



# LawKa PaLa

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**Excerpt:**

**The Changing Landscape of International Law:  
The Global Responsibility To Prosecute Perpetra-  
tors of Grave Crimes Inflicted on the People of  
Burma**

**By Janet Benshoof  
President of the Global Justice Center**



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A JUST, FREE, PEACEFUL AND DEVELOPED ONE.**



## **Legal Journal on Burma**

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The BLC Publication Team

# **THE CHANGING LANDSCAPE OF INTERNATIONAL LAW: THE GLOBAL RESPONSIBILITY TO PROSECUTE PERPETRATORS OF GRAVE CRIMES INFLICTED ON THE PEOPLE OF BURMA**

By: Professor Janet Benshoof (President of Global Justice Center)

August 16, 2007

On June 10, 2002, Captain Ye Htut and 19 other soldiers raped 22 year old Nan Bway Pong from Kyaukyi Township in the Nyaunglebin district. Before raping the young Wa Buddhist women, Captain Ye Htut “said to his soldiers, ‘You all must rape that woman, those who refuse to rape will be shot and killed’.”

*-Shattering Silences Report, April 2004*

Myanmar women have never been known to have lost their rights nor been subjected to torture and degradation.

*-The New Light Of Myanmar (8-5-98) SPDC Newspaper*

## **Introduction**

The Burmese military junta, the State Peace and Development Council (SPDC)<sup>1</sup> continues to exercise dictatorial control over the lives of the people of Burma as it has done with impunity for over forty years. The SPDC, under its various guises, routinely employs torture, rape, slavery, murder, and mass imprisonment as tools to consolidate its power and silence any dissent.<sup>2</sup> These acts go far beyond a repudiation of democracy; they are crimes against humanity and war crimes, including grave breaches of the Geneva Conventions.

There is a growing consensus in the global community that no “safe harbor” should exist for perpetrators whose crimes violate international law. This article will examine how global advances in prosecuting state actors under international criminal law should be used to force the SPDC to face the specter of real, present day judicial accountability for their crimes and thus provide a new tool to weaken their heretofore-unchallenged power.

This article argues that crimes perpetrated by the Burmese military leaders, including torture, forced labor and gang rapes, should not be buried under the rubric of “human rights violations,” but called what they are, international crimes or war crimes as defined by Common Article 3 of the Geneva Conventions of 1949 and Protocol II Additional to the Geneva Conventions. This interpretation is reflective of the Rome

Statute application of Common Article 3 as referenced in Article 8 (2) (d) to cases of non-international armed conflicts.<sup>3</sup> The global community should rally behind a Security Council Resolution for a Commission of Experts to investigate the junta’s criminal activity as a first step in bringing perpetrators suspected of heinous crimes before the International Criminal Court.

## **I. International Criminal Law Developments and How They Apply to Burma**

There is an increasing global consensus that certain atrocities are too onerous to sustain absolute sovereignty. This was made explicit in both the Genocide Convention and the Convention against Torture.<sup>4</sup> This has also led to other international law developments culminating in the establishment of the International Criminal Court (ICC) in 2002.<sup>5</sup>

New opportunities to hold perpetrators responsible for war crimes, including current heads of state or military commanders, arise from parallel legal developments, four of which I discuss in

this article. These are, *first*, the Security Council's increasing willingness to abandon its longstanding policy of noninterference when faced with systematic state sponsored criminal atrocities. *Second*, the legal concept of "universal jurisdiction" which is gaining a legal foothold in some national courts which are prosecuting alleged war criminals, in some instances even for crimes which occurred elsewhere or when the state would not otherwise have jurisdiction. *Third*, there are new international legal tools and criminal law precedents specifically designed to rectify the historic discrimination denying women access to justice for rape and other forms of sexual violence. *Fourth*, the International Criminal Court (ICC) now insures the availability of an international forum to try perpetrators and others responsible for war crimes, crimes against humanity, and genocide.<sup>6</sup>

### **A. The Security Council**

The Security Council is endowed by the U.N. Charter with the power to decide what steps will be taken, up to and including the use of force, "to maintain or restore international peace and security."<sup>7</sup> Though its ability to exercise these powers was constrained during the years of the Cold War, since 1992 the Security Council has exercised these powers through the creation of special criminal courts.

