

Campaign to End Impunity in Burma

Advocacy Toolkit

Burma Lawyers' Council

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Toolkit Components

- Overview: Campaign to End Impunity in Burma
- Q & A: The International Criminal Court (ICC)
- Definitions of International Crimes Under the Rome Statute and Examples of Violations
- Advantages of an ICC Referral for the People of Burma
- The Commission of Inquiry and Referral to the International Criminal Court
- ICC Chief Prosecutor's Initiation of Investigations *Proprio Motu* to Facilitate Ending Impunity in Burma
- Reformation of Judiciary to End Impunity in Burma
- Q & A: The 2010 Elections and the Campaign to End Impunity in Burma
- Intersections Between the Campaign to End Impunity in Burma and Other Campaigns
- Messages and Opportunities for Faith-Based Groups
- Recent Notable Successes in the Campaign
- How to Get Involved in the Campaign to End Impunity in Burma
- Appendix

The purpose of this toolkit is to introduce individuals and organizations already familiar with Burma's human rights situation to the work of the campaign to end impunity in Burma. The following materials are introductory in nature. For more detailed information, please contact:

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This toolkit is intended to be a living document. Please send ideas for additions and other suggestions to the above individuals.

Campaign to End Impunity in Burma

Burma's ruling junta, the State Peace and Development Council (SPDC) is committing war crimes and crimes against humanity under a system of total impunity. Local groups have documented these crimes and have demonstrated the widespread and systematic nature of the abuses. The SPDC enshrined a blanket amnesty for perpetrators of these heinous crimes in its 2008 Constitution, erasing hope that victims would be able to seek justice in Burma. The United Nations Security Council (UNSC) can establish criminal accountability for Burmese leaders by creating a commission of inquiry (COI) to investigate international crimes in Burma. This commission may request that the UNSC refer the situation of Burma to the International Criminal Court (ICC), which would in turn restore the rule of law to Burma.

Most importantly, reforming state institutions from those controlled by the military to those which protect the rights of people on the basis of the rule of law is the overarching goal of the campaign and is a way to end impunity in Burma in the long term.

Objectives

- Urge the UNSC to establish a commission of inquiry to investigate international crimes and impunity in Burma and encourage the UNSC to refer the situation of Burma to the ICC.
- Provide evidence to the Chief Prosecutor of the ICC in order that he may initiate investigations into conspirators with the regime who may fall under the Court's jurisdiction.
- Facilitate efforts for institutional reform in Burma, centering on the judiciary.

Messages

- The war crimes and crimes against humanity perpetrated by the SPDC are not just human rights abuses – they are international crimes that must be prosecuted.
- Security Council Resolutions 1325 and 1820 mandate accountability for perpetrators of sexual violence against civilians in conflict situations. There can be no amnesty for such serious crimes.
- The international community has a responsibility to protect civilians of Burma from further attacks and ensure government authorities obey their international obligations. One way to protect the people of Burma from future violence and provide a measure of justice for victims is to urge the UNSC to establish a commission of inquiry to investigate international crimes.

Q & A: The International Criminal Court (ICC)

What is the ICC?

The ICC is a permanent court established by the Rome Statute (a treaty agreement between countries) to prosecute persons for the most serious international crimes.

Why was there a need for the ICC?

Various post-conflict situations required ad hoc and hybrid tribunals which required difficult political negotiations, funding, and limited jurisdiction. There was a need to have a permanent court to deal with international crimes when and where they occurred without these limitations.

Is the ICC part of the United Nations (UN)?

No, the ICC is not a UN body, but it has a special relationship with the UN. The ICC reports to the UN Security Council every year about what it has been doing, and the UN Security Council has the power to make referrals to the court.

Which crimes may be prosecuted under the ICC?

Genocide, crimes against humanity, and war crimes may be prosecuted under the ICC if they occur after 1 July 2002.

Who may be prosecuted?

Individuals (not organizations, groups, or any other entities) who commit a crime; order, solicit, or induce a crime; aid, abet, or otherwise assist a crime; contribute to a crime by a group of persons acting with a common purpose; attempt to commit such a crime; or incite others to commit genocide.

Commanders in a “superior-subordinate relationship” with the perpetrator of the crime may be prosecuted when:

- the commander **knew** or **should have known** that the crimes were about to be or had been committed or
- the commander **failed to take the necessary and reasonable measures** within his or her power to prevent or repress their commission or to refer to the competent authorities for investigation and prosecution

How do cases come before the ICC?

There are three ways in which a case can come before the ICC. First, a country can refer itself to the Court if it is a state party to the Rome Statute. Second, the prosecutor at the ICC can initiate an investigation on his or her own initiative if the country under investigation is a state party to the Rome Statute. Third, if the country is not a state party to the Rome Statute, the United Nations Security Council can refer the situation to the ICC. Under the principle of complementarity, the ICC will only have jurisdiction over crimes if domestic courts of the country are unwilling or unable to try the cases themselves.

Definitions of International Crimes Under the Rome Statute and Examples of Violations

Article 6: Genocide

“Genocide” means any of the following acts committed **with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group**, as such:

- Killing members of the group;
- Causing serious bodily or mental harm to members of the group (including rape and sexual assault);
- Deliberately inflicting conditions of life calculated to bring about its physical destruction in whole or in part;
- Imposing measures intended to prevent births within the group;
- Forcibly transferring children of the group to another group.

Necessary condition: The conduct of the perpetrator must present a **concrete threat** to the **existence** of the targeted group as opposed to being a latent or hypothetical threat. If an **intent to destroy** the target group is not established but victims are chosen due to discriminatory premises, the act may qualify as persecution under the definition of crimes against humanity.

Examples: There may not be conclusive evidence of genocide until an official commission of inquiry investigates international crimes in Burma, but repeated attacks against particular ethnic groups may indicate the State Peace and Development Council (SPDC)’s intent to destroy these groups. Note that finding this intent is necessary in order to meet the elements of the crime of genocide.

Article 7: Crimes Against Humanity

“Crimes against humanity” refers to any of the following acts when committed as part of a **widespread or systematic attack directed against any civilian population**, with knowledge of the attack:

- Murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment in violation of international law principles, torture, sexual violence, persecution of any identifiable group or collectivity, enforced disappearance, apartheid, other inhumane acts intentionally causing great suffering or serious injury to body, mental, or physical health.

Necessary condition: Acts must be committed as part of a **widespread (large scale) or systematic (organized)** attack against people NOT taking part in active hostilities.

Examples: The SPDC has committed numerous crimes against humanity against the people of Burma. The widespread and systematic **forced relocation** of people is but one example, as is the widespread **sexual violence** and **persecution** of ethnic groups. These crimes are not insular but rather indicators of state policies to use criminal acts as a tool of oppression.

Article 8: War Crimes

“War Crimes” include any of the following acts committed **against persons taking no active part in the hostilities**, including members of armed forces who have laid down their arms and those placed out of combat by sickness, wounds, detention or any other cause (redacted list):

- Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
- The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable;
- Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
- Intentionally directing attacks against buildings dedicated to religious, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
- Committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and other forms of sexual violence;
- Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
- Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
- Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.

Necessary condition: Existence of an **armed conflict** between two or more groups. Similar acts not conducted in an armed conflict may however qualify as crimes against humanity.

Examples: The use of **child soldiers** by any party involved in armed conflict would be a war crime. So too would be the use of **rape as a weapon of war**, **indiscriminate attacks** on civilians, and the **forced relocation** of civilians.

Advantages of an ICC Referral for the People of Burma

Bringing perpetrators to the International Criminal Court (ICC) is one of the only ways in which victims can receive some measure of justice.

Victims of heinous crimes have no recourse to justice in Burma. The judicial system is under the thumb of the State Peace and Development Council (SPDC), Burma's military regime. Such control over the judiciary render courts unable to effectively try perpetrators in the military. A provision in the 2008 Constitution aims to solidify impunity for government criminals. Article 445 states that no court will have the power to hear any proceeding against a member of the government, thereby granting a blanket amnesty to all military perpetrators. Because there is no opportunity for victims to seek justice in Burma's domestic courts, they must look elsewhere. The ICC was designed for these exact situations where domestic courts are unwilling or unable to try cases themselves.

Indictments against SPDC officials will further isolate the regime politically.

Other countries that are parties to the Rome Statute would have the obligation to arrest individuals in their territory who have ICC arrest warrants and turn them over to the Court. Traditional allies of Burma would have difficulty continuing their support of the regime under these circumstances.

An ICC referral would deter future crimes and increase international attention on Burma.

An ICC referral will widen the international spotlight on Burma. Action at the ICC level will show the SPDC that they will be held accountable for their actions. Additionally, pressure to bring perpetrators to trial can deter future commission of crimes.

Local non-governmental organizations will conduct significant fact-finding and documentation throughout the course of the campaign.

In preparation for an ICC referral, local organizations are conducting significant fact-finding efforts. Various organizations are documenting cases of crimes against humanity, war crimes, and other crimes to galvanize momentum for an ICC referral. This information also can be used in international advocacy efforts for a number of other campaigns and as part of other transitional justice mechanisms after a shift to new leadership.

