



September 13, 2011

ASEAN Heads of State

H.M. Sultan Haji Hassanal Bolkiah Hu'izzadin Waddaulah Brunei Darussalam
H.E. Samdech Hun Sen, Prime Minister of the Kingdom of Cambodia
H.E. Susilo Bambang Yudhoyono, President of the Republic of Indonesia
H.E. Thongsing Thammavong, Prime Minister of the People's Democratic Republic of Laos
H.E. Mohamed Najib Bin Abdul Razak, Prime Minister of Malaysia
H.E. U Thein Sein, President of Republic of the Union of Myanmar
H.E. President Benigno S. Aquino, President of the Republic of Philippines
H.E. Lee Hsien Loong, Prime Minister of Singapore
H.E. Yingluck Shinawatra, Prime Minister of the Kingdom of Thailand
H.E. Prime Minister Nguyen Tan Du, Prime Minister of Socialist Republic of Vietnam

Subject: ASEAN States, under the customary *Laus of State Responsibility* are Prohibited from Recognizing Myanmar/Burma as an ASEAN Member Because the Myanmar/Burma Constitution and Elections Violate the Most Fundamental Rules of International Law

Your Excellencies:

The issue of the Republic of Union of Myanmar (hereinafter Myanmar/Burma) becoming Chair of ASEAN is moot. As experts in international law, we urge ASEAN states to comply with their binding obligations under international law to no longer recognize of Myanmar/Burma as a member of ASEAN.

Myanmar/Burma's new constitution sets up a bifurcated sovereign state in violation of the most fundamental precepts of international law. Unlike any country in the world today, the sovereign state of the "Republic of the Union of Myanmar" has no legal capacity to enforce any laws, civil or criminal, against the "Defense Services" (Military). This creation of a sovereign state without sovereign powers means that Myanmar/Burma lacks the legal capacity to comply with the UN Charter, including Chapter VII Security Council Resolutions, the Nuclear Non-proliferation Treaty, the Genocide and Geneva Conventions, and the ASEAN Charter.

Under the customary laws of state responsibility, all states must treat Myanmar/Burma's constitution and elections as null and void, and take all possible measures to end this serious violation of the law of nations. Continued recognition of Myanmar/Burma as a member of ASEAN violates this duty.

1. The constitution violates the UN and ASEAN charters

Myanmar/Burma's constitution, implemented on January 31, 2011, deprives Myanmar/Burma of the legal capacity to comply with ASEAN membership which is predicated on a state's

“agreement to be bound and to abide by the Charter” and [its] “ability and willingness to carry out the obligations of Membership.”

The constitution defines the sovereign state of “the Republic of the Union of Myanmar” as being composed of the executive, legislative, and judicial branches, exclusively. The military is a legally autonomous entity outside of this sovereign state and ruled over exclusively by the Commander in Chief over whom no law—not even the constitution, applies.

Although President Thein Sein, can make pledges, sign ASEAN agreements, and even work with the legislature to pass laws in accordance with ASEAN mandates, the President and the other “civilian” branches of government are prohibited from attempting to enforce these laws against military violations.

The Myanmar /Burma constitution is null and void as a *prima facie* violation of the UN Charter and a “serious breach of peremptory norms.” All states are obligated not to recognize the constitution and subsequent elections *and* to take measures to ensure that Myanmar /Burma revokes the constitution, recalls the election results, and pays reparations to all injured persons. This intransgressible legal duty of non-recognition under international law exists even in the absence of an explicit declaration by a court or the Security Council, which enforced this sanction of non-recognition duty in 1984 by declaring the South African apartheid constitution in violation of the UN Charter and thus null and void.

2. ASEAN states are under Legal Imperatives to take immediate action to stop genocide in Myanmar/Burma

We do not use the term “genocide” lightly, nor do we shy away from the term simply for political reasons. Slow-burning but systematic genocidal crimes are being perpetrated against the Kachin, Karen, Shan, Rohingya, and other ethnic groups in Myanmar/Burma, and ignoring these crimes threatens global peace and security. Although the ongoing civil war in Myanmar/Burma is marked by the military’s perpetrating all ICC-covered crimes, including rape of ethnic women as a weapon of war, the Genocide Convention imposes the strongest absolute affirmative duties on states, particularly to members of ASEAN, given their proximity, to “prevent” and to “punish” genocide.