The horror expressed by the global community in reaction to the atrocities committed in the former Yugoslavia propelled the Security Council in 1992 to equate such "crimes against humanity" with a "threat to international peace and security" under Chapter VII and set up a commission of experts to investigate the crimes.<sup>8</sup> After some 35 field missions to the former Yugoslavia, undertaking what was then the world's largest rape investigation, and establishing a database of 65,000 documents, the Commission reported back to the Security Council and adopted the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY).<sup>9</sup> The Security Council in 1994 issued a similar "threat to international peace and security" Resolution 955 on the Rwanda situations and set up a second ad hoc International Criminal Tribunal for Rwanda (ICTR).<sup>10</sup>

The Statutes setting up these Tribunals established important precedents, including that of the ICTY, which for the first time in an international context explicitly recognized the legal rights of victims and survivors. The witness/victim protections provided were critical to the success of the ICTY since in 1993 there were still powerful factions in Yugoslavia with the ability to exact revenge against people who cooperated with the Tribunal.<sup>11</sup>

Another Security Council development advancing criminal accountability, although it is not usually viewed in those terms, is Resolution 1325 passed in 2000.<sup>12</sup> SCR 1325 is the first Security Council Resolution solely addressing the rights of women in peacemaking and peacekeeping processes and seeks to rectify gender inequality in conflict and post conflict situations including peacekeeping processes, nation building steps and equality in transitional justice forums. The provisions of SCR 1325 make clear it applies to the United Nations itself as well as state parties, albeit in different ways. Relevant to the situation of Burma is the strong language in SCR 1325, that it is the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, war crimes including those relating to sexual violence against women and girls."<sup>13</sup>

Although SCR 1325 is binding on states, passed under the authority of the Security Council, it remains more a promise than a reality due to its less than clear language and lack of enforcement mechanisms. However, the use of SCR 1325 in a legal context is undeveloped and an argument to advance is, that by passing SCR 1325, the Security Council accepted that SCR 1325 imposes affirmative obligations on the Security Council itself. Thus, given the context of the long-documented crimes of sexual violence in Burma by the military should be given an initial presumption for a Chapter VII referral to the ICC.

Finally, the ICC statute in laying out the relationship between the United Nations and the ICC strengthens the Security Council's formal role.<sup>14</sup> The principal way to bring non-member states to the ICC is to use the Chapter VII authority of the Security Council to make a direct referral or, as a first step, set up a commission of inquiry as was done in the case of Darfur, Sudan.<sup>15</sup> This is instructive for Burma, since after reviewing the Darfur Commission report the Security Council referred the Darfur situation to the ICC.<sup>16</sup> After its own investigation the ICC issued an arrest warrant for the former Secretary of State Minister of the Interior in Sudan, Ahmed Haroun on May 2, 2007, requesting that President Bashir of Sudan extradite him to The Hague to be tried as an alleged war criminal.<sup>17</sup>

### **B. Universal Jurisdiction: No Safe Harbor**

The Commission Report on Darfur, acknowledging that the ICC would be able to only prosecute a few perpetrators, recommended that in addition all state parties be encouraged to prosecute perpetrators of grave crimes in Sudan in their national courts under the concept of universal jurisdiction.<sup>18</sup> This recommendation reflects the growing incorporation of the concept of universal jurisdiction in both national and international jurisprudence.<sup>19</sup>

Universal jurisdiction presumes that some crimes are so heinous that prosecuting the perpetrators is the responsibility of the world community. Thus, national courts can and should try persons suspected of such crimes even if neither the suspect nor the victims are nationals of the country where the court is located and even if the crime took place outside that country. International law now strongly suggests that certain crimes are exempt from amnesty and any statute of limitations, as shown by the Spanish Courts' landmark order in 1998 calling for the arrest and extradition of Chilean dictator Augusto Pinochet.<sup>20</sup> The constitutional Court in Spain recently set another precedent by upholding the right of Spanish prosecutors to initiate criminal investigations of members of the Guatemalan military accused of abuses targeting indigenous groups in Guatemala even though none of the alleged perpetrators had ever been in Spain.<sup>21</sup>

The growing consensus against any "safe harbor" for war criminals has led to increased cooperation by countries in extraditing suspected war criminals. For example, the former president of Liberia, Charles Taylor was recently extradited from Nigeria, which had previously given him asylum, and turned over to the Special Court for Sierra Leone, which is trying him in The Hague for his alleged war crimes and crimes against humanity.<sup>22</sup>

### **C. Advances in Gender Justice**

Women's rights under international law are only rarely enforced by courts, however, in a surprising development, the opposite has become true in the context of the war crimes tribunals.