While beneficial, an ICC referral is not enough.

Action at the ICC needs to be mirrored by other reforms and justice initiatives within Burma. Prosecutions at the ICC are one method of achieving justice, but these cases will focus only on selected individuals who are found to be the most responsible for the most serious crimes. Transitional justice, on the other hand, is a holistic process that can punish perpetrators, legitimize the experiences of victims, and rebuild society. Truth commissions, for example are venues through which victims can share their experiences and legitimize their suffering. Institutional reform that allows the establishment of accountable and transparent government bodies is another important aspect of transitional justice. The search for justice must be multi-faceted and does not end with prosecutions.

The Commission of Inquiry and Referral to the International Criminal Court

Authority and Background

Chapter VII of the United Nations Charter gives the United Nations Security Council (UNSC) the authority to determine the existence of threats to peace in the international community, to make recommendations, and to take certain measures in order to maintain or restore international peace and security. One of the ways in which the UNSC can determine if threats to peace exist is by establishing a Commission of Inquiry (COI) to investigate the conflict zone or by referring a particular situation to the International Criminal Court (ICC).

Commission of Inquiry

The COI is a fact-finding mission consisting of a team of legal experts and investigators sent to the conflict location to establish whether violations of international law and human rights law have been committed, identify those responsible, and suggest further actions to ensure that those responsible are held accountable. During its mission, the COI may interview witnesses, visit places of violent conflict, and gather physical evidence while working with the local authorities under United Nations protection.

Establishing a COI

The UNSC adopts a resolution (which requires 9 yes votes and no vetoes from the 5 permanent members) requesting the Secretary General to set up the COI with certain investigative objectives and deadlines for reporting. The Secretary General appoints the most senior members of the investigative mission, including the Commission's Chairperson.

Report and Recommendation

Upon the conclusion of its mission, the COI writes a comprehensive report, with recommendations, and submits it to the Secretary General, who sends the report to the UNSC and its President. The commission may suggest that the UNSC refer the matter to the International Criminal Court, as in the case of Sudan.

From a COI to the ICC

The UNSC has the power to make case referrals to the court according to Article 13 of the ICC Statute. This is the only way for the ICC to have jurisdiction over alleged perpetrators from states that have not signed on to the ICC Statute, such as Burma and Sudan. If a matter is referred by the UNSC, the Prosecutor can investigate conflict and indict and prosecute individuals in a country irrespective of the nationality of the accused or the location of the crime.

The UNSC Referral Process

Based on the COI report and recommendation, as in the case of Sudan, and other evidence, the UNSC may vote to refer the specific matter to the ICC. The UNSC referral requires 9 yes votes out of 15. UNSC members can decide to vote for or against a referral, or abstain

(decide not to vote at all). The permanent members of the UNSC – USA, France, China, UK and Russia – have the veto power over a successful referral. Should a permanent member of the UNSC vote against a referral, the referral will be stopped. If, however, a permanent member abstains from voting on a referral, the referral will be allowed to proceed should there be enough yes votes to pass it.

The Importance of a COI as a First Step

While a COI is not a legal requirement for the UNSC to refer a situation to the ICC, it builds the necessary political momentum to ensure sufficient yes votes and to deter vetoes from the permanent members. While there may be ample evidence from civil society groups regarding the commission of international crimes, the UNSC is often reluctant to refer a situation to the ICC without a thorough investigation by a UN body. The importance of a COI is evidenced by the successful referral of the case of Sudan to the ICC.

Differences Between the Situations of Sudan and Burma

The ICC issued arrest warrants for Omar Al-Bashir, President of Sudan, on March 4, 2009. To this date, Al-Bashir has not been apprehended, spurring criticism from those who believe the ICC is ineffective. Note, however, that Al-Bashir has avoided arrest due to the protection of the African Union and the Arab League. In Asia there is no regional organization that will protect Senior General Than Shwe or other leaders. Also, In Burma there is the charismatic national leader Daw Aung San Suu Kyi who is well-known around the world; there is the National League for Democracy (NLD), the party that influences many people in Burma; there are the 1990 May election results which showed overwhelming support for the NLD; and almost all major ethnic armed resistance organizations are struggling against the rule of the military dictatorship and asking for their right to self-determination. These conditions do not exist in Sudan. If the ICC takes action regarding Burma, it may impact political changes. Impunity can come to an end and the rule of law and long-term peace can be restored.

The ICC Chief Prosecutor's Initiation of Investigations *Proprio Motu* to Facilitate Ending Impunity in Burma

Meeting with the ICC Chief Prosecutor

Under the guidance of the Coalition for the International Criminal Court (CICC)'s initiation, representatives of civil society organizations from the states that founded the ICC held a meeting with ICC Chief Prosecutor Mr. Luis Moreno-Ocampo on 23 November 2009 during the Eighth session of the Assembly of States Parties.

ICC Chief Prosecutor's Response to the Questions Regarding Burma

The Chief Prosecutor, after collectively receiving questions from a total of fifteen nations, responded to questions regarding Burma. He responded with full interest and stated in his first response that he cannot initiate investigations *proprio motu* (on his own initiative) because Burma has not ratified the Rome Statute and because the UN Security Council has not yet referred the situation of Burma to the ICC. He then explained in detail the conditions that might allow initiation of investigations *proprio motu*. He could do so only if he obtained evidence brought forward against a citizen belonging to one of the 110 states that have signed and ratified the Rome Statute which proves that the citizen has conspired with and abetted the SPDC in the commission of international crimes.

The ICC Chief Prosecutor's Reference to the Case of David Benjamin from Israel

The Chief Prosecutor explained the issue by referring a specific incident in which the ICC currently has the ability to prosecute a citizen. Lieutenant-Colonel David Benjamin is an Israel Defense Forces reserve officer who was on duty as a member of the Israeli Military Advocates General's international law department. There have been allegations that Lieutenant-Colonel Benjamin was involved in the war crimes committed during the three weeks of war in Gaza. Mr. Benjamin is a citizen of both Israel and South Africa. There is currently no ability to prosecute him at the ICC since Israel has not signed nor ratified the Rome Statute. However, since South Africa has signed and has ratified the Rome Statute, if a South African citizen committed a crime that falls into one of three international crimes under the Rome Statute, then the ICC may exercise its jurisdiction to prosecute him.

This would mean that there may be people who have conspired with and abetted the SPDC military leaders in committing a crime listed under the Rome Statute. If these individuals are citizens of one of the states that signed and ratified the Rome Statute, then they may fall under the ICC's jurisdiction. Note that there are currently 111 states which have ratified the Rome Statute after Bangladesh did so in March 2010.

Reformation of the Judiciary to End Impunity in Burma

In the realm of human development, one of the core principles and drivers of economic growth, political modernization and the protection of human rights is the rule of law - a legal-political regime under which the law restrains the government by promoting certain liberties and creating order and predictability regarding how a country functions. In the most basic sense, it is a system that protects the rights of citizens from arbitrary and abusive use of government power and has the effect of furthering democracy.

A politically independent and impartial judiciary is crucial to the establishment of the rule of law. It is necessary for resolving disputes among citizens as well as between citizens and the government in an unbiased, transparent, predictable and interpretive manner. Political independence is achieved through the separation of powers, which ensures that the courts are respected by all parties to the dispute, especially by the government itself. Only after the establishment of the rule of law will ending impunity in Burma become a reality for the long term.

Burma's judiciary has been unable and unwilling to confront rampant, systematic and heinous human rights violations taking place on Burma's soil under the auspices of the regime. Judicial independence and impartiality remain nonexistent. The courts, through SPDC directives, serve mainly to oppress political opponents and ethnic minorities. Judges and lawyers are unable to perform their professional functions impartially for fear of reprisals should they be identified as opponents of the regime. Due process and fair trial guarantees are ignored in practice and procedures for arrest and detention are frequently violated, particularly where persons are arrested on political grounds.

Mr. Tomas Ojea Quintana, UN Special Rapporteur on the situation of human rights in Myanmar, provided the following recommendations for Burma's judiciary in September 2008:

- (a) Exercise full independence and impartiality, particularly in cases involving prisoners of conscience;
- (b) Guarantee due process of law, including public hearings, in trials against prisoners of conscience;
- (c) Refrain from charging individuals for alleged infringement of national laws which are under review according to recommendation No. 1;
- (d) Establish effective judicial mechanisms to investigate human rights abuses in order to fight impunity;
- (e) Seek international technical assistance with a view to establishing an independent and impartial judiciary that is consistent with international standards and principles.

Institutional reform is essential and must accompany any international prosecution. Centering on the judiciary, reforming state institutions from those controlled by the military to those which protect the rights of people on the basis of the rule of law is the way to end impunity in Burma for the long term. Reform may become a reality through cooperation between the people of Burma and the international community.

Q & A: The 2010 Elections and the Campaign to End Impunity in Burma

Why are the 2010 Elections important?

