

The Honorable Paul de Jersey AC  
Chief Justice of Queensland  
Chief Justice's Chambers  
George Street  
Brisbane QLD 4000 AUSTRALIA

November 10, 2009

**Re: Existing obligations *erga omnes* require the Conference of Chief Justices of the Asia Pacific region to publicly exclude Chief Justice U Aung Toe of Myanmar as a Conference participant.**

Dear Chief Justice de Jersey,

We are writing you in your capacity as Chair of the Judicial Section of LAWASIA regarding the Conference of Supreme Court Chief Justices from the Asia Pacific region (the Conference), which, we believe, is meeting in Ho Chi Minh, Vietnam this week of November 9, 2009.

We want to preface this letter by expressing our admiration and respect for the powerful initiatives taken by the Chief Justices of the Asia Pacific region (Chief Justices). The Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (Beijing Statement), publicly affirming constitutionalism, judicial independence, and the universality of international humanitarian and human rights law, is a singular example of how Chief Justices can act together to advance respect for the rule of law.<sup>i</sup>

It is with this spirit of deep respect that we call your attention to a matter of utmost importance: the fundamental incompatibility of the Conference of Chief Justices associating with Chief Justice U Aung Toe of the Supreme Court of the Union of Myanmar (Chief Justice U Aung Toe), with States' existing obligations *erga omnes* to take certain actions in regards to Burma.

The serious breaches detailed in this letter are relevant to this Conference due to the legitimizing effects of Chief Justice U Aung Toe's status as a member in good standing. Collective and individual responsibilities of Chief Justices devolve from States' responsibilities under Articles 40, 41 and 58 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts.<sup>ii</sup> Additional *jus cogens* rules apply given Chief Justice U Aung Toe's personal criminal culpability for systematically perpetrating crimes of concern to the global community.<sup>iii</sup> International law requires, at a minimum, that Chief Justice U Aung Toe be

expelled from both the Conference of Chief Justices of the Asia Pacific region and from the Judicial Section of LAWASIA.<sup>iv</sup>

Chief Justice U Aung Toe has perpetrated intentional breaches of international law in his capacity as sitting Chief Justice and in his capacity as Chair of the National Convention Working Committee since 1992, Chair of the Commission for Drafting the State Constitution beginning in 2007, and Chair of the Commission for Holding Referendum for the Approval of the Draft Constitution of the Republic of the Union of Myanmar in 2008.<sup>v</sup>

We understand that the seriousness of this situation calls for considered Conference deliberation and we have outlined the applicable doctrines of international law to help expedite this process. Therefore, we respectfully request that you forward this letter to the Chief Justices listed below, immediately agenda this item for future consideration, and consider convening a special meeting of the Conference. Given the serious and continuing criminal transgressions of Chief Justice U Aung Toe, waiting for the next Biennial Conference before considering this matter will serve only to foster a norm of judicial illegitimacy in the region.

## LEGAL OVERVIEW

### 1. States' obligations *erga omnes* in regards to Burma

Burma is a country in internal armed conflict governed by international humanitarian law (IHL). Third-party States' obligations to ensure respect for the Geneva Conventions<sup>vi</sup> in face of serious breaches of IHL include taking all possible measures to ensure that high-level criminal perpetrators such as Chief Justice U Aung Toe are prosecuted and punished.<sup>vii</sup>

Recent developments in international law heighten States' affirmative obligations to end impunity. Most notably, to date, there are 110 State Parties to the Rome Statute of the International Criminal Court; in fact, nearly half of the thirty-two countries whose Chief Justices signed the Beijing Statement have either ratified or signed the Rome Statute.<sup>viii</sup> Further, States are increasingly enacting national legislation providing for prosecution of perpetrators of *jus cogens* crimes under universal jurisdiction principles.<sup>ix</sup> While this is not yet the established practice, the legal community has a special duty to respect the integrity of such laws, including the penal code in Vietnam providing for prosecution of foreign visitors for treaty related *jus cogens* crimes.<sup>x</sup>

## **2. The 2008 constitution embodies serious breaches of peremptory norms: the granting of permanent amnesties for the Tatmadaw’s *jus cogens* crimes.**

