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

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. 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.

**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. 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.
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 segreagable 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. These obligations exist with regard to Burma given authoritative global indices listing Burma as one of eight “red alert” States at risk of genocide, the inclusion of Burma as a State monitored by the UN Special Advisor on the Prevention of Genocide, 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.”

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. The same jus cogens rules apply to the 2008 Burma constitution as were applied to the 1983 constitution of apartheid South Africa.

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.

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

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 legitimize 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,

Janet Benshoof  
President  
Global Justice Center

U Thein Oo  
Chairman  
Burma Lawyers’ Council

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

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.


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.


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.

- In 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.

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)


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.

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).


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….”).


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.


See Myanmar Constitution, supra note xvi.


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.


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 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.

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

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,

xxxviii Internal States are generally precluded from prosecuting sitting heads of state and
(Feb. 14).

xxxix Committee on the Elimination of Discrimination against Women (CEDAW
Committee), Concluding Observations of the Committee on the Elimination of Discrimination

xla See Letter from the Senate Women’s Caucus on Burma to Secretary-General Ban Ki-
moon, Apr. 9, 2009, available at
Record_id=a5d1f98e-5056-8059-7692-63bda7b74dce&Region_id=&Issue_id= Letter from the
Global Justice Center and SALT to Secretary-General Ban Ki-moon (on file with the author),
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

xliii ICG Report, supra note i, at 12.

xliv Id. at 1.