The 2010 Elections will be the first elections held in Burma since 1990. The ruling State Peace and Development Council (SPDC) announced these elections as a crucial part of their seven-step “Roadmap to Democracy.” The SPDC alleges that completely new government officials will be elected in an attempt to transition Burma from military to civilian rule. However, the imprisonment of key opposition leaders and strict regulations regarding political party formation and political candidacy will allow the SPDC to effectively eliminate real opposition. The elections are designed to promote civilian proxy parties that will act as a puppet government for the military.

What is the relationship between the 2008 Constitution and the 2010 Elections?

The 2008 Constitution was illegitimately “approved” under a referendum marred with electoral fraud during the Cyclone Nargis crisis, and would be implemented with the results of the 2010 Elections. The Constitution includes aspects contrary to international legal principles, and fails to address underlying ethnic and social issues in the country. Additionally, an analysis of the 2008 Constitution shows that certain provisions would perpetuate military control, eliminating the hope for transition to civilian governance.

The 2008 Constitution creates and exacerbates many problems in the country. Since the 2008 Constitution was written without the consultation of political parties and ethnic groups, many of their concerns are not included. If a new government takes power without addressing the current problems, it is likely that the internal conflict and human rights violations will continue.

What is a specific problem of the 2008 Constitution?

The UN, Amnesty International, Human Rights Watch, and many other human rights organizations have documented thousands of human rights violations perpetrated by the SPDC. Article 445 of the constitution declares that no proceeding may be taken against any member of the SPDC or the State Law and Order Restoration Council (SLORC)—the SPDC’s predecessor—for any act committed while they were in power. This creates a culture of impunity where anyone is free to commit crimes without punishment, which means that the legal system will remain dysfunctional with no access to justice for victims. The impunity provision violates well-established customary international law. There is precedent for nullifying such illegal constitutions: the UN Security Council nullified South Africa’s 1983 Constitution because it served to perpetuate apartheid. Because the 2008 Constitution threatens to solidify military dictatorship, similar action would be justified here.

Is there any way that the elections and constitution could result in democratization?

The current constitution does not set up the necessary foundation for democracy, which requires checks and balances between the different branches of government. Additionally,

because of specific restrictions in the new constitution, many stakeholders (different political and ethnic groups) will not be represented in parliament.

Isn't any civilian government, even flawed, better than a military dictatorship?

The military claims a dominant role that allows it to retain *de facto* power despite the transition to a civilian government. For example, the military is guaranteed 25 percent of seats in parliament, and over 75 percent approval is needed to amend the constitution. As a result, no amendments can be made without military agreement. The 2008 Constitution also calls for the introduction of the National Defense and Security Council (NDSC), to be made up of individuals from a military background, which will exercise executive power in the place of the SPDC. Most importantly, the military will not answer to a civilian government. Without a civilian check, military rule will continue unabated.

Why did the National League for Democracy decide to boycott the elections?

The SPDC recently announced election laws that deviate from international democratic standards. The law forbids political prisoners, monks, nuns, and other people from participating in the elections and requires political parties to expel imprisoned members before registering. This particularly targets the National League for Democracy (NLD), of which nearly 500 of its members are in prison and whose leader, Aung San Suu Kyi, is currently under house arrest. The law also calls for the formation of an Election Commission, hand-picked by the military, to oversee the electoral process. The Commission can choose not to hold elections in areas of "security" risks, which may likely include areas where the junta is fighting ethnic minority groups. The Commission would therefore have the power to deny large swaths of voters the right to participate in the elections. The election laws are designed to keep opposition groups out of power and promote allies of the junta. The NLD recognized the election laws as wholly unjust and chose not to participate in elections that do not uphold basic democratic principles. The leadership of the NLD likely chose not to participate in the elections because they did not want to lend the flawed elections any legitimacy. Opposition groups are supporting the decision of the NLD as long as the 2008 Constitution and the election laws remain unchanged. Such groups also urge local people to report observations of election fraud in order to document the illegality of the election.

Intersections Between the Campaign to End Impunity in Burma and Other Campaigns

The 2010 Elections Campaign

The elections do not represent a transition to democracy but rather a continuation of military rule. The junta is taking steps to make sure that only members of the military and sympathetic groups emerge successful from the elections. Approximately 2100 political prisoners remain behind bars, and the regime has shown no sign thus far of releasing them before the elections.

The 2010 elections will perpetuate rampant criminality and will maintain a culture of impunity in Burma. The 2008 Constitution threatens to enshrine impunity for all crimes committed by the State Peace and Development Council (SPDC), including crimes against humanity and war crimes. The 2010 elections will institute the Constitution and threatens to erase any hope of criminal accountability in Burma. Because the SPDC and its allies will continue to hold power after the elections, crimes against humanity and war crimes will continue unabated. The 2010 Elections Campaign highlights the criminality of the regime when urging the international community not to support the elections. The Campaign to End Impunity in Burma draws urgency from the upcoming elections to call the international community to action.

There have been increased attacks on ethnic groups and other civilians leading up to the elections. Violence surrounding the elections may prove to be examples of the regime's widespread and systematic attacks on its civilian opponents. In a part of the regime's recently released election law, the SPDC's hand-picked Election Commission can choose not to hold elections in areas of conflict for "security reasons." In a twist of logic, the attacks on ethnic groups in conflict areas, some of which may constitute war crimes or crimes against humanity, will be a justification for cancelling elections in those areas.

For more information on the 2010 Elections campaign, see Burma Partnership (www.burmapartnership.org).

The Global Arms Embargo Campaign

The SPDC spends nearly half of its budget on the military, granting a sharply skewed amount of resources toward weaponry and away from people's basic needs. The military uses its weaponry for its violent attacks on civilians, especially ethnic groups. A global arms embargo would prevent the regime from acquiring new weapons and would stem the regime's attacks on its people. Although a global arms embargo may not definitively end the commission of international crimes in Burma, it would certainly lessen violent attacks and would send a unified international message to the regime that such crimes are unacceptable.

For more information on the global arms embargo campaign, see Burma Campaign UK (www.burmacampaign.org.uk).

Environmental Justice Campaigns

Abuses against people and the environment often go hand in hand. In Burma, projects such as dams, gas pipelines, mining, and logging deplete essential resources, destroy biodiversity, and change the natural balance in surrounding ecosystems. Such projects are excuses for committing heinous crimes including widespread forced displacement, forced labor, killings, beatings, and other human rights violations. The profits from these projects go directly to the regime, which uses these funds to continue its criminal rule. The devastation continues long after an environmentally unsustainable project is implemented; when an area is cleared of natural resources, local populations are left unable to sustain themselves in their former homes. In order for development projects to become environmentally sustainable and respectful of the rights of local people, there must be an end to the regime's criminality. Ending impunity would keep the regime from committing crimes against its people in the name of development.

For more information on environmental justice campaigns, see EarthRights International (www.earthrights.org), Burma Rivers Network (www.burmariversnetwork.org), Salween Watch (www.salweenwatch.org), Shwe Gas Movement (www.shwe.org).

ASEAN Campaign

The Association of Southeast Asian Nations (ASEAN) has traditionally focused on non-intervention in the internal affairs of member states. Thus far, ASEAN has not taken a strong stance against the junta's significant breaches of the ASEAN charter including its human rights abuses. Southeast Asian nations continue to support the SPDC, some more actively than others. The campaign to end impunity is related to ASEAN in two main ways. First, action at the international level to investigate crimes against humanity and war crimes in Burma – and an eventual referral to the International Criminal Court – will dissuade regional actors from partnering with the regime. Supportive ties with a government the world has acknowledged as criminal become more costly politically. International action such as a COI will in turn encourage ASEAN member states to take a harsher line regarding international crimes in Burma. Secondly, the ASEAN Intergovernmental Human Rights Commission (AICHR) is a newly minted institution that has the ability to receive complaints from victims in member states. Organizations such as the Task Force on ASEAN and Burma are calling for the AICHR to take concrete action regarding crimes against humanity in Burma. While the AICHR's enforcement powers are limited, a claim by Burmese crime victims at the AICHR could supplement the work of the international campaign to end impunity by strengthening the chorus of those demanding justice.

For more information on ASEAN, see Burma Partnership (www.burmapartnership.org) and Altsean-Burma (www.altsean.org).

Messages and Opportunities for Faith-Based Groups

Faith-based groups have unique messages and opportunities to get involved in the campaign to end impunity in Burma. The following is a list of suggested talking points and ideas for action that can be adapted to a group's particular views.

Messages

- Systematic human rights violations strike at the core of all humanity, including people of all faiths. Crimes against humanity and war crimes in Burma affect all of us, and we all have the obligation to stand up for victims.
- Holding criminals accountable for their actions allows victims the necessary space for spiritual healing.
- A fundamental element of many faiths is the creation of a culture based on peace and justice. When heinous crimes go unchecked, a culture of impunity and lawlessness is allowed to flourish instead of one that embodies norms of peace and justice.
- There is a moral obligation on the part of all people to call for an end to crimes against humanity and war crimes and to seek justice for victims. The establishment of a United Nations Commission of Inquiry is an important step to end international crimes and replace impunity with the rule of law.
- The personal and communal healing that accompanies any transitional justice initiative must be supported by communities of faith.