Since 1993, Chief Justice U Aung Toe has worked hand-in-hand with Senior General Than Shwe to draft a constitution which is primarily aimed – in his own words – to ensure that “Tatmadaw (the military) [were given] the leading political role in the future of the state....”<sup>xi</sup>

To accomplish this aim, Chief Justice U Aung Toe in February 2008 granted all Tatmadaw military officers a permanent amnesty for all crimes as their constitutional right.<sup>xii</sup> This amnesty provision precludes civilian or military courts from ever being able to prosecute Tatmadaw perpetrators of *jus cogens* crimes including genocide, war crimes, and crimes against humanity. Victims, including women sexually assaulted during conflict, are also precluded from ever suing for civil damages.

This intentional and aggressive act by Chief Justice U Aung Toe to enshrine impunity is a serious breach of peremptory norms striking at the heart of Burma’s nontransgressible obligations under the Genocide and Geneva Conventions and customary international law.<sup>xiii</sup> Additionally, by constructing a constitution which deliberately and permanently excludes women from the highest government offices, Chief Justice U Aung Toe precluded Burma from ever being in compliance with the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), which it ratified in July 1997.<sup>xiv</sup>

Further, by awarding amnesties to the government side of a situation in armed conflict, the constitution flouts Security Council mandates including SCR 1674, 1325 and 1820.<sup>xv</sup> Notably, on July 15, 2009, the Secretary-General’s report on SCR 1820 to the Security Council cites Burma as a violator country for affording impunity for the ongoing military crimes of sexual violence against ethnic women in conflict areas.<sup>xvi</sup>

## **3. The 2008 constitution embodies serious breaches of peremptory norms: the repudiation of the Geneva Conventions.**

Under Chief Justice U Aung Toe’s specific directives, the 2008 Burma constitution removes all power over the military from the executive, judicial, and legislative branches.<sup>xvii</sup> This entrenches the current structure whereby the non-elected Commander-in-Chief is the most powerful person in Burma and clarifies that his power over all legal matters involving the military are deemed “final and conclusive.”<sup>xviii</sup>

What this means is that under the 2008 constitution, offenses committed by the military, including by active military serving as parliamentarians or in the civil service, cannot be tried in any civilian court nor are defendants entitled to appellate review or constitutional oversight by the Supreme or Constitutional Courts.<sup>xix</sup>

Excluding all military legal matters from any civilian review, covering Courts-Martial and military tribunals alike, is a formal repudiation of Common Article 3 of the Geneva Conventions. The 2008 constitution makes it impossible for Burma to comply with Common Article 3, now part of customary international law, requiring that States provide protected persons with courts that ensure “essential guarantees of independence and impartiality,” and which “[afford] all the judicial guarantees which are recognized as indispensable by civilized peoples.”<sup>xx</sup>

#### **4. The individual criminal culpability of Chief Justice U Aung Toe, States’ nontransgressible obligations *erga omnes*, and the resulting implications for the Conference and individual Chief Justices**

It is beyond dispute that Chief Justices have neither a duty nor a right to advocate for the prosecution of any particular criminal perpetrator, much less when that perpetrator is a sitting Chief Justice in another State. That being said, the fact that Chief Justice U Aung Toe, solely by virtue of his office, is considered a member of this Conference in good standing, raises serious issues of international law. Membership in this conference serves as a source of legitimacy, which he should not be conferred, given the ongoing impunity of Chief Justice U Aung Toe for crimes of the most serious nature and given his role as the chief architect of a constitution designed to “ensure disrespect” for the rule of law. This conference “membership” triggers an “obligation of means” requiring Chief Justices take positive action and, in turn, expel Chief Justice U Aung Toe from the conference.

