

*"There can be no global justice unless the worst of crimes – crimes against humanity – are subject to the law.*

*In this age more than ever we recognize that the crimes of genocide against one people truly is an assault on us all – a crimes against humanity.*

*The establishment of an International Criminal Court will ensure that humanity's response will be swift and will be just."*

*- Kofi Annan July 16, 1998*

## **Opening remarks of Janet Benshoof\***

**President of the Global Justice Center**

**April 27, 2009**

**Bangkok, Thailand**

### ***Advances in International Law and the Security Council's Legal Obligation to End Impunity for Grave Crimes in Burma***

#### **Introduction**

Mingalaba.

I am honored to give this keynote presentation on how advances in international law can—and must —be used to end the impunity fueling the reign of terror over the people of Burma.

I want to thank the Burma Lawyers Council and FIDH for their vision, hard work, and dedication to making this critical meeting happen. Most of all, I want to express my deep admiration for my friends from Burma. Your unrelenting work for justice and democracy, and courage in face of immense personal suffering, is inspiring and humbling.

What I hope from this meeting is no less than a turning point in history; the beginning of the end to impunity in Burma. And, only one body in the world has the power to make this happen— the United Nations Security Council.

Over the last ten years, states legal obligations to act in face of gross violations of international humanitarian law have rapidly expanded. The global consensus on ending impunity for criminal dictators has, in turn, changed the dynamics around Security Council decision making. No longer can we regard the Security Council as a “purely political” body, unfettered by international law imperatives.

#### **I. What does this mean for Burma?**

There is ample evidence that the gross violations of international humanitarian law perpetrated by Senior General Than Shwe and others arise to the level of a threat to peace. In this situation, under a contemporary interpretation of what are called '*jus cogens*' principles, the Council, as the sole gatekeeper to accountability, is required to use its Chapter VII powers to refer the situation of Burma to the International Criminal Court.

Leaving the people of Burma trapped in a "law free zone" is neither a legal nor moral option. The continuing failure of the Security Council to end impunity for the grave crimes in Burma sends a clear message that a political chasm can forever separate law from justice. We cannot afford to undermine the fragile structure of global accountability central to our world order.

Over the last twenty years there have been revolutionary advances in global justice enforcement—on paper and, in practice. The current center-stage role of the Council in enforcing international humanitarian law is vastly different from the Council's more limited role in say, 1962, or 1988. Even subsequent to 2004, when the Security Council took the historic step of referring Sudan to the International Criminal Court, there have been legal advances which further help the case of Burma.

The key question, I believe, is not "if" there should be an ICC referral, but, "how". Yes, the junta is stronger than ever. But, law is also stronger than ever. Obstacles can open up unexpected opportunities—especially—if we look for them and, act on what we find.

This means we must now take a new look at how the facts in Burma provide powerful support for the Security Council action.

## **II. This Much We Know For Sure.**

*We all know*, emboldened by decades-long impunity, Senior General Than Shwe and others continue to wage what is the oldest internal armed conflict and one of the longest runs of unaddressed criminal violations of the Geneva Conventions in the world.

*We all know* "business as usual" for Senior General Than Shwe and his henchmen is rule by terror and enslavement of the people of Burma using forced labor, torture, arbitrary arrests and imprisonment, murder, rape and abducting children for the army.<sup>i</sup>

*We all know* these grave crimes violate international humanitarian and human rights law and constitute war crimes, crimes against humanity and, potentially, crimes of ethnic cleansing and genocide as demonstrated by the targeted attacks against civilian ethnic populations.

*We all know* that no perpetrators of these heinous crimes, which include serious breaches of Burma's obligations as party to the Geneva and Genocide Conventions, have ever been prosecuted in Burma or by an international or regional body.

*We all know* that due to their longstanding impunity the junta has been able to destroy all indicia of legitimate sovereignty by consolidating all organs of government, including the judiciary, into one criminal enterprise. Senior General Than Shwe, following the footsteps of Hitler and Saddam Hussein, has transformed Burma into a powerful and mature criminal regime. A third generation of people in Burma is now living and dying in what has become the world's largest concentration camp.

*What do we do with all this we know?*

I believe these facts, given revolutionary advances in international law, provide a tool of unprecedented power to require the Security Council to act to end impunity in Burma.

