

FREQUENTLY ASKED QUESTIONS ABOUT BURMA AND THE INTERNATIONAL CRIMINAL COURT

1. Why is a referral of Burma to the ICC by the UN Security Council the only option to end impunity for grave violations of international humanitarian law?

The backdrop of a Security Council referral under Chapter VII to the ICC are the ongoing systematic crimes against the people of Burma, including but not limited to extrajudicial killings, rape and other forms of sexual violence persistently carried out by members of the military regime. These crimes have been documented in all 31 United Nations Resolutions on Burma and in the reports of all 8 United Nations Envoys, which called upon the regime to end impunity. Yet, the military regime has ignored United Nations recommendations most of which include a call for an independent investigation of crimes such as the Depayin massacre, the monks killed in October 2007, the rapes by the military of ethnic women and have called for an end to the arbitrary jailing of Aung San Sui Kyi.

Further, because the people of Burma have no access to a suitable judicial system, the ICC is the only avenue for bringing offenders to justice. In Burma there is no separation of powers between the executive and judicial branches of government. In fact, the junta uses the judiciary as one of its key weapons to commit crimes. For example, in November 2008, certain judges acting under the orders of Chief Justice U Aung Toe and Senior General Than Shwe convicted 280 political activists and issued sentences ranging from 4 to 104 years in prison.ⁱ The judges did not allow defendants to question prosecution witnesses, many defendants did not have legal representation and those that did were not permitted to meet with their lawyers in private. United Nations Special Rapporteur on Human Rights in Burma, Tomás Ojea Quintana said in reference to these convictions that, “There is no independent and impartial judiciary system [in Burma].”ⁱⁱ

The ICC was created to intervene in situations when the countries themselves are unable or unwilling to investigate or prosecute. Under the current conditions in Burma, one would be hard pressed to argue

that the judiciary is at all capable of prosecuting those responsible for the atrocities perpetrated by the regime.

2. Why should the Security Council act under its Chapter VII power to refer Burma to the ICC?

The UN Charter, a binding treaty ratified by all member states of the UN, gives the Security Council the authority to act. Under its Chapter VII powers, the Security Council shall make recommendations or decide what measures to take to maintain or restore international peace and security.”

The Security Council’s own agreement to work in cooperation with the ICC and its sole power to refer situations of nonparties to the ICC provides a new opportunity to the victims of the armed conflict in Burma. This does not mean that the Security Council is obliged or should refer every situation involving a humanitarian crisis or violations of human rights to the ICC. However, in order to promote the legitimacy of both the ICC as an institution and the referral power of the Security Council, the Council must act with an even hand. In the situation of Burma, where grave crimes have been verified as ongoing and intransigent by no less than the International Committee of Red Cross, and where UN Security Council Resolutions 1325 and 1820 mandate criminal accountability for the perpetrators of gender crimes in conflict, the Security Council must live up to its responsibility.

Independent of the ICC there is a duty to prosecute in the case of grave breaches of the Geneva and Genocide Conventions. Burma ratified those two treaties in 1992 and 1956 respectively. In fact, under the Genocide and Geneva Conventions, Burma not only pledged to investigate and prosecute heinous crimes but also consented to the Security Council’s role as the ultimate enforcer of accountability for such international humanitarian law treaty violations. Under Article 8 of the Genocide Convention, for example, the Security Council can be seized by any party to the Convention-- “Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.”ⁱⁱⁱ

This obligation was affirmed by the Security Council, the European Union and fifty-five governments in signing the Stockholm Declaration on Genocide in 2004^{iv}. This Declaration signaled a renewed commitment to enforcing the Convention thus reaffirming the state parties' legal responsibility to protect groups identified as potential genocide victims and to ensuring that perpetrators of genocidal acts are held accountable – which is now made more feasible since the establishment of ICC.

3. What effect may a referral have on the upcoming elections of 2010 in Burma?

A Security Council referral of the Burma situation to the ICC would render the 2010 elections illegitimate. If the Security Council issues a referral, Senior General Than Shwe and his cohorts would be immediately labeled as war criminals by the international community and rendered unqualified to run for office.

