commission for Holding Referendum for the Approval of the Draft Constitution of the Republic of the Union of Myanmar in 2008.²⁶

Under the firm leadership of Chief Justice U Aung Toe, the judiciary in Burma has become a critical criminal arm of the military.²⁷ The "rule of law" in Burma is one where judges routinely commit heinous crimes, including murder, by "means of court order." The judges in Burma perpetrate heinous crimes exactly as did judges in the regimes of Adolf Hitler,²⁸ Emperor Hirohito,²⁹ and Saddam Hussein³⁰ who were subsequently convicted of war crimes and crimes against humanity. The decisions in those cases rested on sham trials that handed down predetermined guilty findings accompanied by draconian prison sentences. All of the above is equally applicable to Burma.³¹

Notably, it was stated in the Justice Case during the Nuremberg Tribunals that "If the evidence cited supra does not demonstrate the utter destruction of judicial independence and impartiality, then we 'never writ nor no man ever' proved."³² The same can equally be said of Burma.

In the March 11 Report, the Special Rapporteur states that the crime of Daw Pone Na Mee (dae Mya Nyunt), an 84 year old crippled nun, was unknown. We note for the public record that Daw Pone Na Mee was convicted by Judge U Pyein Tun Aung on October 23, 2008 of pornography; a court order designed to both eliminate and humiliate her.³³



IV. The 2008 Constitution embeds permanent gender inequality and repudiates CEDAW

The March 11 Report commends Myanmar as a party to CEDAW³⁴ and encourages the government to implement the Committee's concluding recommendations on gender balance.³⁵ However, the 2008 constitution, embedding what constitutes de jure and de facto gender apartheid,³⁶ is a repudiation of Burma's CEDAW obligations.

Women are not allowed in the military except in honorary positions, and thus are precluded under the constitution from ever holding the top government offices, which are reserved for active military. This includes Commander-in-Chief, several ministries, and 25% of all parliamentary seats. Further this "military experience" qualification effectively makes women ineligible for both the Presidency and/or Vice Presidency.³⁷ No other constitution in modern history explicitly declares women as second-class citizens. This factor has been the focus of protests to the Secretary General by US Congresswomen and others.³⁸

We strongly urge you to use your mandate to address the illegality of the 2008 constitution rather than endorsing it and further legitimizing Burma's ongoing violations of peremptory norms.

Sincerely,

President
Global Justice Center

General Secretary
Burma Lawyers' Council

Cc: H.E. Mr. Alex Van Meeuwen, President of the Human Rights Council; Ms. Patricia O'Brien, Under-Secretary-General for Legal Affairs; Ms. Navanethem Pillay, UN High Commissioner for Human Rights; Mr. Ibrahim Gambari, Special Advisor to the Secretary-General; Sisi Shahidzadeh, Assistant to the Special Rapporteur; Stuart Groves, Senior Security Manager and Security Focal Point; Hannah Wu, Human Rights Officer, OHCHR Regional Office for South-East Asia

(Endnotes)

¹ 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. 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.

² Special Rapporteur on the Situation of Human Rights in Myanmar, Report of the Special Rapporteur on the Situation of Human Rights in Myanmar, Tomas Ojea Quintana, U.N. Doc. A/HRC/10/19 at 2 (Mar. 11, 2009) [hereinafter Special Rapporteur's Report] (Noting that one of the four core human rights elements includes "a review of national legislation in accordance with the new Constitution and international obligations....").

³ See 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."). While the Draft Articles are addressed to states, the obligations of non-recognition outlined in Article 40 and 41 regarding serious breaches of peremptory norms have long been recognized as applying to the UN and other organizations. See S.C. Res.554, ¶ 5, U.N.Doc. S/RES/556 (Aug. 17, 1984) (urging "all Governments and organizations not to accord recognition to the results of the so-called 'elections' and to take appropriate action, in cooperation with the United Nations...to assist the oppressed people of South Africa in their legitimate struggle for a non-racial, democratic society...."). See also 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, 473 (2009) ("The acceptance of human rights obligations enjoying the status of jus cogens conforms with the views of the International Law Commission that peremptory norms of international law apply to international organizations as well as to states, on the basis that states cannot avoid compliance with such norms by creating international organizations."). Furthermore, under Common Article 1 of the Geneva Conventions, all States undertake to "ensure respect for the present Convention in all circumstances." Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 1, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. This article, which applies to internal conflict, has been found by the International Court of Justice to constitute part of the "intransgressible principles of international customary law." *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 at ¶220 (June 27); *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 95 at ¶79 (July 8).

⁴ See Address by Ms. Navanethem Pillay, United Nations High Commissioner for Human Rights at the Annual Conference, FDFA Political Affairs Division IV, Human Security (Oct. 15, 2009) ("The growing acceptance of the compatibility of peace and justice is reflected in current international law and UN policy on amnesties. Amnesties are impermissible if they prevent prosecution of individuals who may be criminally responsible for war crimes, genocide, crimes against humanity, and gross violations of human rights.") See also 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.").

⁵ 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, 448 (2009). (Noting the human rights issues raised when members of the UNDP were eyewitnesses to government-perpetrated killings of monks in Myanmar in 2007).

⁶ Security Council Resolution 1820 "stresses the need for the exclusion of sexual violence crimes from amnesty provisions in the context of conflict resolution processes, and calls upon Member States to comply with their obligations for prosecuting persons responsible for such acts, to ensure that all victims of sexual violence, particularly women and girls, have equal protection under the law and equal access to justice...." S.C. Res. 1820, ¶ 4, U.N. Doc. S/RES/1820 (June 19, 2008). Nonetheless, the Myanmar constitution provides for such amnesties.