The ICJ has held that states’ “due diligence” duties to take all possible measures “to prevent” genocide are triggered by the serious risk of genocide. Global indices on genocide continue to rank Myanmar/Burma in the “Red Alert” category. Myanmar /Burma is one of the top four “hot” states monitored by the UN Special Advisor on the Prevention of Genocide, who has initiated at least one confidential briefing on Burma to the Security Council.

States must arrest any person coming on their territory against which there is credible evidence of genocide, including Senior General Than Shwe.

3. The constitution ensures Myanmar/Burma “supra sovereignty” over other ASEAN states, including by granting the military a green light to develop nuclear weapons.

The military currently lacks nuclear capability, but their fierce designs on developing or buying nuclear weapons to use as a bargaining tool on the world stage are backed with ample resources, including mineable uranium and billions of dollars.

The clear nuclear ambitions of Burma's military are strengthened by a constitutional structure ensuring the military's legal autonomy and control over Burma's energy development projects, including nuclear power. Although the UN Security Council has cited Burma's involvement in "nuclear-related and ballistic missile-related activities," as violating the sanctions on North Korea, the civilian government, including the judiciary, is constitutionally prohibited from enforcing any domestic or international laws on nuclear issues including sanctions violations against the military.

Thus we call on ASEAN states to support the rule of law and international conventions by not recognizing the Myanmar/Burma's constitution or government, which therefore precludes Myanmar/Burma from being a member of ASEAN. Such an action will strengthen international law and ASEAN, and be an important step in stopping the ongoing genocide and violations of international law now taking place in Myanmar/Burma.

Sincerely,



Janet Benshoof
President
Global Justice Center

cc: ASEAN Member States – Foreign Ministers, and Chief Legal Counsels

ASEAN Member States □ Foreign Ministers

H.R.H. Prince Mohamed Bolkiah, Minister of Foreign Affairs and Trade, Brunei Darussalam

H.E. Mr. Hor Nam Hong, Deputy Prime Minister and Minister of Foreign Affairs and International Cooperation, Kingdom of Cambodia

H.E. Dr. R.M. Marty M. Natalegawa, Minister of Foreign Affairs, Republic of Indonesia

H.E. Dr. Thongloun Sisoulith, Deputy Prime Minister and Minister of Foreign Affairs, Lao People's Democratic Republic

H.E. Dato' Sri Anifah bin Haji Aman, Minister of Foreign Affairs, Malaysia

H.E. U Wunna Maung Lwin, Minister of Foreign Affairs, Government of the Republic of the Union of Myanmar

H.E. Mr. Albert del Rosario, Secretary of Foreign Affairs, Republic of the Philippines

H.E. Mr. Kasiviswanathan Shanmugam, Minister for Foreign Affairs, Republic of Singapore

H.E. Mr. Kasit Piromya, Minister of Foreign Affairs, Kingdom of Thailand

H.E. Mr. Pham Gia Khiem, Deputy Prime Minister and Minister of Foreign Affairs, Socialist Republic of Vietnam

ASEAN Member States - Chief Legal Counsel

Attorney General, Ybdatin Paduka Hj Hayati Binti Pokspsp Hj Mohd Salleh, Brunei Darussalam

Minister of Justice, Ang Vong Vatana, Kingdom of Cambodia

Attorney General, Basrief Arief, Republic of Indonesia

Minister of Justice, Chaleun Yiabaoher, People's Democratic Republic of Laos

Attorney General, The Honorable Tan Sri Abdul Gani Patail, Malaysia

Attorney General, Dr. Tun Shin, Republic of the Union of Myanmar

Solicitor General, Jose Anselmo I. Cadiz, Republic of Philippines

Attorney General, Sundaresh Menon, Singapore

Attorney General, Pirapan Salirathavibhaga, Kingdom of Thailand

Minister of Justice, Ha Hung Cuong, Socialist Republic of Vietnam