Let us turn to the Security Council.

### **III. The Power of the Security Council**

The Security Council is the only world body with the power to end the impunity of Senior General Than Shwe and his criminal cohorts. Although human rights groups have called on states to use the doctrine of universal jurisdiction to prosecute criminal perpetrators from Burma, should they appear on their territory, procedural immunity precludes state prosecution of sitting heads of state. Only the ICC or an ad hoc Tribunal established under the Security Council's Chapter VII powers can arrest and try criminals who are sitting heads of state, like Senior General Than Shwe.

Further, even if Burma had acceded to the ICC, given the junta's imperviousness to some twenty years of exhortations and sanctions by states and the UN, it would be difficult—if not impossible—to exercise effective jurisdiction over Senior General Than Shwe and his cohorts without the enforcement powers inherent in a Security Council referral. A Chapter VII referral to the ICC imposes a binding legal duty on all states to cooperate with the ICC prosecutor regardless of whether they are party to the ICC.

### **IV. Legal Milestones and the Security Council**

In 1945 fifty one self-contained states formed the United Nations premised on the concept of impregnable sovereign states.

This has radically changed.

Today, our world is based on an interdependent global economy using advanced technology and communications and, as demonstrated by this meeting, on a burgeoning transnational civil society. The nature of conflict itself has changed from primarily interstate conflicts with military targets to mainly internal conflicts targeting civilians, mostly women and children. The consensus today that global peace and security are dependent on enforcing international humanitarian law means that a Security Council action addressing a state's grave crimes is no longer considered a breach of state sovereignty.

The evolving role of the Security Council is highlighted on the wall chart behind you. Here are some of the milestones:

1. In 1984, the Security Council mandated that states neither treat as null and void [Apartheid South Africa's] so-called new constitution and neither assist with any elections nor support any resulting government arising out of the constitution.<sup>ii</sup> The Council said to recognize such a constitution would serve to encourage crimes of apartheid and would violate the principles of the UN Charter.<sup>iii</sup>
2. In 1991 the Security Council for the first time found the purely internal genocidal crimes of Saddam Hussein against the Kurdish population a threat to "international peace and security in the region."<sup>iv</sup> This foreshadowed the jurisprudence of the ad hoc Tribunals and the Rome Statute of the International Criminal Court, which treat most crimes perpetrated in the context of internal armed conflicts as war crimes. For Burma, a country in armed conflict, this means Senior General Than Shwe and others, including Chief Justice U Aung Toe are culpable as war criminals.
3. In 1992 the Security Council, equating "crimes against humanity" with a "threat to the peace" in the context of ongoing armed conflict, evoked its Chapter VII power to set up a commission of experts which in turn led to resolutions establishing the ad hoc Tribunals for the former Yugoslavia (ICTY) and then Rwanda (ICTR) in 1993 and 1994 respectively.
4. In 1999 the Security Council passed its first thematic resolution to protect civilians in armed conflict. In 2009, the Presidential Statement marking the resolution's tenth anniversary stated that "enhancing the protection of civilians in armed conflict is at the core of the work of the United Nations Security Council for the maintenance of peace and security."<sup>v</sup> Since 1999 the Council has increasingly passed resolutions mandating an end to impunity for conflict related crimes including for sexual violence against women, forced labor and the conscription of child

soldiers.<sup>vi</sup> This principle was further expanded by the Security Council's historic 2006 endorsement of the "Responsibility to Protect" doctrine.<sup>vii</sup>

5. In 2002 the advent of the International Criminal Court ensured there could be recourse to an international court when states fail to prosecute grave crimes.<sup>viii</sup> The Council's role as the ultimate enforcer of the Geneva and Genocide Conventions is strengthened by the ICC. Security Council dynamics are also changed by the contract between the United Nations and the ICC, which sets out the Security Council's ability to refer or defer ICC actions. The effect of this agreement is to make Council actions or, in the case of Burma, inactions, pivotal to the success of the ICC.<sup>ix</sup>

6. In 2004 the Security Council exercised its Chapter VII powers to refer Sudan, a nonparty, to the ICC. This referral was the first time the Security Council had acted in its role as ultimate enforcer of the Genocide Convention.<sup>x</sup>

7. In 2009 the Security Council acknowledged the ongoing impunity for ICC-covered crimes of sexual violence in Burma based on a report of the Secretary General under the mandate in SCR 1820 passed in 2008.<sup>xi</sup> Secretary of State Hillary Clinton subsequently referenced the ongoing use of "rape as a tactic of war" by countries like Burma, as a reason for the Security Council to strengthen measures to end such sexual violence by passing Security Council Resolution 1888.<sup>xii</sup>

What does this all mean for Burma?