Opportunities to Get Involved

- Lead educational workshops on international justice, the International Criminal Court, and the commission of crimes in Burma for members of faith-based organizations.
- Dedicate a service, prayer, or day of worship to the victims of international crimes in Burma.
- Organize a peaceful protest, march, or demonstration on a day of importance for Burma. Options could include dates around the anniversary of Depayin Massacre on May 30, Daw Aung San Suu Kyi's birthday on June 19, or the upcoming election day.
- Reach out to the larger public. Write a letter to the editor of your local newspaper to let others know how your faith relates to the call for justice in Burma. Let your government representatives know about how you or your group feels about ending impunity in Burma. They will be encouraged to know that faith-based groups support action to establish a commission of inquiry.

Helpful Resources

- Christian Solidarity Worldwide, www.csw.org.uk
- International Burmese Monks Organization, <http://burmesemonks.org>
- United States Faith and Ethics Network for the ICC, www.amicc.org/faith.html

Recent Notable Successes in the Campaign

Individuals, organizations, and governments all over the world are joining the campaign to end impunity in Burma. The list below represents just a few significant highlights of the campaign to end impunity in Burma. The growing grassroots effort to call for accountability for international crimes is sign of more successes in the future.

Secretary General's Report on Security Council Resolution 1820

On July 15, 2009, United Nations Secretary General Ban Ki-Moon released a report regarding the implementation of Security Council Resolution 1820, which confirms the Council's commitment to ending sexual violence in conflict zones. The Secretary General lists notable violators of the resolution, and names Burma at four places in the report. This report is groundbreaking in that it shows that Burma is indeed in violation of Security Council Resolution 1820 and that systematic impunity is preventing victims from achieving justice. Civil society groups have used this report as a rallying cry for international action to end impunity in Burma.

United Nations General Assembly Resolution

The October 29, 2009 United Nations General Assembly Resolution on Burma is notable for its condemnation of systematic impunity in Burma. The resolution condemned systematic human rights violations in Burma including arbitrary detentions, enforced disappearances, sexual violence, and torture and cruel, inhuman and degrading treatment. Most importantly, the resolution called for the Burmese government to, "allow a full, transparent, effective, impartial and independent investigation into all reports of human rights violations, and to bring to justice those responsible in order to end impunity for such crimes."

Letter from 442 Members of Parliament

442 Members of Parliament from 29 countries sent a letter to Ban Ki-Moon, United Nations Secretary General on December 10, 2009, urging the United Nations Security Council to launch an investigation into crimes against humanity in Burma and to establish a global arms embargo against the regime. See a copy of the letter in the appendix.

International Tribunal on Crimes Against Women of Burma

The Nobel Women's Initiative and the Women's League of Burma held an international tribunal on crimes against women of Burma. Women victims of heinous human rights violations testified about their experiences and the impact of the regime's crimes on their families and communities. The judges, including Nobel Peace Laureates Shirin Ebadi and Jody Williams, and human rights experts Dr. Heisoo Shin and Professor Vitit Muntarbhorn published their findings on March 3, 2010. The judges' recommendations included a United Nations Security Council referral of Burma to the International Criminal Court and concerted action from the international community to effectively implement Security Council Resolutions 1325, 1820, 1888, and 1889. See the press release discussing the judges' findings in the appendix.

Report of the Special Rapporteur on Human Rights in Burma

Special Rapporteur on Human Rights in Burma, Tomas Ojea Quintana, issued a report that acknowledged that human rights violations in Burma are likely crimes against humanity and/or war crimes. Because Burma's government is not taking action to investigate and prosecute these offenses, Quintana urges United Nations (UN) institutions to conduct a thorough investigation of international crimes in Burma. Quintana's report is groundbreaking. This is one of the few times a UN representative has made an official recommendation that the UN form a commission of inquiry (COI). The report demonstrates the growing momentum toward the eventual establishment of a COI. See the statement of the Burma Lawyers' Council regarding the report in the appendix.

United Nations Human Rights Council Meeting on Special Rapporteur's Report: Support from Australia and the United States for a Commission of Inquiry

During a March 15, 2010 meeting of the United Nations Human Rights Council, several countries discussed Quintana's report, described above. During a dialogue on Burma, a representative of the Australian government expressed its support for the establishment of a United Nations Commission of Inquiry. A representative from the United States government indicated that the Special Rapporteur's recommendation for such an investigation was significant. This meeting demonstrates the growing concern in the international community about impunity in Burma and forecasts increased action from governments at the United Nations level.

Support from the United Kingdom on an International Criminal Court Referral

In late March 2010, Great Britain's ambassador to the United Nations indicated that the United Kingdom would support a referral of Burma's leaders to the International Criminal Court (ICC) if such a proposal were made. Government spokespeople indicated that they hoped pressure for an ICC referral would force the regime to change their biased election policies and implement new rules that would provide for free and fair elections. While other permanent members of the United Nations Security Council may remain hesitant to back an ICC referral, the stance of the UK may encourage other countries to make similar showings of support.

Support from the Czech Republic for a Commission of Inquiry

The Czech Republic publicly announced its support for Quintana's call for the establishment of a Commission of Inquiry to investigate war crimes and crimes against humanity. The Czech foreign ministry acknowledged that the crimes occurring in Burma may entail international crimes as defined under the Rome Statute and stated that the establishment of a Commission of Inquiry should be "seriously examined."

Report from Harvard Law School International Human Rights Clinic

In May 2009, the International Human Rights Clinic at Harvard Law School issued a report entitled Crimes in Burma. With a preface from world-renowned international jurists including Justice Richard Goldstone from South Africa, the report uses information on

international crimes in Burma from primarily United Nations sources in order to demonstrate that the crimes in Burma fall under the Rome Statute framework. Its authors call for the establishment of a UNSC COI. The report has become an important advocacy tool to demonstrate that documented abuses do in fact constitute international crimes under the Rome Statute and that the United Nations has a responsibility to take action.

Amnesty International Briefing on the 2010 Elections

Amnesty International conducted a briefing on the 2010 elections at the Royal Institute for International Affairs on May 11, 2010. The briefing included a detailed analysis of the election laws and an overview of how the elections will breach significant international norms. The briefing concluded with a call for a COI, noting the growing international strength of the campaign to end impunity, the recent report from Special Rapporteur Quintana, and the public support from Australia, the UK, and the Czech Republic.

How to Get Involved in the Campaign to End Impunity in Burma

If you are a concerned citizen:

- If you live in a democratic country which has not yet expressed official support for a United Nations Commission of Inquiry (COI), contact your elected representatives and express your support for its establishment in order to investigate international crimes in Burma.
- If you are based outside of Burma, write letters to the editor of your local newspaper about international crimes in Burma and the regime's system of impunity. Letters submitted following the publication of news stories about the election may receive more attention. You can also submit letters and articles to democracy and human rights blogs such as Open Democracy (www.opendemocracy.net) or Alternet (www.alternet.org).
- Share information about crimes in Burma on social networking sites.

If you work at a human rights organization:

- Mainstream the language of international criminal law into human rights work. Include information about crimes against humanity, war crimes, and genocide, when warranted, in reports that document human rights abuses. Remember to include international avenues to justice in recommendations about how best to respond to human rights abuses.
- If your work centers on Burma, advocate for a United Nations COI as a necessary step to end impunity in Burma. Issue an official statement or press release about the need to establish a COI.
- If your organization focuses on human rights documentation, encourage documenters and researchers to become involved with advocacy campaigns.
- If your group focuses on Burma and/or has an international reach, cooperate with the International Federation of Human Rights, Human Rights Watch, Global Justice Center, Asian Human Rights Commission, Alternative Asean, Forum Asia, Human Rights Now in Japan, Christian Solidarity Worldwide, and other human rights organizations listed in the appendix which have been promoting human rights in Burma.

If you are a lawyer:

- Urge your bar association to take public action to end impunity in Burma. Bar associations can facilitate public education events on international justice and its relation to the situation in Burma.
- If you are a member of the International Bar Association (IBA), encourage the IBA's Human Rights Institute to publicly support the establishment of a COI.
- If you are a member of the Law Association for Asia and the Pacific (LAWASIA), encourage LAWASIA to take a stronger position regarding impunity in Burma. Request that LAWASIA join international calls for a COI to investigate crimes in Burma.

If you are a member of a faith-based group:

- Lead educational workshops on international justice, the International Criminal Court, and the commission of crimes in Burma for members of faith-based organizations.
- Dedicate a service, prayer, or day of worship to the victims of crimes in Burma.
- Organize a peaceful protest, march, or demonstration on a day of importance for Burma. Options could include dates around the upcoming election or Daw Aung San Suu Kyi's birthday on June 19.