Working since 1988, Chief Justice U Aung Toe transformed the judiciary in Burma into a criminal arm of the military regime.<sup>xxi</sup> A cadre of judges in Burma provide critical support for Senior General Than Shwe by disposing of political dissidents. Under direction of Chief Justice U Aung Toe, judges in Burma routinely commit crimes by “means of court order,” exactly as did the judges in the regimes of Adolf Hitler<sup>xxii</sup>, Emperor Hirohito<sup>xxiii</sup>, and Saddam Hussein.<sup>xxiv</sup> These judges were convicted of war crimes and crimes against humanity for the same acts as those committed daily in Burma; holding fake trials based on sham criminal charges before announcing predetermined guilty findings accompanied by the most draconian prison sentences.<sup>xxv</sup>

Chief Justice U Aung Toe and other judges are guilty of crimes against humanity and war crimes, underlying crimes include first degree murder for the wrongful

premeditated imprisoning of those persons who later died in prison from torture, killing, inadequate food, gross medical neglect and forced labor.<sup>xxvi</sup>

The documentary evidence used to convict Hitler's former Chief Judge, Schlegeberger, in the *Altstoetter* trial at Nuremberg is the same type of evidence now publicly available to prosecute and convict Chief Justice U Aung Toe. As stated in *Altstoetter*, and equally applicable to Burma: "If the evidence cited supra does not demonstrate the utter destruction of judicial independence and impartiality, then we 'never writ nor no man ever' proved."<sup>xxvii</sup>

As Chief Justices, you stand as representatives of the core values underlying the rule of law: an independent judiciary. The integrity of the judiciary is threatened by the transformation of the judiciary in Burma into an instrument of crime. We request you take action on the matter of Chief Justice U Aung Toe in the interest of advancing global justice.

Sincerely,



Janet Benshoof  
President  
Global Justice Center



U Aung Htoo  
General Secretary  
Burma Lawyers' Council

CC: The Hon. Justice John Muir, Judge of Appeal Supreme Court of Queensland

**Chief Justices of Asian Pacific Region**

Hon Chief Justice Paul de Jersey of Australia  
Hon Chief Justice Xiao Yang of the People's Republic of China,  
Hon Chief Justice Andrew Li of the Hong Kong Special Administrative Region of the People's Republic of China,  
Hon President Sam Hou Fai of the Macao Special Administrative Region of the People's Republic of China,  
Hon Chief Justice Murray Gleeson of Australia,  
Hon Chief Justice Muhammed Ruhul Amin of Bangladesh,  
Hon Justice Steven Chong of Brunei,  
Hon Chief Justice Beverley McLachlin of Canada,

Premier President Olivier Aimot of French Polynesia,  
 Hon Chief Justice Philip Carbullido of Guam,  
 Hon Chief Justice Konakupakattil G. Balakrishnan of India,  
 Hon Chief Justice Professor Dr Bagir Manan of Indonesia,  
 Hon Chief Justice Niro Shimada of Japan,  
 Hon Chief Justice Robin Millhouse of Kiribati,  
 Hon Chief Justice Lee Yong-hoon of Korea,  
 Hon Chief Justice Tun Dato' Sri Ahmad Fairuz Dato' Sheikh Abdul Halim of  
 Malaysia,  
 Hon Chief Justice Carl B. Ingram of Marshall Islands,  
 Hon Chief Justice Batdelger Sodnomdarjaa of Mongolia,  
 Hon Chief Justice Dilip Kumar Paudel of Nepal,  
 Hon Monsieur Le Premier President Gerard Fey of New Caledonia,  
 Hon Chief Justice Dame Sian Elias of New Zealand,  
 Hon Chief Justice Miguel Demapan of Northern Mariana Islands,  
 Hon Chief Justice Arthur Ngiraklsong of Palau,  
 Hon Chief Justice Reynato Puno of the Philippines,  
 President of the Supreme Court Professor Vyacheslav Lebedev of Russia,  
 Hon Chief Justice Patu Falefatu Sapolu of Samoa,  
 Hon Chief Justice Chan Sek Keong of Singapore,  
 Hon Chief Justice Sir Albert Rocky Palmer of Solomon Islands,  
 Hon Justice Viruch Limvichai of Thailand,  
 Hon Chief Justice Tony Ford of Tonga,  
 Hon Chief Justice Gordon Ward of Tuvalu,

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<sup>i</sup> LAWASIA: The Law Association for Asia and the Pacific, Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (Aug. 19, 1995) [hereinafter Beijing Statement].