The commencement of criminal proceedings has in the past prevented suspected war criminals from running for office. For example, as Europe began to rebuild after the atrocities of World War II, former Nazis in countries that had been part of Nazi-controlled Europe were not able to run for office, even if they had not been indicted for crimes committed during the war. An ICC referral would have a similar effect on those criminals in Burma who would run in the 2010 elections.

4. How does the Security Council determine if a situation is a “threat to the peace,” and therefore that it can act under Chapter VII?

The Security Council has equated massive humanitarian crimes with a threat to peace. Some examples include:

- i. The passage of Security Council Resolution 688 on Kurdistan, Iraq (1991). Resolution 688 stated that the consequences of the “repression of the Iraqi civilian population...threaten international peace and security in the region.”^v
- ii. In 1992, the horror expressed by the global community in reaction to the atrocities committed in the former Yugoslavia propelled the Security Council to equate such “crimes against humanity” with a “threat to the peace”. Acting under Chapter VII, the Security Council passed Resolution 780 noting that the violations of international humanitarian law, “including reports of mass killings and the continuance

of the practice of ‘ethnic cleansing’” mandated the creation of an “Impartial Commission of Experts” to investigate the crimes”. The Security Council subsequently created the International Criminal Tribunal for the former Yugoslavia via Resolution 827.^{vi}

iii. The Security Council actions taken on Sierra Leone, Afghanistan, Haiti, Rwanda, Liberia and Cambodia demonstrate the Security Council’s increased willingness to address systematic internal humanitarian criminal violations as a threat to peace.

iv. Most recently, the Darfur, Sudan ICC referral is a symbol that the Security Council will enforce justice and accountability as fundamental to rule of law by using its Chapter VII power to respond to severe violations of international law and provide redress and justice.

5. Can the Security Council act “to maintain or restore international peace and security” in Burma, an internal conflict?

Yes. There is now consensus in the global community that grave and systematic violations of humanitarian law constitute a Chapter VII threat to peace regardless of whether the conflict is of an internal or international character.

6. The people of Burma have been ruled by a repressive regime for over 60 years. Would an ICC referral be able to hold individuals responsible for crimes committed prior to 2002?

No. The ICC can only prosecute crimes that occurred after July 1, 2002, when the Rome Statute came into force.^{vii} Any ICC investigation should be accompanied by a simultaneous campaign to encourage parallel prosecutions in national courts of perpetrators whose crimes took place prior to 2002, or the creation of an ad hoc tribunal to prosecute pre-2002 crimes.

7. Does the Rome Statute cover the crimes occurring in Burma?

Yes. The crimes committed against the people of Burma rise to the level of crimes against humanity, war crimes and genocide as defined under the Rome Statute. In fact, numerous UN Resolutions and Envoys have repeatedly expressed grave concern about ongoing violations and have called upon the regime to end impunity. For example, in the last report submitted to the United Nations by Special

Rapporteur on the Situation of Human Rights in Burma, Paulo Sérgio Pinheiro, confirmed that, “Such a culture of impunity which continues to pervade in Myanmar, whereby State agents who perpetrate serious crimes are rarely prosecuted, is of grave concern” he also expressed concern that, “those who lodge complaints to the authorities find no avenue of redress but, rather, are liable to reprisals.”^{viii}

In 2008 alone, Human Rights Watch issued its World Report detailing the political imprisonment of over 2,120 individuals, as well as continued violence against ethnic groups, including forced labor, rape, and summary executions.^{ix} This NGO also estimated that 40,000 civilians had been displaced within two years as a result of a large-scale military offensive in the northern Karen state.^x These numbers pale in comparison, however, to the over 450,000 to half a million Burmese deemed to be internally displaced in eastern Burma.^{xi} Because the SPDC restricts the activities of foreign aid agencies and blocks humanitarian aid to areas of ongoing conflict,^{xii} it is highly probable that these numbers represent a floor, rather than a ceiling.