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.").

⁷ Burma ratified the Geneva Conventions 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>.

⁸ Special Rapporteur's Report, *supra* note 2, at 2.

⁹ S.C. Res.554, ¶ 5, U.N.Doc. S/RES/556 (Aug. 17, 1984) (calling for non-recognition of the 1983 constitution in apartheid South Africa due to its serious breaches).

¹⁰ Reuters, New Myanmar Constitution Gives Military Leading Role, Feb. 19, 2008, <http://www.reuters.com/article/worldNews/idUSBK10184120080219?feedType=RSS&feedName=worldNews>.

¹¹ Myanmar Constitution, *supra* note 6, at art. 445.

¹² *Id.*

¹³ See The Secretary-General, Report of the Secretary-General Pursuant to Security Council Resolution 1820 (2008), ¶29, U.N. Doc. S/2009/363 (Aug. 20, 2009); Basic Principles and Guidelines on the Right to A Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, U.N. Doc. A/RES/60/147 (Mar. 21 2006).

¹⁴ See S.C. Res.1325, ¶11, U.N. Doc. S/RES/1325 (Oct. 30, 2000); S.C. Res. 1674, U.N. Doc. S/RES/1674 (Apr. 28, 2006); S.C. Res. 1820, ¶ 4, U.N. Doc. S/RES/1820 (June 19, 2008).

¹⁵ The constitution states that "In the adjudication of Military Justice...the decision of the Commander-in-Chief is final and conclusive." Myanmar Constitution, *supra* note 6, 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. Note, this is a divergence even from Myanmar's previous constitutions. Under the 1947 constitution the president was the chief executive, there was no parallel 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 6, 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.

¹⁶ Myanmar Constitution, *supra* note 6, at art. 343.

¹⁷ 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 [hereinafter Geneva Conventions]; 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.

¹⁸ *Id.*

¹⁹ See 1820 Report, *supra* note 15 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."). See also SCR 1820, *supra* note 7 at ¶ 3; S.C. Res. 1888, ¶ 3, U.N. Doc. S/RES/1888 (Sept. 30, 2009);

²⁰ Geneva Conventions, *supra* note 18, at art. 1.

²¹ Jakob Kellenberger of the ICRC urged, "the government of Myanmar to put a stop to all violations of international humanitarian law and to ensure that they do not recur." 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.

²² Global indices on genocide placed Burma as eight on the red alert states at risk of genocide. See Genocide Prevention Project, Mass Atrocity Red Alert, <http://www.preventorprotect.org/overview/watch-list.html> (last visited Oct. 21, 2009). The ICJ has asserted that states have obligations to prevent genocide where such a risk exists. 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).

²³ 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....").

²⁴ 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." See 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).

²⁵ See Assistance Association for Political Prisoners, *Eight Seconds of Silence: The Death of Democracy Activists Behind Bars*, May 2006.

²⁶ See, Union of Myanmar Convening Commission for National Convention Letter No.3/Convention/1-Sa ma of December 1, 1992 on Formation of the Working Committee, *Working People Daily*, Dec 1, 1992; See also State Peace and Development Council of the Union of Myanmar, announcement No. 2/2007 issued as Commission for Drafting State Constitution formed, Oct 18, 2007, *Working People Daily*, Oct 18, 2007.

²⁷ See report by Asia Watch stating that sixty-two judges were reportedly deprived of office in 1989 after failing to comply with SLORC instructions to sentence political dissidents to prison terms longer than those permissible than in the prescribed laws. Asia Watch, *Human Rights in Burma* 12 (1990).

²⁸ See *The Justice Case*, 3 Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10, at 1024 (1951) [hereinafter *The Justice Case*].

²⁹ Japanese judges were convicted of war crimes for using false trials to convict and execute American Prisoners of War. See *Isayama trials*, *supra* note 3; *Hisakasu Trials*, *supra* note 3.

³⁰ The Iraqi High Tribunal found Judge Awad Hamed al-Bandar jointly criminally liable for crimes against humanity committed with Saddam Hussein because he used the pretense of judicial "authority and law" to try and then execute civilians. Under the leadership of Awad



Hamad Al Bandar, the court had issued an execution verdict against defendants after a period of only 17 days during a single session. See *al-Dujail Opinion*, *supra* note 3.

³¹ See Assistance Association for Political Prisoners, *The Darkness We See: Torture in Burma's Interrogation Centers and Prisons*, Dec. 2005.

³² *The Justice Case*, *supra* note 29, at 1024 ("In view of the conclusive proof of the sinister influences, which were in constant interplay between Hitler, his Ministers, the Ministry of Justice, the Party, the Gestapo, and the courts, we see no merit in the suggestion that Nazi judges are entitled to the benefit of the Anglo-American doctrine of judicial immunity. The doctrine that judges are not personally liable for their judicial actions is based on the concept of an independent judiciary administering impartial justice. Furthermore, it has never prevented the prosecution of a judge for malfeasance in office.") (emphasis added).

³³ See attachment 1

³⁴ Special Rapporteur's Report, *supra* note 2, at ¶14.

³⁵ *Id.*, at ¶15.

³⁶ 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).

³⁷ Myanmar Constitution, *supra* note 6, at art. 190.

³⁸ See Letter from the Senate Women's Caucus on Burma to Secretary-General Ban Ki-moon, Apr. 9, 2009, available at http://feinstein.senate.gov/public/index.cfm?FuseAction=NewsRoom.PressReleases&ContentRecord_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.

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