The international law developments increasing states' legal duties to address what are termed "*jus cogens*" crimes increase the Security Council's legal role as the ultimate enforcer when states fail to act.<sup>xiii</sup>

It is common for international law experts to accept that certain *jus cogens* principles constrain Security Council's actions because their very peremptory nature is binding on the Council. What is not discussed is that these same norms also impose a duty on the Council to act in certain situations.

This is what is key to a new Security Council strategy on Burma.

## **V. Next Steps: Turning Obstacles into Opportunities**

We must rethink old strategies in order to successfully use these new legal tools for Burma.

Take China. Put at the forefront of your thinking that China wants ties with Burma, not with Senior General Than Shwe. China is making international humanitarian law (as opposed to human rights law) a

centerpiece of its bid for global legitimacy. The ICC is taught as a legal course at nearly every major law school in China. Further, in all the examples I have given, when the focus is solely on impunity for gross violations of international humanitarian law, China has never exercised its veto power on the Council.

I often hear disparaging remarks about the ICC and on the “futility” of efforts for justice for Burma. It is all too easy to point out shortcomings of the ICC to date and, be discouraged about the seemingly intransigent problems in Burma. However, such short-sighted positions are self-defeating and, more importantly, an abdication of our duties as global citizens to make justice work, however imperfectly.

The ICC is not a cure-all for Burma but, it exists. Without our help the people of Burma cannot access this portal of justice, which is a matter of their fundamental rights.

Central to a Security Council strategy is to focus on individual members’ clear legal duties to act in face of Burma’s grave crimes, including breaches of the Geneva Conventions. Member States do not shed their legal obligations when sitting on the Council. The actions—or inaction—by the individual fifteen member representatives must be in accordance with their States’ obligations including under the Geneva, Genocide, and Torture Conventions, the Rome Statute and customary law.

In light of the serious breaches of peremptory norms by the junta, international law requires that all members on the Council propose—individually and collectively—a resolution to refer Burma to the ICC. This action is required to be taken, regardless of the likelihood of success.

We must, over and over again, at every opportunity, remind Member States of their individual legal obligations under international law and, spell them out. This is not being done. State representatives express surprise when shown how international law mandates that their state take action to end impunity in Burma.

Although neither genocide nor crimes against humanity require an ongoing armed conflict situation, Burma is in armed conflict. Thus, we must make clear that the killings and rapes of ethnic women are war crimes.

The junta is now seeking to “legalize” its criminal military oligarchy by means of a sham constitution and elections which violate the Geneva Conventions and, thus, constitute breaches of peremptory norms. These grave breaches require the Security Council to take the same immediate actions it took in 1984 denouncing the peremptory norms embodied in South Africa’s 1983 apartheid constitution.

The general amnesties in the constitution strike at the heart of Burma's obligations under the Genocide and Geneva Conventions and customary international law.<sup>xiv</sup> The fact that no national court in Burma has any jurisdiction to prosecute perpetrators of *jus cogens* crimes, including for genocide, war crimes, and crimes against humanity, strengthens the case for an ICC referral, since national level prosecutions are constitutionally prohibited.

The constitution also breaches the Geneva Conventions by giving unfettered powers to the Commander-in-Chief of the armed forces outside of any constitutional constraints. Such powers, including over courts martial and military tribunals, breach Article III of the Geneva Conventions, which require parties afford "all the judicial guarantees which are recognized as indispensable by civilized peoples."<sup>xv</sup>

## **Conclusion**

The legal duty to ensure Senior General Than Shwe and other top criminal perpetrators are prosecuted for perpetrating crimes of concern to the global community is neither an option nor a "lever" for change. This legal duty, just like the criminal culpability of these perpetrators, exists today and forever. It can never be negated, suspended, or replaced by a statute of limitation, peace agreements, talks, sanctions, elections, negotiations or amnesties.