If you are a journalist:

- Seek updated information on crimes against humanity and war crimes in Burma to include in media work. Use the organizations listed in appendix for current information.
- Include news these international crimes in articles and submissions relating to the human rights or political situation in the country. Any news story about the upcoming elections should highlight the fact that they are taking place amidst severe and continuous criminality.

If you are a student studying outside of Burma:

- Arrange an event on campus to highlight the international crimes in Burma. An event could coincide with the upcoming elections or Human Rights Day on December 10. Skim the organizations listed in appendix for ideas for possible speakers to invite.
- Coordinate letter-writing campaigns to the United Nations Secretary General, your country's representative to the United Nations, or your elected Congressional or Parliamentary leaders (if applicable) urging them to support the Special Rapporteur's recent call for the establishment of a United Nations COI. If your country has already made a public showing of support for a COI, encourage national media outlets to keep Burma in the spotlight.
- Encourage professors of international criminal law at your school to include a discussion of Burma in their courses.
- Bring together young people to form groups of young human rights advocates. Seek support from other organizations currently working on human rights issues in Burma. Educate others in your community about the international crimes in Burma and use your combined voices to advocate internationally for a United Nations COI.

If you are a government official:

- Express your public support for a United Nations COI.
- Show solidarity with the people of Burma by making an official statement demanding an end to impunity.
- Regularly meet with civil society groups including members of youth or faith-based groups to discuss campaigns to end human rights abuses in Burma.
- Draft resolutions for other officials to join that call on your country's leadership to support a United Nations COI.

Appendix

- o List of organizations involved in the campaign to end impunity
- o Letter from the Global Justice Center and Burma Lawyers' Council to the International Crisis Group regarding their report on the 2008 Constitution
- o Nobel Women's Initiative and Women's League of Burma, International Tribunal on Crimes Against Women of Burma, Press Release on Findings
- o Burma Lawyers' Statement on Report of Special Rapporteur on the Situation of Human Rights in Myanmar Tomas Ojea Quintana
- o Letter from 442 Parliamentarians to the United Nations Secretary General demanding a Commission of Inquiry and a global arms embargo
- o Letter from the International Federation for Human Rights (FIDH) to the United Nations Security Council

List of Organizations and Helpful Websites

Actions Birmanie, www.birmanie.net

Aegis Trust, www.aegistrust.org

ALTSEAN-Burma, www.altsean.org

Amnesty International, www.amnesty.org

ASEAN Inter-Parliamentary Myanmar Caucus, www.aseanmp.org

Asian Human Rights Commission, www.ahrchk.net

Burma Campaign Australia, www.aucampaignforburma.org

Burma Campaign UK, www.burmacampaign.org.uk

BurmaInfo, www.burmainfo.org

Burma Lawyers' Council, www.blc-burma.org

Burma Partnership, www.burmapartnership.org

Canadian Friends of Burma, www.cfob.org

Christian Solidarity Worldwide, www.csw.org.uk

FIDH, www.fidh.org

Forum Asia, www.forum-asia.org

Forum for Burmese in Europe, www.forumburma.eu

Global Justice Center, www.globaljusticecenter.net

HREIB, www.hreib.com

Human Rights Now, hrn.or.jp/eng

Human Rights Watch, www.hrw.org

Info Birmanie, www.info-birmanie.org

International Center for Transitional Justice, www.ictj.org

ND-Burma, www.nd-burma.org

Nobel Women's Initiative, www.nobelwomensinitiative.org

US Campaign for Burma, uscampaignforburma.org

Women's League of Burma, www.womenofburma.org

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

October 28, 2009

**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.ⁱ 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.ⁱⁱ

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.ⁱⁱⁱ 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.^{iv}

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.^v

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.^{vi}

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.^{vii} 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.^{viii}

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."^{ix}

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".^x

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.^{xi} 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.^{xii}

States' obligations to take all possible measures "to prevent" genocide are triggered even prior to any official court or UN finding.^{xiii} These obligations exist with regard to Burma given authoritative global indices listing Burma as one of eight "red alert" States at risk of genocide,^{xiv} the inclusion of Burma as a State monitored by the UN Special Advisor on the Prevention of Genocide,^{xv} 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."^{xvi}

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.^{xvii} The same *jus cogens* rules apply to the 2008 Burma constitution as were applied to the 1983 constitution of apartheid South Africa.^{xviii}

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.^{xix}

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.^{xx} Further, the United Nations is clearly prohibited from recognizing the legitimacy of the constitution in any way given its amnesty provisions.^{xxi}

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.^{xxii} 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."^{xxiii}

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."^{xxiv} 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.^{xxv}

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.^{xxvi} 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.^{xxvii}

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...."^{xxviii} 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...."^{xxix} 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...."^{xxx}

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.^{xxxi} 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.^{xxxii}

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.^{xxxiii}

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.^{xxxiv}

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. ^{xxxv} 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.^{xxxvi}

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.^{xxxvii} 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.^{xxxviii}

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.^{xxxix} 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.^{xl} 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.^{xli}

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).^{xlii}

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..."^{xliii} premising its support for the 2010 elections solely on the speculation that it might "inadvertently" open up political space.^{xliv} 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,

A handwritten signature in dark ink, appearing to read "Janet Benshoof". The signature is fluid and cursive, with a large loop at the end.

Janet Benshoof

President
Global Justice Center

A handwritten signature in dark ink, appearing to read "U Thein Oo". The signature is more stylized and angular than the one on the left, with a prominent horizontal stroke.

U Thein Oo

Chairman
Burma Lawyers' Council

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

ⁱ International Crisis Group, *Asia Report N° 174, and Myanmar: Towards the Elections*, Aug. 20, 2009, ii-iii, 25-26 [hereinafter ICG Report].

ⁱⁱ 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.

ⁱⁱⁱ 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>.

^{iv} 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.

^v 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).

^{vi} 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.

^{vii} 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.

viii 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)

ix 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.

x *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/myanmar-news290607?OpenDocument&style=custo_print.

xi 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.

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- xii *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).
- xiii *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) (“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.aegistrust.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).
- xiv *See* Genocide Prevention Project, Mass Atrocity Red Alert, <http://www.preventorprotect.org/overview/watch-list.html> (last visited Oct. 21, 2009).
- xv *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....”).
- xvi 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).
- xvii 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.
- xviii 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.”).
- xix *See* Myanmar Constitution, *supra* note xvii.
- xx *See* S.C. Res.1325, ¶11, U.N. Doc. S/RES/1325 (Oct. 30, 2000); SCR 1820, *supra* note xviii.
- xxi *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.”).

^{xxii} 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 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.

^{xxiii} *Id.*

^{xxiv} 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.

^{xxv} *Id.*

^{xxvi} 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.”).

^{xxvii} ILC Draft Articles, *supra* note xviii, at art. 41.

^{xxviii} ICG Report, *supra* note i, at ii-iii.

^{xxix} *Id.*

^{xxx} *Id.*

^{xxxi} ILC Draft Articles, *supra* note xviii.

^{xxxii} *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.”).

^{xxxiii} SCR 554, *supra* note xviii.

^{xxxiv} 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>.

xxxv 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.”).

xxxvi 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.

xxxvii 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.

xxxviii 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).

xxxix 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).

xl Myanmar Constitution, *supra* note xvii, art. 190.

xli *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.

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

xliii ICG Report, *supra* note i, at 12.

xliv *Id.* at i.

Nobel Women's Initiative and the Women's League of Burma International Tribunal on Crimes Against Women of Burma

Press Release: International Tribunal on Burma Calls for End to Impunity of Military Regime

March 3, 2010

International Tribunal on Burma Calls for End to Impunity of Military Regime

(New York) Nobel Peace Laureates Shirin Ebadi and Jody Williams - along with human rights experts Dr. Heisoo Shin (Korea) and Professor Vitit Muntarbhorn (Thailand) - today released the findings and recommendations developed during the International Tribunal on Crimes Against Women of Burma held this week in New York City. The quasi-legal event featured compelling testimony - the first ever - of 12 women from Burma who have suffered rape, torture, and other crimes at the hands of the military junta. The event highlighted the egregious human rights crimes, including rape as a weapon of war, and called for policymakers to demand a last resort: the International Criminal Court.

"Women should no longer be invisible when crimes are committed against them with impunity," said Jody Williams, who won the Nobel Peace Prize in 1997. "The history of violence and oppression of women in Burma is long and sordid--and must come to an end."

A few of the women who testified are colleagues of Aung San Suu Kyi, the leader of the opposition, still under house arrest and a prisoner of General Than Shwe. Than Shwe is the war criminal who has reigned terror over the people of Burma for decades. World leaders have rallied in support of her freedom countless times since her Nobel Peace Prize award in 1991, passing UN resolutions almost annually and demanding the release of her and other political prisoners. But these cries have fallen on deaf ears, with the international community failing to hold General Shwe and his cronies criminally responsible. The resulting impunity has given the ruling generals of Burma even more license to escalate their power and continue to inflict violence on the people of Burma.