Additionally, the International Labor Organization (ILO) reports that forced labor remains widespread in Burma, particularly by the army, and continues to expand.^{xiii} A report issued by the Karen Women’s Organization documents hundreds of cases of rape, forced pregnancy and murder documented by witnesses and survivors, and reports that “at the time of publication in April 2004, Karen women continue to be killed and raped by SPDC soldiers, forced to work as porters and forced from their homes.”^{xiv} In the same vein, the government’s own “Four Cuts Policy” detailing its plan to “cut off communication between villages and the insurgency movements, cut back on new recruitment for insurgency groups, cut up their logistics and cut down their flow of information” has resulted in indiscriminate violence against countless innocent civilians in clear violation of international law.^{xv}

These examples make clear that crimes are occurring in Burma at the hands of the military regime. The Security Council must now take the necessary steps to insure that allegations of war crimes, crimes against humanity and genocide reported by the international community and by many victims of the regime are fully addressed.

8. How could the Security Council refer Burma to the International Criminal Court?

Any UN Security Council member acting under Chapter VII of the UN Charter may support a draft resolution to refer a situation to the Prosecutor of the ICC. Although there is no detailed provision in the Rome Statute, the Security Council referrals to the ICC are governed by Article 13(b) of the Treaty. Nine votes are required to adopt a resolution, but any permanent member may exercise a veto (or abstain).

If jurisdiction is triggered, whether the ICC can operate effectively and perform its mission largely depends on the degree of co-operation provided to it by states. Under the Rome Statute, only member states to the ICC are bound to cooperate with any ICC investigation. However, when the Court's jurisdiction is triggered via a Security Council referral, the obligation to cooperate extends to non-member states and is no longer voluntary in nature, but is instead obligatory in the sense of customary international law.^{xvi} Thus, if the Security Council adopts a Burma resolution under Chapter VII, all member states are bound to cooperate with the investigation.

9. What are the political challenges facing a Security Council referral to the ICC?

The major obstacles to obtaining a Security Council referral to the ICC are the three permanent Security Council members: China, Russia, and the United States. Nevertheless, a useful example for comparison to the Burma situation is the Darfur referral. China and the United States did not veto the resolution referring Darfur but rather abstained. This abstention was enough to obtain a referral.

The reasons behind the Commission's referral recommendation were numerous and several parallels are present between the rationale for the referral of Darfur and the current situation in Burma. First, the Commission felt that the situation in Darfur threatened international peace and security. Second, it believed that since high-ranking State officials were suspected of committing the offenses, it would be difficult to investigate them in Sudan, thus use of the ICC was the only way to ensure justice, in particular because "holding trials away from the *locus delicti* (where the crime took place) 'might

ensure a neutral atmosphere and prevent the trials from stirring up political, ideological or other passions.”^{xvii} Third, the Commission felt that the authority of the Security Council and the ICC might persuade those high-level officials suspected of crimes to submit to a trial. The other reasons were of a more procedural nature, focusing on the fairness, efficiency and financial status of the ICC.^{xviii}

The ultimate success of this referral stemmed from the notable abstention, rather than the exercise of their veto, of the U.S. and China, ensuring, according to some, at least a limited future for the ICC.^{xix} The U.S. abstention indicates that rather than push their persistent opposition to the Court by exercising the veto in the case of all suggested referrals, the U.S. will instead use its veto power to receive specific assurances that its nationals will be excluded from Security Council referrals and exempted from the Court’s jurisdiction.^{xx} Many speculate that China abstained despite having strong financial interests in the Sudan because China did not want a negative human rights reputation.^{xxi} It is possible therefore, that similar diplomatic maneuvering may override a potential China veto and bring Burma into the ICC as well.

There is further hope that the US will support a Burma referral by the Security Council with the incoming Obama administration. When asked about his stance on cooperation with the ICC, President-Elect Obama stated, "The Court has pursued charges only in cases of the most serious and systemic crimes and it is in America's interests that these most heinous of criminals, like the perpetrators of the genocide in Darfur, are held accountable. These actions are a credit to the cause of justice and deserve full American support and cooperation."^{xxii}

10. How would a Burma resolution today differ from the draft resolution vetoed by the Security Council in 2007?

In January 2007, a resolution on Burma was put forward by the United States, the United Kingdom and Northern Ireland.^{xxiii} Despite garnering 9 “yes” votes, 3 abstentions and 3 “no” votes, the resolution was vetoed by China and Russia causing it to fail.^{xxiv} The arguments given by the countries that voted “no”, South Africa, China and Russia included: 1) that it was an internal matter of a sovereign state, 2) that it would interfere with the “good offices” of the Secretary General, 3) that it was best left to other

bodies of the United Nations such as the Human Rights Council, and 4) that the situation was not a threat to international peace and security.