The top military leaders and criminal judges in Burma will face criminal trials; if not this year or next year, then in ten or twenty years. War criminals from Cambodia and Nazi Germany are still being prosecuted even today some thirty and sixty years after the crimes occurred.

However, generations of men, women, and children of all ethnic and religious backgrounds have lived and died in Burma without knowing peace, without having received any forms of redress or justice and, without experiencing the most basic guarantees of human dignity embodied in the Universal Declaration of Human Rights.

***They are entitled to justice in their lifetime.***

***I believe we can make this happen.***

***Thank you.***

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\* This more comprehensive written version of the April 27, 2009 speech has been edited to include the Security Council's finding on Burma's impunity for sexual crimes in conflict under SCR 1820.

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<sup>i</sup> 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*, and Sept. 2009.

<sup>ii</sup> S.C. Res.554, ¶ 5, U.N.Doc. S/RES/556 (Aug. 17, 1984).

<sup>iii</sup> *Id.*

<sup>iv</sup> S.C. Res. 688, U.N. Doc. S/RES/0688 (Apr. 5, 1991).

<sup>v</sup> Statement by the President of the Security Council, U.N. Doc. S/PRST/2009/1(Jan. 14, 2009).

<sup>vi</sup> See S.C. Res 1820,U.N. Doc. S/RES/1820 (June 19, 2008)[hereinafter SCR 1820]; S.C. Res. 1612, U.N. Doc. S/RES/1612 (July 26, 2005); S.C. Res. 1325, U.N. Doc. S/RES/1325 (Oct. 31, 2000).

<sup>vii</sup> See S.C. Res 1674, U.N. Doc. S/RES/1674 (Apr. 28, 2006).

<sup>viii</sup> See Rome Statute of the International Criminal Court, art. 17, July 17, 1998, U.N. Doc. A/CONF.183/9, 37 I.L.M. 999 (1998)[hereinafter Rome Statute].

<sup>ix</sup> See Negotiated Relationship Agreement between the International Criminal Court and the United Nations, U.N. Doc. ICC-ASP/3/Res.1 (2004). See also Rome Statute, *supra* note vii, at art. 13.

<sup>x</sup> The U.S., in calling on the UN to initiate an investigation into the violations in Darfur, which led to an ICC referral, invoked Article 8, which states “Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.” Convention on the Prevention and Punishment of the Crime of Genocide, art. 8, Dec. 9, 1948, 78 U.N.T.S. 277; Colin L.Powell, *The Crisis in Darfur, Written Remarks before the Senate Foreign Relations Committee* (Sept. 9, 2004).

<sup>xi</sup> SCR 1820, *supra* note vii.

<sup>xii</sup> Secretary of State Hillary Rodham Clinton, Opening Remarks on the Adoption of a UNSC Resolution to Combat Sexual Violence in Armed Conflict (Sept. 30, 2009). In addition to recognizing violations of 1820, the Security Council from 2001 through 2009 received four consecutive reports from Secretary General on children and armed conflict citing Burma’s national army for violating international law prohibiting the use of Child Soldiers and two specific reports detailing such violations. See Report of the Secretary-General on Children in Armed Conflict in Myanmar, U.N. Doc. S/2007/666 (Nov. 16, 2007). The Security Council’s Working Group on Children and Armed Conflict subsequently urged the government of Myanmar “to put an immediate end to the continuing recruitment of child soldiers.” Working Group on Children and Armed Conflict, Conclusions on Children and Armed Conflict in Myanmar, S/AC.51/2008/8 (July 25, 2008).

<sup>xiii</sup> A *jus cogens* norm is defined as a “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Conventions on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331.

<sup>xiv</sup> Constitution of the Republic of the Union of Myanmar (2008), Ch. XIV, § 445.

<sup>xv</sup> 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. In fact, the General Assembly has repeatedly called upon the government of Burma “to respect fully the obligations of the Geneva Conventions...in particular the obligations in article 3 common to the Conventions....” G.A. Res. 48/150, ¶13, U.N. Doc. A/RES/48/150 (Dec. 20, 1993).