"We live in a globalized world, which means that Burma cannot do whatever it wants to its people within its own walls," said Shirin Ebadi, who won the Nobel Peace Prize in 2003. "Globalization is effective when it helps bring an end to injustice. The international community cannot stand by and let other countries to use their sovereignty to commit atrocities against their own people."

The purpose of the Tribunal was to spotlight the oppression of women of Burma in order to encourage policymakers and political leaders to take specific action now. The women Nobel Laureates have joined with the Women's League of Burma to highlight the systemic use of rape and other forms of violence against ethnic women in Burma. The Women's League of Burma is an umbrella organization comprising thirteen women's organizations of different ethnic backgrounds in Burma.

The women who testified now live in Thailand, Bangladesh, the US and Canada and traveled to New York to tell their personal stories and those of their families. Their stories include a range of horrific human rights violations and crimes. Testimony was organized into three categories: violence against women (rape, sexual violence, trafficking), civil and political violations (torture, arbitrary arrest and detention, harassment), and social, economic and cultural violations (forced labor, portering, relocation). Violence against women in Burma is often ethnically motivated, particularly minority groups such as the Karen who have been brutally persecuted by the military regime

The following are the recommendations of the Tribunal:

Recommendations to the international community, particularly the United Nations:

- *Urge States to take collective action to ensure the implementation of Security Council Resolutions 1325, 1820, 1888, and 1889 guaranteeing women's full participation in post-conflict reconstruction, and freedom from all forms of sexual violence.
- *Strongly urge the UN Security Council to refer Burma to the International Criminal Court.
- *Call upon United Nations member States to fulfill their obligations to exercise universal jurisdiction and to prosecute through their national tribunals perpetrators of the crimes against the civilian population of Burma, including women.
- *Ask United Nations agencies with a presence in Burma to increase their work in promoting and protecting human rights.
- *Call upon the United Nations Security Council to take effective measures against state authorities on the basis of the responsibility of the state to protect its people from egregious human rights violations (Responsibility to Protect Doctrine).
- *Urge the United Nations system to take measures to ensure that the Burmese authorities comply with international human rights standards and international humanitarian law.

Recommendations to Burma's military regime:

- *Stop all forms of violence against women. "End the intimidation, harassment, arbitrary arrest, unlawful detention, torture, and degrading treatment against women [and all] political prisoners; [and] respect and adhere to the principles and norms of the international [criminal and] human rights standards, particularly Convention on the Elimination of all forms of Discrimination Against Women..."
- *Stop attacks and persecution against ethnic nationalities and groups.
- *Release immediately and unconditionally all political prisoners.
- *Grant access to United Nations agencies and non-governmental humanitarian groups to ensure that women, in particular, are assisted effectively.
- *Provide access to and cooperate with United Nations agencies and human rights organizations to monitor human rights within Burma.
- *Ratify all human rights treaties, including ICCPR and ICESCR, and implement them effectively.
- *Abide by rules of customary international law, such as the prohibitions against torture, slavery, and violence against women and children.

- *Ratify the Rome Statute of the International Criminal Court, reform and implement domestic legislation accordingly.
- *Establish an effective process for dialogue between different stakeholders including democracy groups, ethnic minorities/nationalities, and concerned authorities with emphasis on women's participation in the pursuit of democracy.
- *Revise the constitution, particularly the amnesty provisions, and other national laws in an inclusive and participatory manner, engaging all stakeholders including women, to ensure consistency with international legal obligations and human rights standards.
- *Establish effective judicial mechanisms and other processes to establish accountability and provide adequate remedies for international crimes and human rights violations to end impunity.
- *Build human-centered national development plans and processes that respond to women's human rights bearing in mind the special needs of rural women, and allocate national resources fairly and equitably for this purpose.

Recommendations to the Asia-Pacific region (including ASEAN, bilateral and other channels):

- *Call upon ASEAN through its Summit of Heads of Government to impel Burma to apply effective and time-limited measures to comply with the ASEAN Charter and international legal obligations and human rights standards.
- *Invite the ASEAN Intergovernmental Human Rights Commission to submit thematic reports covering particular issues related to Burma.
- *Bearing in mind the ASEAN Declaration on the Elimination of Violence Against Women and various declarations on children's rights in the region, to which Burma has subscribed, support the establishment of the ASEAN Commission for the Promotion and Protection of the Rights of Women and Children, including consideration of the situation in Burma.
- *Call upon the various partners of ASEAN and other regional bodies and states engaging with Burma to influence constructive changes in the country.
- *Prohibit trade with Burma involving goods produced through forced labor, as well as oil, gas, and electricity generated as a result of forced relocations.
- *Take effective cross-border measures to prevent and punish human trafficking, in particular that of women and children, and to offer gender and child sensitive measures to protect and assist those victimized by trafficking.
- *Respect the rights of refugees and internally displaced persons, protect them from violence, abuse, and exploitation, and forced repatriation, which violates the international principle of non-refoulement, and ensure the application of basic standards of international law.

For more information, and to arrange interviews, please contact us:

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Statement on the Special Rapporteur's Recommendation for a Commission of Inquiry

The Burma Lawyers' Council applauds the recent report from Tomas Ojea Quintana, Special Rapporteur on the Situation of Human Rights in Myanmar/Burma, which acknowledges the widespread and systematic nature of human rights abuses in Burma, indicates that the abuses may constitute crimes against humanity or war crimes as defined under the Rome Statute, and calls on the United Nations to establish a commission of inquiry to investigate international crimes in Burma. The report explained that a culture of impunity, weak rule of law, and a lack of independent judiciary allow the regime to implement its pattern of widespread and systematic human rights abuses. Quintana's report to the Human Rights Council explained the following:

*Given the gross and systematic nature of human rights violations in Myanmar over a period of many years, and the lack of accountability, there is an indication that those human rights violations are the result of a State policy that involves authorities in the executive, military and judiciary at all levels. According to consistent reports, the possibility exists that some of these human rights violations **may entail categories of crimes against humanity or war crimes under the terms of the Rome Statute of the International Criminal Court.***

*The mere existence of this possibility obliges the Government of Myanmar to take prompt and effective measures to investigate these facts. There have clearly been cases where it has been necessary to establish responsibility, but this has not been done. Given this lack of accountability, United Nations institutions may consider the possibility to **establish a commission of inquiry with a specific fact-finding mandate to address the question of international crimes.***

Mr. Quintana's report is groundbreaking. Human rights and democracy groups including the Burma Lawyers' Council have been calling for an investigation into crimes against humanity and war crimes for years, but this report represents the first demand for such an investigation from a United Nations official. The Special Rapporteur's unprecedented demand signifies the growing outrage over the commission of international crimes in Burma which until now have been met with impunity.

During a dialogue on Burma during a United Nations Human Rights Council meeting, several country representatives echoed Quintana's call. A representative of the Australian government expressed its support for the establishment of a commission of inquiry and a representative from the United States government indicated that the Special Rapporteur's recommendation for such an investigation was significant. This meeting demonstrates the growing concern in the international community about impunity in Burma and forecasts increased action from governments at the United Nations level.

The Burma Lawyers' Council welcomes Mr. Quintana's report and urges the international community to seize the current momentum and push for a commission of inquiry into international crimes in Burma. Because this year's elections promise to perpetuate military rule, implement the illegal 2008 Constitution, and enshrine impunity for even the most serious crimes, the international community must act now to end impunity for perpetrators of crimes against humanity and war crimes.

December 10, 2009

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Permanent Representative of Burkina Faso to the United Nations
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New York, NY 10017, U.S.A
Fax: 1(212) 308 4690

H.E. Mr. Ban Ki-moon
Secretary-General of the United Nations
United Nations
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Via facsimile

Your Excellencies,

On behalf of 442 Members of Parliament from 29 countries around the world, we are writing to urge the United Nations Security Council to launch an investigation into crimes against humanity committed by the military regime in Burma (Myanmar) and to impose a global arms embargo on that regime.

Such action is long overdue. Burma's military regime has carried out brutal attacks on its own people for decades. According to the Thailand Burma Border Consortium (TBBC), a humanitarian agency providing aid to Burmese refugees and displaced persons for 25 years, through these attacks, the regime has destroyed over 3,500 ethnic minority villages in eastern Burma since 1996. Here, at least 75,000 people were forced to leave their homes during this past year alone, and more than half a million people remain internally displaced. TBBC has described the situation in Burma as being comparable to the situation in Darfur. Furthermore, these crimes against humanity in Burma are well documented by various UN bodies, although none of them have taken effective action.

There is an urgent need for the Security Council to address this horrific condition in Burma. Please find attached a letter to the United Nations Security Council that has been endorsed by 442 Members of Parliament from 29 countries. We respectfully request you to distribute the letter to the members of the Security Council and call for an emergency meeting to discuss the issue. We thank you for your time and attention to this matter.