<sup>ii</sup> See 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, 58 U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (Nov. 2001) [hereinafter ILC Draft Articles].

<sup>iii</sup> For precedents on the conviction judges for war crimes, see *The Justice Case*, 3 Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10 (1951) [hereinafter *The Justice Case*] (finding Nazi judges guilty of crimes against humanity, and war crimes). See also *Trial of Lieutenant General Harukei Isayama and Seven Others*, 5 Law Reports of Trials of War Criminals (1948); *Trial of General Tanaka Hisakasu and Five Others*, 5 Law Reports of Trials of War Criminals (1948) (finding the Japanese military tribunal judges guilty using fraudulent evidence and denying prisoners of war fair hearings); *Cassation Panel, Iraqi High Tribunal, Al-Dujail Final Opinion*, available at <http://www.iraq-iht.org/ar/doc/ihtco.pdf> and <http://law.case.edu/saddamtrial/content.asp?t=1&id=88> (unofficial English translation) [hereinafter *al-Dujail Opinion*]. See also Statute of the International Criminal Tribunal for Rwanda arts. 4, 6, Nov. 8, 1994, S/RES/955 (1994).

<sup>iv</sup> See ILC Draft Articles, *supra* note 2, at arts. 40, 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.”). See also S.C. Res.554, ¶ 5 (Security Council Resolution in 1983 calling for non-recognition of the 1983 constitution in apartheid South Africa due to its serious breaches).

<sup>v</sup> See, Union of Myanmar Convening Commission for National Convention Letter No. 3/Convention/1-Sa ma of December 1, 1992 on Formation of the Working Committee, Working People

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Daily, Dec 1, 1992; *See also* State Peace and Development Council of the Union of Myanmar, announcement No. 2/2007 issued as Commission for Drafting State Constitution formed, Oct 18, 2007, Working People Daily, Oct 18, 2007.

<sup>vi</sup> *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-news-290607> (noting ongoing serious crimes by Burma's military, the ICRC reminds all State Parties to the Geneva Conventions of "their obligation, under Article 1, to respect and to ensure respect for the Conventions.").

<sup>vii</sup> *See generally* Press Release, International Committee of the Red Cross, Protection of Civilians in Armed Conflict (Nov. 20, 2007), available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/united-nations-statement-201107> ("By means of Article 89 of Protocol I additional to the Geneva Conventions, the High Contracting Parties have also committed themselves 'to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter' in the event of serious violations of international humanitarian law. States must employ all appropriate means, including political, legal, economic and security measures, to honour this commitment."). *See also* Yasmin Naqvi, International Review of the Red Cross: Amnesty for War Crimes: Defining the Limits of International Recognition, 613-614, Vol. 85, No. 851, Sept. 2003 (discussing the possibility of criminal prosecutions by third-party states for war crimes).

<sup>viii</sup> Chief Justices representing 32 States have signed the Beijing Statement: Australia, Bangladesh, People's Republic of China, Hong Kong, India, Indonesia, Mongolia, Myanmar, Nepal, New Caledonia, New Zealand, Pakistan, Papua New Guinea, the Philippines, Singapore, Sri Lanka, Vanuatu, Vietnam, Samoa, Fiji, Korea, Malaysia, Republic of the Seychelles, Solomon Islands, Tonga, Republic of Kiribati, Marshall Islands, Chief Justice of Tuvalu, Russian Federation, Japan, and Thailand. *See* Beijing Statement, *supra* note 1. Nine of these countries have ratified the Rome Statute of the International Criminal Court: Australia, New Zealand, Republic of Korea, Mongolia, Japan, Samoa, Fiji, Marshall Island and Nauru. *See* The International Criminal Court, The States Parties to the Rome Statute, available at <http://www.icc-cpi.int/Menus/ASP/states+parties/>. Furthermore, six additional countries have signed the Rome Statute: Bangladesh, Philippine, Seychelles, the Solomon Islands, Thailand and Russia Federation. *Id.*

<sup>ix</sup> 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). 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 according to the Penal Code of Vietnam in circumstances provided for in the international treaties which the Socialist Republic of Vietnam has signed or acceded to."). 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.