Dr. Kelly Askin, renowned expert on women and war crimes, points out that although the laws of warfare have prohibited the rapes of combatants and noncombatants for centuries it was not until the first ad hoc Tribunals that gender crimes have been prosecuted with some regularity.<sup>23</sup> Both the ICTY and ICTR have over the last decade established strong legal precedents, beginning with the now famous Akayesu decision, placing rape and sexual violence firmly under the rubric of war crimes, crimes against humanity and instruments of genocide.<sup>24</sup>

Although there is still a long way to go until sexual violence is adequately addressed, these tribunals are a large step forward. Further, military or civilian leaders who should have foreseen the possibility of the criminal acts or who can be shown to have failed to punish criminal acts by soldiers are themselves liable under theories of joint criminal enterprise or superior responsibility.

#### **D. The International Criminal Court**

The ICC, unlike the Ad hoc Tribunals or the International Court of Justice, is an independent institution created by the Rome Treaty, which as of July 2007 has been acceded to by 105 States.<sup>25</sup> Because the ICC will prosecute only those crimes which occurred after its implementing date, July 1, 2002,<sup>26</sup> any ICC investigation should be accompanied by a simultaneous campaign to encourage parallel prosecutions in national courts of perpetrators whose crimes took place prior to 2002.

There are three ways for a case to be brought to the ICC. First, a state party can refer a case or even self-refer perpetrators in its own territory. Second, the prosecutor can initiate an investigation of crimes within the ICC jurisdiction, and, finally, under Article 13(b), the only way non-signing states can be referred to the ICC is by a Security Resolution under Chapter VII.<sup>27</sup>

Since 2002, the ICC has opened investigations into crimes in Darfur, the Democratic Republic of the Congo, the Central African Republic, and Uganda, and issued arrest warrants in the cases of Uganda, DRC, and Darfur.<sup>28</sup>

##### ***i. Crimes covered by the ICC***

ICC jurisdiction is limited to prosecuting the crimes of most serious concern to the international community, i.e., genocide, crimes against humanity and war crimes. Prosecutions under genocide and crimes against humanity do not require proof of any ongoing-armed conflict as do the war crimes provisions.<sup>29</sup> Crimes against humanity as an initial matter do require proof of “widespread and systematic” criminality pursuant to or in furtherance of a State or organizational policy. However, once such a pattern is established any one particular criminal act, such as rape or torture or forced labor, need itself not be committed in a widespread matter to be charged as a crime against humanity – only the attack needs to be widespread or systematic.<sup>30</sup>

Although the ICC Statute sets out some basic international humanitarian law, which regulates the conduct of armed conflict, its provisions minimize any difference in criminal culpability depending on whether the conflict is deemed to be of an international character or an internal conflict. This includes the enumerated gender crimes listed in Article 8 (b) (xxii) of the Rome Statute. In addition the ICC explicitly provides for jurisdiction over top military commanders and even current heads of state.<sup>31</sup>

## *ii. The ICC and Women's Rights for Redress for gender crimes*

The ICC, incorporating the case law from the ad hoc Tribunals, has codified rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and other forms of sexual violence as elements of genocide and acts which could constitute war crimes and crimes against humanity.<sup>32</sup> Further, the ICC requires affirmative measures to ensure redress for gender crimes. The rape and sexual violence by the military as detailed in the seven reports by the women from Burma, if proven, could amount to genocide, crimes against humanity, and war crimes under the ICC.<sup>33</sup>

## **Conclusion**

Over the last two decades there has been a sea of change in the sheer number of prosecutions of perpetrators of the most serious of state sponsored crimes. This enforcement reflects a growing consensus, not only that lawless states are a threat to security, but also that the world community has a moral and legal duty to protect people held prisoners by their own leaders. The military junta in Burma has had unbridled license to use a country and destroy a people. A Security Council Resolution under Chapter VII setting up an international criminal investigation is not a political decision but rather a legal obligation enforcing the most fundamental of rights of the people of Burma. All countries, including Myanmar/Burma, should cooperate with this inquiry and welcome the opportunity to be part of a constructive engagement with justice.