Yours sincerely,



Azuma Konno, Member of the House of Councillors, the National Diet of Japan



Tadashi Inuzuka, Member of the House of Councillors, the National Diet of Japan

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Enclosures: Letter to the United Nations Security Council

Copies to:

1. H.E. Dr. Susan Rice, Permanent Representative of the United States to the United Nations, Fax: 1(212) 415 4415
2. H.E. Sir John Sawers, Permanent Representative of the United Kingdom to the United Nations, Fax: 1(212) 745 9316
3. H.E. Mr. Jean-Maurice Ripert, Permanent Representative of France to the United Nations, Fax: 1 (212) 207 8765
4. H.E. Mr. Yukio Takasu, Permanent Representative of Japan to the United Nations, Fax: 1(212) 308 1451
5. Mr. Vijay Nambiar, Chef de Cabinet, Executive Office of the Secretary-General, United Nations, Fax: 1 (212) 963 1185
6. Mr. B. Lynn Pascoe, Under-Secretary-General, Department of Political Affairs, United Nations, Fax: 1(212) 963 5065
7. Mr. Kim Won-soo, Deputy Chef de Cabinet, Executive Office of the Secretary-General, United Nations, Fax: 1(212) 963 1185
8. Media

December 10, 2009, International Human Rights Day

Members of the United Nations Security Council
c/o H.E. Ambassador Michel Kafando and Secretary-General Ban Ki-moon

RE: Burma/Myanmar: Commission of Inquiry and Arms Embargo

Dear Members of the United Nations Security Council,

We are members of parliaments and congresses from throughout the world, writing to urge you to draft and pass a UN Security Council resolution both establishing a commission of inquiry into crimes against humanity and war crimes in Burma and imposing a global arms embargo on Burma's military regime.

For too many years, the Security Council has ignored widespread and systematic crimes carried about by Burma's military regime, including the destruction of over 3,300 ethnic minority villages, widespread rape of ethnic women, the forced displacement of over 1 million refugees and internally displaced persons, the recruitment of tens of thousands of child soldiers, and the prolific use of modern-day slave labor.

The silence of the Security Council on these matters is especially shocking since five of the world's leading judges recently commissioned a report which found that various bodies of the UN are already aware of these shocking crimes. At the same time, several United Nations special rapporteurs on human rights in Burma, including Brazil's Paulo Sergio Pinheiro and Japan's Yozo Yokota, have called on the regime to address these abuses. South Africa's Nobel Peace Prize recipient Desmond Tutu is adding his name to this call for action, and ten more Nobel Laureates are calling for a ban on weapons sales to the military regime.

The Burmese military regime's incarceration of Nobel Peace Prize recipient Aung San Suu Kyi has gained great international attention, but these crimes against humanity – and the provision of weapons which strengthen the military regime, has been wrongly ignored by the Security Council.

As Pinheiro wrote in the New York Times, "The Security Council must establish a commission of inquiry into crimes against humanity and impunity in Myanmar. The Security Council took similar steps with regard to Rwanda, Bosnia and Darfur. The situation in [Burma] is equally as critical."

We strongly urge you to immediately draft and pass a resolution on these matters. The longer the Council waits, the more people in Burma will die.

Members of Parliament from:

Commonwealth of Australia (13)

Michael Danby
Kelvin Thomson
Judi Moylan
Laurie Ferguson
Guy Barnett
Chris Bowen

Gary Humphries
Scott Ludlam
Janelle Saffin
Jim Turnour
Helen Kroger
Robert Oakeshott
Kerry Rea

Kingdom of Belgium (1)

Juliette Boulet

Federative Republic of Brazil (1)

Antonio Carlos Pannunzio

Kingdom of Cambodia (30)

Sam Rainsy
Son Chhay
Mu Sochua
Yim Sovann
Tiouloung Saumura
Mao Munyvann
Cheam Channy
Thak Lany
Kimsour Phirith
Eng Chhai Eang
Cjiv Cata
Ho Vann
Ly Srey Vyna
Yont Tharo
Chan Cheng
Lhim Laky
Pot Pov
Nuth Rumduol
Men Sothavarin
Khy Vandeth
Long Ry
Chea Poch
Kong Bora
Huoy
Bunroeun
Tok Vanchan
Ke Sovannaroth
Kem Sokha
Ou Chanrith
Nhem Ponharith

Republic of Croatia (2)

Željana Kalaš
Gordana Sobol

Czech Republic (66)

Petr Bratsky
Marek Benda
Pavel Bohatec
František Bublan
Jan Bürgermeister

Martin Bursík
František Dědič
Michal Doktor
Tomáš Dub
Eva Dundáčková
Radim Fiala
Dana Filipi
Petr Gandalovič
Jan Hamáček
Vladimír Hink
Zdeňka Horníková
Ludvík Hovorka
Radim Chytka
Kateřina Jacques
Věra Jakubková
Josef Ježek
David Kafka
Miroslav Kalousek
Jan Kasal
Jan Klas
Jaroslav Klein
Jozef Kochan
Tomáš Kvapil
Ivan Langer
Ladislav Libý
Ondřej Liška
Miloš Melčák
Václav Mencl
Petr Nečas
Miroslava Němcová
Zbyněk Novotný
Jiří Oberfalzer
Vlasta Parkanová
Daniel Petruška
Jaroslav Plachý
Petr Pleva
Jiří Pospíšil
Přemysl Rabas
Juraj Raninec
Daniel Rován
Jana Rybínová
Aleš Řebíček
Martin Říman
Karel Sehoř
Jan Schwippel
Pavel Suchánek
Cyril Svoboda
Pavel Svoboda

[Czech Republic continued]

David Šeich
Milan Šmíd
Michaela Šojdrová
Boris Šťastný
Jaromír Štětina
Lucie Talmanová
Vlastimil Tlustý
Mirek Topolánek
Tomáš Úlehla
Jan Vidím
Oldřich Vojř
Tom Zajíček
Olga Zubová

Republic of Estonia (8)

Silver Meikar
Andres Herkel
Aleksi Lotman
Lauri Luik
Kalle Palling
Aivar Riisalu
Marek Strandberg
Toomas Trapido

French Republic (24)

Auréli Filippetti
Lionnel Luca
François Loncle
Michel Voisin
Axel Poniatowski
Etienne Pinte
Noël Mamere
Chantal Robin-Rodrigo
Joëlle Garriaud Maylam
Jean Francois-Poncet
Robert Badinter
Nicole Borvo Cohen-Seat
Odette Terrade
Christian Cointat
Serge Lagauche
Michel Becot
Bernard Fournier
Françoise Henneron
Laurent Beteille
Yves Pozzo Di Borgo
Michel Guerry
Jean-Pierre Sueur

Catherine Morin Desailly
Jean-Pierre Leleux

Federal Republic of Germany (1)

Florian Toncar

Republic of Hungary (1)

Mátyás Eorsi

India (39)

Sharad Joshi
B.S.Gnanadesikan
Abani Roy
Barun Mukherji
Tarlochan Singh
Brij Bhushan Tiwari
Syed Azeez Pasha
Thomas A Sangma
O.T. Lepcha
Ram Jethmalani
D. Raja
Janeshwar Mishra
George Fernandes
J.D.Seelam
Supriya Sule
Narahari Mahato
Nripendra Nath Roy
Maheshwar Hazari
Kaushalendra Kumar
Bhudeo Choudhary
Ram Sundar Das
Baidyanath Prasad Mahto
Mangani Lal Mandal
Jainarayan Prasad Nishad
Purnmasi Ram
Arjun Roy
Jagdish Sharma
Mahabali Singh
Meena Singh
Rajiv Ranjan Singh
Sushil Kumar Singh
Dinesh Chandra Yadav
Sharad Yadav
Monazir Hassan
Ranjan Prasad Yadav
Mohan Singh
Hari Kewal Prasad
Nand Kishore Yadav

[India continued]
Vishwa Mohan Kumar

Indonesia (37)

Ratu Hemas
Sarah Lery Mboik
Syarifah
Alit Kalakan
Nurmawati Dewi Bantilan
Sofwat Hadi
Erma Suryani Ranik
Abraham Paul Liyanto
Emanuel Babu Eha
Sofia Maipauw
Supartono
Istibsjaroh
Abd. Sudarsono
Wasis Siswoyo
I Nengah Wiratha
I Kadek Arimbawa
Ahmad Syaifullah Malonda
Elviana
I Wayan Sudirta
Hairiah
Bambang Susilo
Luther Kombong
Roy Suryo Notodiprojo
Helmi Fauzy
Evita Nursanty
Budiman Sudjatmiko
Ganjar Pranowo
Yassonna H. Laoly
Dewi Asmara
Ruhut Poltak Sitompul
Viva Yoga Mauladi
Anna Mu'awanah
Honing Sanny
Hetifah
Rieke Diah Pitaloka
Wahid
Eva Kusuma Sundari

Ireland (11)

Simon Coveney
Tom Kitt
Thomas P. Broughan
Michael D. Higgins
Mary White

Liz McManus
Jim O'Keeffe
Jim Higgins [MEP]
Marian Harkin [MEP]
Charles Flanagan
Aengus Ó Snodaigh

Republic of Italy (3)

Albertina Soliani
Carmen Motta
Margherita Boniver

Japan (28)