A focus on the crimes provides a new impetus for action. The Security Council has recognized that when there are crimes rising to the level of war crimes, crimes against humanity or genocide it is no longer an internal matter of a sovereign state and, as demonstrated above, the other bodies of the United Nations have proven ineffective at halting or even deterring the crimes. In addition, these crimes, as a threat to the peace, belong in the purview of the Security Council.

ⁱ Assistance Association for Political Prisoners in Burma (AAPP), *Chronology of Political Prisoner in Burma for December 2008* available at <http://www.aappb.org/release131.html>.

ⁱⁱ VOA Interview with Tomas Ojea Quintana, United Nations Special Rapporteur on Human Rights in Burma, available at <http://www.voanews.com/burmese/2008-11-18-voa6.cfm>.

ⁱⁱⁱ *Convention on the Prevention and Punishment of the Crime of Genocide* pt. XIII, art.7 (Jan 2, 1951)

^{iv} *Declaration by the Stockholm International Forum 2004*, available at <http://www.preventgenocide.org/prevent/conferences/StockholmDeclaration28Jan2004.htm>

^v U.N. SCOR, 2982nd mtg. at 1, U.N. Doc. S/RES/0688 (1991).

^{vi} The Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/827 (May 25, 1993).

^{vii} See Rome Statute of the International Criminal Court, Preamble paras. 4&5, July 17, 1998, U.N. Doc. A/Conf.183/9th [hereinafter Rome Statute].

^{viii} E/CN.4/2006/34. P.19.

^{ix} See Human Rights Watch, World Report 2008, at 226, available at <http://www.hrw.org/wr2k7/wr2007master.pdf>.

^x *Id.*, at 225.

^{xi} *Id.*, at 227.

^{xii} *Id.*, at 247.

^{xiii} Gustavo Capdevilla, *Rights-Burma: No End to Forced Labour*, IPS NEWS, Jun. 15, 2008, available at <http://ipsnews.net/news.asp?idnews=38199>.

^{xiv} The Karen Women's Organization, *Shattering Silences: Karen Women Speak Out About the Burmese Military Regime's Use of Rape as a Strategy of War in Karen State*, at 6 (April 2004).

^{xv} Khin Maung Win, *Designing Constitution as Policy Formulation to Stop Human Rights Violations*, 8 Legal Issues on Burma J. (Apr. 2001), available at <http://www.ibiblio.org/obl/docs/LJOB08-KMW.htm>.

^{xvi} Zhu Wenqi, 'On Co-operation by States not Party to the International Criminal Court' (2006) 88:861 *International Review of the Red Cross* 88.

^{xvii} See Robert Cryer, *Sudan, Resolution 1593, and International Criminal Justice*, 19 LEIDEN J. OF INT'L L. 195, 200 (2006).

^{xviii} *Id.* at 200.

^{xix} George P. Fletcher and Jens David Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, in *Symposium: The Commission of Inquiry on Darfur and Its Follow-Up: A Critical View*, 4 Nw. U. J. Int'l Hum. Rts. 561.

^{xx} *Id.* at 561.

^{xxi} Christopher Hitchens, "Maintained in China: Burma's foul regime depends on Beijing," 1 October 2007, Slate, <http://www.slate.com/id/2175047/>.

^{xxii} Citizens for Global Solutions, available at <http://www.globalsolutions.org/node/1157>.

^{xxiii} S/2007/14 (January 12, 2007).

^{xxiv} Security Council Report, Update Report No. 3, Myanmar, 12 November 2007 available at <http://www.securitycouncilreport.org/site/c.glKWLeMTIsG/b.3580913/>.