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<sup>1</sup> State Peace and Development Council is the official name of the military regime of Myanmar (known as Burma). In 1997, Burma's ruling military junta announced it was changing its name from the State Law and Order Restoration Council (SLORC) to the "State Peace and Development Council" (SPDC).

See, e.g. [http://hrw.org/english/docs/2007/07/18/burma\\_6412.htm](http://hrw.org/english/docs/2007/07/18/burma_6412.htm)

<sup>2</sup> Human Rights Watch, World Report 2007: Burma, Event of 2006, <http://hrw.org/englishwr2k7/docs/2007/01/11/burma14865.htm>; See, e.g. Karen Women's Organization, Shattering Silences (2004) <http://www.karenwomen.org/>; Karen Women's Organization, Shattering Silences: Ongoing Rape of Karen Women by the SPDC (2006), <http://www.karenwomen.org/>; Human Rights Foundation of Monland, Catwalk to the Barracks (2005), available at: <http://www.rehmonnya.org/catwalk-to-the-barracks.php>; Shan Women's Action Network, License to Rape (2002), available at: <http://www.shanwomen.org/>; Refugees International, No Safe Place: Burma's Army and the Rape of Ethnic Women (2003), available at: <http://www.refugeesinternational.org/content/publication/detail/3023/>

<sup>3</sup> See Rome Statute of the International Criminal Court [hereinafter "Rome Statute"], Art. 8(2)(d), July 17, 1998, U.N. Doc. A/CONF. 183/9. ("Paragraph 2 (c) applies to armed conflict not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.")

<sup>4</sup> Convention on the Prevention and Punishment of the Crime of Genocide [hereinafter "Genocide Convention"], arts. 4-6, January 12, 1951, G.A. Res. 260 (III) A, U.N. GAOR, U.N.T.S. 1021, vol. 78.; The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment [hereinafter "Convention Against Torture"], Art. 4, February 4, 1985, G.A. Res. 39/46, 39 U.N. GAOR, Supp. No.51, at 197, U.N. Doc. A/39/51.

<sup>5</sup> Rome Statute, *supra* note 3.

<sup>6</sup> *Id.*, Art. 5

<sup>7</sup> Charter of the United Nations, Art. 42, June 26, 1945, 59 Stat. 1031, T.S. 993, 3 Bevens 1153. (The quote is a description of the mandate of the ICTY by Antonio Cassesse, the first President of the Tribunal.)

<sup>8</sup> S.C Res. 780, U.N. SCOR, 47th Sess., 3119th mtg., U.N. Doc. S/RES/780 (1992).

<sup>9</sup> The Statute of the International Criminal Tribunal for the Former Yugoslavia, May 25, 1993, UNSC Res. 827, U.N. SCOR, 48th Sess., U.N. DOC S/RES/827.

<sup>10</sup> The Statute of the International Criminal Tribunal for Rwanda, November 8, 1994, UNSC Res. 955, U.N. SCOR, 49th Sess., U.N. DOC S/RES/955.

<sup>11</sup> See Asa Rydberg, *The Protection of Interests of Witness - The ICTY in Comparison to the Future ICC*, 12 Leiden Journal of Int. Law 455, 462 (1999). (The ad hoc tribunals are important in both bringing some measure of justice to victims and setting positive precedents for new mechanisms in victim protections. For example, the Special Court for Sierra Leone adopted the Rules of Procedures and Evidence of the ICTR, which under Rule 34 established a Victims and Witness Unit to provide protective measures to victims and witnesses along with counseling and support, particularly in cases of rape and sexual assault. The expansion in victim and witness protections is also exemplified by the various gender provisions of the Rome Statute, which has drawn heavily from this jurisprudence and developed concepts even further. The ICC Statute and Rules of Procedure and Evidence offers special protection to victims and witnesses of sexual or gender violence, for example, under Rule 88 (2) the Court is required to control the questioning of witnesses to avoid harassment or intimidation, especially in sexual violence cases. Additionally, motions may be filed under seal to protect victims and under Rule 87 (3) as an exception to the principle of public hearing, the Pre-Trial, Trial or Appeals Chamber may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera (closed to the press and public))

<sup>12</sup> UN Security Council, Resolution 1325, S/Res/1325, adopted Oct. 13. 2000.