Azuma Konno
Tadashi Inuzuka
Kumiko Aihara
Ryuichi Doi
Yukihisa Fujita
Shinkun Haku
Tsutomu Hata
Wakako Hironaka
Ritsuo Hosokawa
Keiko Itokazu
Ryuhei Kawada
Shokichi Kina
Masamichi Kondo
Nobuo Matsuno
Shunichi Mizuoka
Masaharu Nakagawa
Tetsuji Nakamura
Masayoshi Nataniya
Tomiko Okazaki
Kusuo Oshima
Naoto Sakaguchi
Atsuko Shimoda
Hiroyuki Tani
Kantoku Teruya
Yataro Tsuda
Kiyomi Tsujimoto
Marutei Tsurunen
Katsuhiko Yokomitsu

Republic of Latvia (1)

Oskar Kastens

Malaysia (42)

Lim Kit Siang
Teresa Kok Suh Sim

[Malaysia continued]

M Kula Segaran

Lim Guan Eng

Karpal Singh

Fong Kui Lun

Chong Eng

Lim Lip Eng

Tan Kok Wai

Fong Po Kuan

Sim Tong Him

Tony Pua Kiam Wee

Hiew King Cheu

Charles Santiago

Liew Chin Tong

Er Teck Hwa

Teo Nie Ching

Chong Chieng Jen

Gobind Singh Deo

P Ramasamy

Dato Ngeh Koo Ham

Tan Seng Giaw

Nga Kor Ming

Chow Kon Yeow

Loke Siew Fook

Jeff Ooi Chuan Aun

M Manogaran

John Fernandez

Salahuddin Haji Ayub

Dzulkefly Ahmad

Dato' Mahfuz Omar

Dato' Seri Ir. Muhammad Nizar Jamaluddin

Mohd Yusmadi Mohd Yusoff

Dato' Johari Abdul

Loh Gwo Burne

Abdullah Sani Abdul Hamid

Hj. Abdul Aziz Abdul Kadir

Azan Ismail

Dato' Seri Zahrair Mohammad Hashim

Ahmad Kasim

Hee Loy Sian

Chua Tian Chang

Republic of Maldives (28)

Ahmed Rasheed

Ahmed Abdulla

Mohamed Shifaaz

Ahmed Sameer

Mohamed Nasheed

Hussain Waheed

Ahmed Eesa

Mohamed Thoriq

Ibrahim Mohamed Salih

Ruqiyya Mohamed

Ahmed Hamza

Mohamed Musthafa

Mohamed Riyaz

Mohamed Qasam

Mohamed Nazim

Shifaaq Mufeed

Ilyaas Labeeb

Mohamed Aslam

Mohamed Rasheed

Moosa Manik

Hamid Abdul Ghafoor

Eva Abdulla

Mariya Ahmed Didi

Mohamed Rasheed

Imthiyaz Fahmy

Ibrahim Rasheed

Abdull Gafoor Moosa

Ismail Abdull Hameed

Kingdom of the Netherlands (2)

Harry van Bommel

Mariko Peters

New Zealand (23)

Phil Goff

Maryan Street

Pete Hodgson

Lianne Dalziel

Trevor Mallard

Ruth Dyson

Chris Carter

Steve Chadwick

Ross Robertson

Lynne Pillay

Charles Chauvel

Darien Fenton

Su'a William Sio

Jacinda Ardern

Grant Robertson

Carol Beaumont

Phil Twyford

Carmel Sepuloni

Iain Lees-Galloway

[New Zealand continued]

Keith Locke
Sue Kedgley
Kennedy Graham
Te Ururoa Flavell

Republic of Korea (6)

Gang Ki Gap
Gwak Jeong Suk
Kwon Young-gil
Lee Jeong Hee
Hong Hee Deok
Hong Young Phyo

Republic of Poland (1)

Zbysgniew Romaszewski

Romania (1)

Renate Weber [MEP]

Slovak Republic (1)

Laszlo Nagy

Spain (1)

Raül Romeva [MEP]

Kingdom of Sweden (6)

Fredrick Federley
Helena Leander
Magdalena Streijffert
Gunvor G Ericson
Birgitta Ohlsson
Lage Rahm

Kingdom of Thailand (6)

Kraisak Choonhavan
Rachada Dhnadirek
Pusadee Tamthai
Buranaj Smutharaks
Pojanart Kaewpaluek
Rachadaporn Kaewsanit

United Kingdom of Great Britain and Northern Ireland (55)

Andrew Mitchell
Andrew Pelling
Andrew Stunnell
Ann Clwyd

Anne Moffat
Anne Picking
Alistair Carmichael
Ashok Kumar
Baroness Cox
Baroness Ludford
Baroness Northover
Ben Chapman
Betty Williams
Bill Rammell
Bill Etherington
Bob Spink
Charles Hendry
David Amess
David Burrowes
David Hamilton
Evan Harris
Edward Garnier
Edward Leigh
Elliot Morley
Glenda Jackson
Graham Brady
Grant Shapps
Ian McCartney
Jim Sheridan
John Austin
John Bercow
John MacDougall
John Pugh
John Robertson
Julie Morgan
Lord Alton of Liverpool
Lord Avebury
Lord Faulkner of Worcester
Lord Kinnock
Lord Steel of Aikwood
Khalid Mahmood
Marsha Singh
Michael Connarty
Michael Weir
Mike Gapes
Peter Bottomley
Roberta Blackman-Woods
Roger Gale
Sandra Osborne
Sir Peter Tapsell
Stephen Crabb
Tim Loughton

[United Kingdom of Great Britain and
Northern Ireland continued]

Tom Clarke

Janet Anderson

Maggie Jones

United States of America (4)

Joseph Pitts

Aaron Schock

Mark Souder

Frank Wolf



Fédération internationale des ligues des droits de l'Homme

ORGANISATION INTERNATIONALE NON GOUVERNEMENTALE AYANT STATUT CONSULTATIF AUPRES DES NATIONS UNIES, DE L'UNESCO,
DU CONSEIL DE L'EUROPE ET D'OBSERVATEUR AUPRES DE LA COMMISSION AFRICAINE DES DROITS DE L'HOMME ET DES PEUPLES

International Federation
for Human Rights

Federación Internacional
de los Derechos Humanos

الفدرالية الدولية لحقوق الإنسان

Member States of the
United Nations Security Council

Paris - New York, November 11th 2009

Re: The Security Council should address the situation in Burma and the protection of civilians in armed conflict.

Excellencies,

The International Federation for Human Rights (FIDH) is writing to you to urge the United Nations Security Council to address the gravity of the situation in Myanmar/Burma. As you may recall, Tomás Ojea Quintana, the Special Rapporteur on the situation of human rights in Myanmar, in addressing the 64th session of the United Nations General Assembly expressed his concerns that the widespread and systematic violations of civilians' rights continue in Myanmar/Burma. Moreover, Mr. Quintana urged the General Assembly to act against impunity in the country by putting in place measures to establish responsibility for these violations.

The human rights violations, potentially amounting to crimes against humanity and war crimes¹, perpetrated by the State Peace and Development Council (SPDC) are escalating in number and taking place in a context where the junta enjoys complete impunity and is gaining legitimacy in the eyes of the international community merely for undertaking superficial, cosmetic reforms. At the same time, the new constitution of Burma will only further entrench the power of the SPDC while it refuses to undertake any actions in favor of national reconciliation.²

The United Nations Human Rights special procedures, including the UN Special Rapporteur, have cited the destruction of over 3,000 ethnic minority villages, the conscription of tens of thousands of child soldiers, the forced displacement of over one million refugees and internally displaced persons, and the widespread and systematic rape of women in the ethnic minority regions of the

1 See FIDH - BLC- ALTSEAN-Burma report entitled "Burma: An International Commission of Inquiry more urgent than ever", can be downloaded at <http://www.fidh.org/IMG/pdf/bu08.pdf>

2 See ALTSEAN - Burma report on 2010 Elections : a recipe for continued conflict on : <http://www.altsean.org/Reports/2010Electionsbis.php>

FIDH

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country. The Security Council has made numerous condemnations of these same crimes: The Resolutions 1265, 1296 and 1674 for Protection of Civilians in Armed Conflict, Resolutions 1325, 1820, 1888 and 1889 on women and peace and security and against sexual violence in conflict, and Resolutions 1612 and 1882 on Children and Armed Conflict, all of them provide an international legal framework to address those crimes allegedly perpetrated in Burma.

Abuses are taking place in the country in total impunity while the United Nations Security Council has passed resolutions against these crimes. On November 11, 2009 the Security Council will revisit the issue of protection of civilians during armed conflict. FIDH requests the member States of the Security Council to take urgent and proper action in response to the violations occurring in Burma in the context of the armed conflict taking place in the ethnic minority areas on the occasion of this meeting. FIDH firmly believes that it is the responsibility of the Security Council to address the specific instances of these crimes occurring in countries such as Burma, and to move beyond discussing them in a merely thematic manner.

We sincerely hope that you will take into consideration these concerns, and we remain

Sincerely yours,



Souhayr Belhassen
President

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