<sup>x</sup>*See id.*

<sup>xi</sup> Reuters, New Myanmar Constitution Gives Military Leading Role, Feb. 19, 2008, <http://www.reuters.com/article/worldNews/idUSBKK10184120080219?feedType=RSS&feedName=worldNews>.

<sup>xii</sup> 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.").

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<sup>xiii</sup> 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>.

<sup>xiv</sup> Convention on the Elimination of All Forms of Discrimination against Women, Dec. 19, 1979, 1249 U.N.T.S. 13. *See also* the findings of the CEDAW Committee in 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).

<sup>xv</sup> *See* S.C. Res.1325, ¶11, U.N. Doc. S/RES/1325 (Oct. 30, 2000); S.C. Res. 1674, U.N. Doc. S/RES/1674 (Apr. 28, 2006); S.C. Res. 1820, ¶ 4, U.N. Doc. S/RES/1820 (June 19, 2008) (Noting that “rape and other forms of sexual violence can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide, *stresses the need for* the exclusion of sexual violence crimes from amnesty provisions in the context of conflict resolution processes, and *calls upon* Member States to comply with their obligations for prosecuting persons responsible for such acts, to ensure that all victims of sexual violence, particularly women and girls, have equal protection under the law and equal access to justice, and *stresses* the importance of ending impunity for such acts as part of a comprehensive approach to seeking sustainable peace, justice, truth, and national reconciliation....”).

<sup>xvi</sup> 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).

<sup>xvii</sup> The constitution states that “In the adjudication of Military Justice...the decision of the Commander-in-Chief is final and conclusive.” Myanmar Constitution, *supra* note 12, 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. Note, this is a divergence even from Myanmar’s previous constitutions. 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 12, 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.

<sup>xviii</sup> Myanmar Constitution, *supra* note 12, at art. 343.

<sup>xix</sup> *Id.*

<sup>xx</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. *See also Prosecutor v. Dusko Tadic (Jurisdiction)*, Case No. IT-94-1-AR72, para. 134, Oct. 2 1995 (“customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict.”).

<sup>xxi</sup> *See* report by Asia Watch stating that sixty-two judges were reportedly deprived of office in 1989 after failing to comply with SLORC instructions to sentence political dissidents to prison terms longer than those permissible than in the prescribed laws. Asia Watch, *Human Rights in Burma* 12 (1990).

<sup>xxii</sup> *See* The Justice Case, *supra* note 3.

<sup>xxiii</sup> Japanese judges were convicted of war crimes for using false trials to convict and execute American Prisoners of War. *See* Isayama trials, *supra* note 3; Hisakasu Trials, *supra* note 3.

<sup>xxiv</sup> The Iraqi High Tribunal found Judge Awad Hamed al-Bandar jointly criminally liable for crimes against humanity committed with Saddam Hussein because he used the pretense of judicial “authority and law” to try and then execute civilians. Under the leadership of Awad Hamad Al

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Bandar, the court had issued an execution verdict against defendants after a period of only 17 days during a single session. *See* al-Dujail Opinion, *supra* note 3.

<sup>xxv</sup> *See* Open Society Institute, *The Darkness We See: Torture in Burma's Interrogation Centers and Prisons*, Dec. 2005.

<sup>xxvi</sup> *See* Open Society Institute, *Eight Seconds of Silence: The Death of Democracy Activists Behind Bars*, May 2006.

<sup>xxvii</sup> *The Justice Case*, *supra* note 22, at 1024 (“In view of the conclusive proof of the sinister influences, which were in constant interplay between Hitler, his Ministers, the Ministry of Justice, the Party, the Gestapo, and the courts, we see no merit in the suggestion that Nazi judges are entitled to the benefit of the Anglo-American doctrine of judicial immunity. The doctrine that judges are not personally liable for their judicial actions is based on the concept of an independent judiciary administering impartial justice. Furthermore, it has never prevented the prosecution of a judge for malfeasance in office.”) (emphasis added).