<sup>13</sup> *Id.*

<sup>14</sup> See Rome Statute, *supra* note 3, at art.13 (b).

<sup>15</sup> In September 2004 the Security Council adopted Resolution 1564 to establish an international commission of inquiry to investigate "violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable". S.C. Res. 1564, U.N. SCOR, 5040th mtg. S/RES/1564 (September 18, 2004).

<sup>16</sup> UNSC Res.1593, U.N. SCOR, 5158th meeting., U.N.Doc. S/RES. 1593 (March 31, 2005). Resolution 1593 referring Darfur to the ICC was adopted by a vote of 11 in favor and 4 abstentions in the Security Council. (Algeria, Brazil, United States, and China). Both China and the U.S. are permanent members. The 11 members that voted for the resolution are Argentina, Benin, Denmark, France, Greece, Japan, Philippines, Romania, Russia, Tanzania, and United Kingdom. See: Press Release, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, U.N. Doc. SC/8351 (Mar. 31, 2005), available at <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm>

<sup>17</sup> The Prosecutor v. Ahmad Muhammad Harun ("Almad Harun"), Case No. ICC-02105-01107, Warrant of Arrest for Ahmad Harun, (27 April 2007).

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<sup>18</sup> UN Security Council, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, ICC-02/05-3 (July 20, 2005) p.153-164.

<sup>19</sup> The most helpful sources are the website of Amnesty International (<http://www.amnesty.org>) and the Human Rights Watch (<http://www.hrw.org>). See also: Kenneth Roth, *The Case for Universal Jurisdiction*, 80 Foreign Affairs 150 (2001).

<sup>20</sup> In the Proceedings relating to Chile, decision of judge Manuel Garcia-Castellon, Judge-Magistrate of the Central Investigatory Court number six, Madrid, Summary Proceeding 1/98J, September 1998, see the order of November 5, 1998 (no. 1998/22605) of the High Court (Audiencia Nacional) in the proceedings against Augusto Pinochet.

<sup>21</sup> Guatemala Genocide, Judgment No. STC 237/2005 (Tribunal Constitucional Sept.26, 2005), available at: <http://www.tribunalconstitucional.es/Stc2005/STC2005-237htm>

<sup>22</sup> BBC News, Nigeria to give up Charles Taylor (2006), <http://news.bbc.co.uk/2/hi/africa/4845088.stm>

<sup>23</sup> Kelly D. Askin, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 Berkeley J. Int'l Law 288 (2003). See also, Christine Chinkin, *Rape and Sexual Abuse of Women in International Law*, 5 Eur. J.Int'lL. 326 (1994).

<sup>24</sup> Prosecutor v. Akayesu, Case No. ICTR-96-4-A, Decision (1 June 2001). The Akayesu case held that when rape used as a method to destroy a cause physical and mental damage to a group or member of a group it constitutes genocide. Id. In the ICTY in Dragoljub Kunarac, Case Nos. IT-96-23-T & IT-96-23/1-T, Judgement (22 Feb. 2001). The court found the rapes against the Bosnian-Muslim women constituted "crimes against humanity," war crimes, an "outrage upon personal dignity within Article 3c of the Geneva Conventions

<sup>25</sup> See. ICC website. (the ICC is based on a treaty, joined by 104 countries). <http://icc-cpi-int/about.html>. Japan becomes 105th country by its accession to the Rome Statute of the ICC on 17 July 2007.<http://www.iccnw.org/mod=country&iduct=86>.

<sup>26</sup> Rome Statute, *supra* note 3, art. 11.

<sup>27</sup> *Id.*, art.13.

<sup>28</sup> See ICC website <http://icc-cpi-int/about.html>

<sup>29</sup> Rome Statute, *supra* note 3, art. 6,7.

<sup>30</sup> Askin, *supra* note 23, at.11.

<sup>31</sup> Rome Statute, *supra* note 3, art.27, 28.

<sup>32</sup> *Id.*, art. 7(2)(c). (The ICC definition of enslavement includes human trafficking.)

<sup>33</sup> See sources cited *supra* note 2.